

**GETTING BEYOND “GOOD ENOUGH” IN CONTINGENCY
CONTRACTING BY USING PUBLIC PROCUREMENT LAW AS
A FORCE TO FIGHT CORRUPTION**

MAJOR MARLIN D. PASCHAL*

I. Introduction

In 2003, Iraq, under Saddam Hussein, had a corruption perception index (CPI) rating of 2.2, ranking it as the nineteenth most corrupt country surveyed that year according to data compiled by Transparency International (TI).¹ In December 2011 that score had decreased to 1.8, tying it with Haiti as the seventh most corrupt country surveyed; just a few weeks before the U.S. military mission formally concluded there. Afghanistan, under President Karzai, has a CPI rating of 1.5, tying it with Myanmar as the second most corrupt country surveyed, just ahead of North Korea and Somalia, which share the first place position.² No CPI score exists for Afghanistan prior to the U.S. invasion, but some Afghan locals have complained that the country “was less corrupt under the Taliban.”³

* Judge Advocate (JA), U.S. Army. Presently assigned as the Command Judge Advocate, 413th Contract Support Brigade at Fort Shafter, Hawaii. Previously assigned as Chief of Contract and Fiscal Law, USD-Iraq and 1st Armored Division (1AD) (January–December 2010); Trial Attorney, Contract Fiscal Law Division, U.S. Army Legal Services Agency (June 2007–June 2009). This article is adapted from a thesis completed in partial fulfillment of the requirements for a LL.M. at The Judge Advocate General’s Legal Center and School (TJAGLCS), Charlottesville, Virginia. This effort would not have been possible without the thoughtful mentorship of Lieutenant Colonel (LTC) Christine M. Schverak, the advice of Major (MAJ) Darrin Pohlman, the persistent lobbying by MAJ Heidi Weaver & MAJ Keirsten Kennedy and the routine feedback from all members of the 2010–2011 Contract and Fiscal Law Department. I also thank my former Staff Judge Advocate, Colonel (COL) Ian Corey, for allowing me to take such an active role in crafting the Contract and Fiscal mission for 1AD during our deployment to Iraq.

¹ *Corruption Perceptions Index 2003*, TRANSPARENCY INT’L, http://www.transparency.org/policy_research/surveys_indices/cpi/2003. The Corruption Perception Index (CPI) is developed from “a poll of polls, reflecting the perceptions of business people, academics and risk analysts, both resident and non-resident.” Press Release, Transparency Int’l, *Corruption Perceptions Index 2003 (2003)*, available at http://archive.transparency.org/policy_research/surveys_indices/cpi/2003.

² *Corruption Perceptions Index 2011*, TRANSPARENCY INT’L, <http://cpi.transparency.org/cpi2011/results/> (last visited Feb. 8, 2013).

³ Kim Sengupta, *It Was Less Corrupt Under the Taliban, Say Afghans*, INDEPENDENT (Jan. 20, 2010), <http://www.independent.co.uk/news/world/asia/it-was-less-corrupt-under-the-taliban-say-afghans-1873169.html>; see also U.S. AGENCY FOR INT’L. DEV.

According to a United Nations report published in 2010, “Afghans paid out \$2.5 billion in bribes over the past 12 months—that’s equivalent to almost one quarter (23%) of Afghanistan’s GDP.”⁴ That same report went on to note that “drugs and bribes are the two largest income generators in Afghanistan: together they [are equivalent] to about half the country’s GDP.”⁵ Insurgent groups, criminal patronage networks, and local power brokers are at the heart of this illicit economy, but unseating them requires a host nation response that is currently beyond Afghanistan’s institutional capabilities. The conventional storyline holds that U.S. forces are in Afghanistan to support the Afghan government in shoring up that institutional weakness, but an article by Aram Roston in *The Nation* titled *How the US Funds the Taliban* suggests an alternate narrative.⁶

In the summer of 2009, the U.S. military expanded its Host Nation Trucking (HNT) contract in Afghanistan by 600 percent, “citing the coming ‘surge’ and [the application of] a new doctrine [known as] ‘Money as a Weapons System.’”⁷ The HNT contract is essential for U.S. military operations in Afghanistan, because it accounts for over “70 percent of the total goods and materiel distributed to U.S. troops in the field.”⁸ The routes these truckers must travel are long, dangerous, and often controlled by Taliban warlords. And since the contractors are usually outmanned and outgunned, they often resort to paying bribes and extortion money to potential Taliban insurgents and criminals to guarantee safe passage from the pickup point to the final destination.⁹ However, the most troubling fact is not this blatant criminality but the moral quagmire it creates for U.S. officials. Of particular note, the congressional committee investigating the matter found:

(USAID), ASSESSMENT OF CORRUPTION IN AFGHANISTAN 4 (2009) [hereinafter USAID CORRUPTION ASSESSMENT]. According to this assessment, Afghanistan has become progressively more corrupt since 2005. For instance, “Afghanistan fell from a ranking of 117th out of 159 countries covered in 2005, to 172d of 180 countries in 2007, and finally to 176th out of 180 countries in 2008—the fifth most corrupt country in the world.” *Id.*

⁴ U.N. OFFICE ON DRUGS AND CRIME (UNODC), CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS 4 (2010).

⁵ *Id.*

⁶ Aram Roston, *How the US Funds the Taliban*, NATION (Nov. 30 2009), <http://www.thenation.com/article/how-us-funds-taliban>.

⁷ *Id.*

⁸ See MAJORITY STAFF OF H. COMM. ON NAT’L SECURITY & FOREIGN AFFAIRS, 112TH CONG., WARLORD, INC.—EXTORTION AND CORRUPTION ALONG THE U.S. SUPPLY CHAIN IN AFGHANISTAN 1 (Comm. Print 2010) [hereinafter WARLORD, INC.].

⁹ *Id.*

In meetings, interviews, e-mails, white papers, and PowerPoint presentations, many HNT prime contractors self-reported to military officials and criminal investigators that they were being forced to make “protection payments” for “safe passage” on the road. While military officials acknowledged receiving the warnings, these concerns were never appropriately addressed.¹⁰

The Roston article went on to state that Afghan military sources believed insurgents were pocketing ten to twenty percent of funds from every contract in Afghanistan.¹¹ In 2010, the congressional committee investigation reinforced that belief by concluding that the HNT contract “fueled warlordism, extortion, and corruption, and it may be a significant source of funding for insurgents.”¹² The HNT contracting effort, and others like it, highlights a critical flaw in the Department of Defense (DoD) counterinsurgency (COIN) strategy for Afghanistan, a strategy that has likely resulted in the American military leaving Iraq more corrupt than it found it and repeating a similar storyline in Afghanistan.

With this background in mind, I argue that the Money as a Weapon System (MAAWS) mindset that has underwritten the U.S. COIN procurement ethos in Iraq and Afghanistan is fundamentally flawed, because it is built on an operational framework that is ill-suited for cultivating a just and stable state. A major aspect of this flaw lies in a DoD procurement culture that values speed and military necessity over developing sound processes and strengthening host nation institutions. Money is *not* a weapons system; it is the ammunition that serves that system. The effectiveness of any weapon system is not judged in terms of how much ammunition it expends or how many targets it hits; instead, it is judged in terms of its ability to neutralize its intended target. Successful deployment of those funds means aiming at the proper target.

The central thesis of this article is built on two key assumptions: (1) systemic public corruption in Iraq and Afghanistan is a *symptom* of

¹⁰ *Id.* at 55.

¹¹ Roston, *supra* note 6.

¹² WARLORD INC., *supra* note 8, at 2. The investigation began in December 2009 and a final report was issued on June 2010. It found that the host nation trucking (HNT) contract had, in fact, “fueled warlordism, extortion, and corruption, and it may [have been] a significant source of funding for insurgents,” largely due to the manner in which HNT contractors were implicitly encouraged to assemble their “security details.”

larger institutional failings at the national and sub-national levels, and (2) effective public institutions can resist and retard the growth of corruptive influences. However, this article will explain how DoD procurement practices have routinely frustrated the development of these institutions during the course of COIN operations in both countries. Although the article's focus is on contracting efforts in Iraq and Afghanistan, it is not meant to serve as an academic rendition of Monday morning quarterbacking. Instead, the aim here is to critically examine the dubious interplay between contingency contracting and the spread of corruption. Operations in Iraq and Afghanistan merely serve as real world case studies for understanding this phenomenon and what the DoD might do to combat it now and to mitigate its impact in the future.

Part II of this article examines the concept of "state-building" and the DoD's role in facilitating a viable state-building agenda during COIN operations within Afghanistan and similar operations. Although COIN should continue to be the focal point of U.S. combat operations in Afghanistan, it should be limited to a supporting role that does not conflict with the aims of the larger stability operation or state-building strategy.

Part III explores the interplay between U.S. COIN-focused policy decisions and the impact those decisions have on the bureaucratic framework for Afghanistan's governing institutions. Although corruption is not an indelible part of any culture, its effects are heightened when billions of dollars flow into a country that lacks the human capital and institutional resources to deter bad actors drawn to weak systems. This section explores the idea of empowering the public procurement system as a means for reversing the tide of corruption and developing host nation institutional capabilities.

Part IV examines the "MAAWS contracting mindset" that took root during the surge in Iraq and how that mindset has become the blueprint for so-called "COIN contracting" in Afghanistan. This section looks at the Iraqi procurement system available at the time of the Surge and how that system *could have* been used as a nexus between U.S. military operations in Iraq and a larger state-building strategy. Unfortunately, the DoD elected to bypass Iraq's public procurement framework and embrace a MAAWS money-spending ethos that was consistent with COIN, but corrosive to host nation institutional development.

Part V considers several recommendations to address the flaws in DoD procurement culture and provide solutions for synchronizing current military operations in Afghanistan with an overarching state-building strategy. The first step is to adopt an integrated procurement model that develops and utilizes the Afghan procurement process for *all* DoD-related reconstruction requirements. Second, U.S. forces must work to compliment host nation dispute resolution processes to encourage greater market participation and enhance government transparency, predictability, and a sense of fairness. Finally, this article considers how the DoD can ameliorate the adverse impact of unchecked spending practices by limiting the amount of money a tactical level commander can spend on reconstruction projects and by requiring *all* commanders to fully assess the collateral consequences of *all* contracting actions before a contract can be awarded.

II. State-Building by Any Other Name is Still State-Building: Challenging the Assumptions of COIN

A. From Hunting Terrorists to Building a State

Charles de Gaulle popularized the edict that nations do not have friends, only interests, and the U.S. presence in Afghanistan generally embodies that principle.¹³ American interests in Afghanistan, however, have evolved as the circumstances have changed. What started out as a straightforward mission to hunt down and neutralize a terrorist threat has largely evolved into the daunting task of state-building.¹⁴ State-building

¹³ The exact quote by De Gaulle was, "France has no friends, only interests," in response to a query posed by Clementine Churchill.

¹⁴ The underlying goal of Operation Enduring Freedom was to destroy Afghanistan's terrorist-harboring-capacity and bring Osama bin Laden to justice by any means necessary. In 2001, this called for a rather light U.S. military footprint, minimal reconstruction contributions, and propping up a governing regime defined by parochial Afghan and U.S. stability interest. Up until 2006, military operations in Afghanistan were mostly left under U.N. stewardship and the efforts of indigenous Afghan military forces. Unfortunately, this limited U.S. focus ultimately compromised the prospects for a lasting peace, because Taliban leaders and fighters withdrew from direct combat and hid and regrouped within the safe harbors of Pakistan and Iran, where it launched an aggressive insurgency campaign against the new Afghan government. Additionally, the Karzai administration proved to be too inept and corrupt to establish an inclusive and competent Afghan state capable of serving the Afghan people or defeating the emerging insurgency. See U.S. DEP'T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN 41, 42 & 57 (Nov. 2010) [hereinafter STABILITY REPORT], *available at*

has subsumed all other priorities for both the international community and U.S. policy makers.¹⁵ Thus, in 2011, the UN declared that “all the UN agencies and [programs] in Afghanistan agreed to work together on five main priorities, which include (1) peace, reconciliation and reintegration; (2) human rights protection and promotion; (3) sub-national governance and the rule of law; (4) maternal and newborn health; and (5) sustainable livelihoods.”¹⁶ On June 22, 2011, President Obama described the way forward in Afghanistan as follows:

The goal that we seek is achievable, and can be expressed simply: no safe-haven from which al Qaeda or its affiliates can launch attacks against our homeland, or our allies. We will not try to make Afghanistan a perfect place. . . . What we can do, and will do, is build a partnership with the Afghan people that endures—one that ensures that we will be able to continue targeting terrorists and supporting a sovereign Afghan government.¹⁷

The difference between the two mission statements is that the UN goals are more idealistic, whereas the President’s goals lie somewhere between perfection and “good enough.” Plainly stated, the President seeks an end state that will allow us “to continue [to] target terrorist and support a sovereign Afghan government.”¹⁸ But will any government do? Perhaps, at least in the short term, but ideally the government the U.S. agrees to support should be a *just* one.

In the *Politics*, Aristotle argues that an aristocratic regime (e.g., rule by the best and most enlightened) would be the ideal guarantor of justice,

http://www.defense.gov/pubs/pdfs/Report_Final_SecDef_04_26_10.pdf.

¹⁵ S.C. Res. 1974 U.N. SCOR, 66th Year, U.N. Doc. S/RES/1974 (Mar. 22, 2011) (providing the current authority for U.N. operations in Afghanistan). United Nations Resolution 1974 extends the mandate of UN resolution 1917, which is to provide “continued support for the Government and people of Afghanistan as they rebuild their country, strengthen the foundations of sustainable peace and constitutional democracy and assume their rightful place in the community of nations.” S.C. Res. 1917, U.N. SCOR, 65th Year, U.N. Doc. S/RES/1917 (Mar. 22, 2010).

¹⁶ *Mandate*, U.N. ASSISTANCE MISSION IN AFGHANISTAN, <http://unama.unmissions.org/Default.aspx?tabid=12255&language=en-us>.

¹⁷ Excerpt from Remarks of President Barack Obama on the Way Forward in Afghanistan—Official Release, <http://kabul.usembassy.gov/obama-speech.html>.

¹⁸ *Id.*

but such perfection is “beyond the reach of ordinary states.”¹⁹ In the absence of perfection, wise men should strive to create a governing regime that is *aristocratic-like* or the proper synthesis of wealth and individual freedom—*restrained* by the rule of law and oriented toward the pursuit of justice.²⁰ This means that perfect justice is largely an aspiration, but a just state is one that perpetually seeks that perfection. Put another way, a just government is not a perfect one, but is “good enough” to effectively govern, while having the capability to be something better. By contrast, a tyrant can effectively govern, but the development of national institutions will be limited by the wisdom and imaginative capabilities of the particular tyrant. Iraq under Saddam Hussein and Libya under Muammar Gadaffi provide modern examples of this limiting condition. It also means little to create a “democratic government” via elections if the institutions of state are factious and ineffective, as they are in Iraq under Prime Minister Maliki and Afghanistan under President Karzai. In this sense, the DoD’s continued role in places like Afghanistan must be governed by a desire to expand the rule of law within the context of a reasonably achievable state-building effort.

B. What Is State-Building?

The idea of the nation-state was generated by the reformative energy of the French Revolution.²¹ Its emergence, however, “presupposed centuries of state-building, and the slow growth of national consciousness within the frame of the developing territorial state . . . ,” and moving beyond a society that limited state-membership to members of the privileged class.²² In the modern era, the nation-state is generally accepted as the central organizing principle for modern democratic

¹⁹ ARISTOTLE, *POLITICS*, bk. VI, ch. 11 (J.E.C. Welldon, MA trans., 1883) (350 B.C.) (note: in some translations, book VI is ordered as book IV; see <http://classics.mit.edu/Aristotle/politics.4.four.html> (last visited Feb. 8, 2013)).

²⁰ See ARISTOTLE, *supra* note 19, bk. III, ch. 16.

²¹ William Rogers Brubaker, *The French Revolution and the Invention of Citizenship*, 7 *FRENCH POL. & SOC’Y* 30, 30 (1989), available at http://www.sscnet.ucla.edu/soc/faculty/brubaker/Publications/04_The_French_Revolution_and_the_Invention_of_Citizenship.pdf.

²² *Id.* at 30–31. Brubaker writes, “the ancien regime society—in France as elsewhere on the Continent—was essentially inegalitarian. It was a society honeycombed with privilege, ““with distinctions, whether useful or honorific . . . enjoyed by certain numbers of society and denied to others.”” *Id.*

states.²³ In terms of structure, the idea of the nation-state begins with the concept of the *nation*, which is essentially a group of people with a set of shared cultural beliefs or ethnicity, coupled with the concept of the *state*, which is the sovereign territorial and political entity with the authority to act on the international stage.²⁴ A “nation-state” emerges when the “political boundaries of the state and the presumed cultural boundaries of the nation match.”²⁵

In the *Beginner’s Guide to Nation-Building*, James Dobbins, Seth G. Jones, Keith Crane, and Beth Cole DeGrasse describe nation-building as “the use of armed force as part of a broader effort to promote political and economic reforms with the objective of transforming a society emerging from conflict into one at peace with itself and its neighbors.”²⁶ However, Francis Fukuyama notes that “outsiders can never build nations, if that means creating or repairing all the cultural, social, and historical ties that bind people as a nation.”²⁷ Instead, “what we are really talking about is state-building—that is, creating or strengthening such government institutions as armies, police forces, judiciaries, central banks, tax-collection agencies, health and education systems, and the like.”²⁸ The idea of nation-building, as distinguished from state-building, is the process of consolidating the cultural identity of the nation around a common purpose or a set of shared core beliefs, while state-building is aimed at establishing and empowering governing institutions.

With these distinctions in mind, Fukuyama is probably correct; outsider-imposed nation-building is an exercise in futility if it means outsider-imposed consolidation of cultural practices and core beliefs within the indigenous population. This is especially true in countries like Iraq and Afghanistan, where several distinct peoples occupy the same geographical space, but have distinct and competing beliefs. In such instances, outsiders must accept the people as they find them, but be

²³ Alfred Stepan, Juan J. Linz & Yogendra Yadav, *The Rise of “State-Nations,”* J. DEMOCRACY, July 2010, at 50, 52.

²⁴ Hedva Ben-Isreal, *The Nation-State: Durability Through Change*, 24 INT’L. J. POL., CULTURE, & SOC’Y 65, 65 (2011), available at <http://www.springerlink.com/content/24684r03w12160q2/>.

²⁵ Stepan, Linz & Yadav, *supra* note 23, at 52.

²⁶ JAMES DOBBINS, SETH G. JONES, KEITH CRANE & BETH COLE DEGRASSE, *THE BEGINNER’S GUIDE TO NATION-BUILDING*, at xvii (2007), available at http://www.rand.org/pubs/monographs/2007/RAND_MG557.pdf.

²⁷ Francis Fukuyama, *Nation-Building 101*, ATLANTIC MONTHLY (Jan. 2004), <http://www.theatlantic.com/magazine/archive/2004/01/nation-building-101/2862/>.

²⁸ *Id.*

prepared to support state-building practices that are just and consistent with the aims of an “internally driven” nation-building agenda.

Alfred Stepan, Juan J. Linz, and Yogendra Yadav have proposed the idea of a “state-nation”. . . political institutional approach that respects and protects multiple but complementary sociocultural identities.”²⁹ The state-nation approach is built around a form of “constitutional patriotism” that unites multiple nations around the common symbols of the state such as a written constitution and a self-sustaining government.³⁰ “Self-sustaining” is key here, because if outsiders cannot “leave behind stable, legitimate, relatively uncorrupt indigenous state institutions, they have no hope of a graceful exit.”³¹ This means that if the DoD wishes to be successful in places like Afghanistan, it must develop a strategy anchored in an active policy of state-building. This starts by developing an operational language that adequately describes the DoD’s role in the state-building process and authoring a strategy that is consistent with that role. Department of Defense Instruction 3000.05, *Stability Operations*, provides a critical first step in that direction.

The term “stability operation” is a key component of the DoD’s operational vernacular. The DoD defines a stability operation as “an overarching term encompassing various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”³² Qualitatively, there is no significant difference between Fukuyama’s conception of “state-building” and the DoD’s concept of stability operations. Although not all stability operations require a state-building response, all DoD state-building endeavors can be classified as stability operations.³³ And

²⁹ Stephan, Linz & Yadav, *supra* note 23, at 53.

³⁰ *Id.*

³¹ Fukuyama, *supra* note 27.

³² U.S. DEP’T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS ¶ 4 a & b (16 Sept. 2009) [hereinafter DoDI 3000.05] (describing stability operations as “a core U.S. military mission,” in which military commanders must be prepared to (1) establish civil security and civil control; (2) restore or provide essential services; (3) repair critical infrastructure; and (4) provide humanitarian assistance).

³³ *Id.* The difference between a state-building endeavor and something else depends on the capability and capacity of the host nation. For instance, providing disaster assistance to Japanese citizens following a massive typhoon can be classified as humanitarian assistance because the Japanese state generally has the capacity and capability to fix the problem on its own, but the assistance of other nations simply expedites the process in

since the DoD has designated stability operations as a “core military mission” and placed them on par with combat operations, stability operations should **not** be seen as subordinate to the warfighting mission.³⁴ At the policy level, this suggests that the DoD has the necessary operational language to describe the state-building process. But at the strategic level and echelons below, the current DoD approach in Afghanistan is mired within the operational limitations of a COIN strategy that has not fully embraced a state-building agenda.

C. Examining the Limitations of a “COIN Strategy” in a Failing State

Field Manual (FM) 3-24 describes insurgency and counterinsurgency as “complex subsets of warfare.”³⁵ Warfare is, by definition, another name for combat, and an insurgency is essentially a way of waging war that relies on irregular methods to overthrow the established government.³⁶ In *Counterinsurgency*, David Kilcullen notes that the combat methods of insurgency are not irregular “in the sense that [they are] uncommon . . . but in the literal sense that [they are] against the rules” set forth by “nation-states and their military establishments.”³⁷ Counterinsurgency, on the other hand, is an “umbrella term that describes the complete range of measures that governments take to defeat the insurgency.”³⁸ More specifically, FM 3-24 describes COIN as a combination of

[o]ffensive, defensive, and stability operations to achieve the stable and secure environment needed for effective governance, essential services, and economic development. The focus of COIN operations generally progresses through three indistinct stages that can be envisioned with a medical analogy: 1) Stop the bleeding,

order to provide critical aid in a timely fashion. A state-building operation occurs when the host nation government lacks the institutional capability or capacity no matter how much time it is given to address the problem.

³⁴ *See id.*

³⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ 1-1 (15 Dec. 2006) [hereinafter FM 3-24].

³⁶ *Id.* ¶ 1-2.

³⁷ DAVID KILCULLEN, COUNTERINSURGENCY preface, at x (2010).

³⁸ *Id.* at 1.

2) Inpatient care—recovery and 3) Outpatient care—movement to self-sufficiency.³⁹

As Kilcullen suggests, COIN is not just a type of combat operation. Instead, it is as an overarching blueprint for conducting combat and *all other* operations needed to defeat the insurgency and to move the host nation government to a self-sustaining state.⁴⁰ Therefore, inasmuch as the military operation in Afghanistan is a COIN operation, COIN is the organizing strategic principle for conducting military operations in that country, and a stability operation is simply a potential *tactic* for supporting the COIN strategy.⁴¹

This conception of COIN is not without its critics. Noted historian Colonel (COL) Gian Gentile writes that “population-centric COIN may be a reasonable operational method to use in certain circumstances, but it is not a strategy.”⁴² Gentile goes on to write that “strategy is about choice, options, and the wisest use of resources in war to achieve policy objectives. Yet in the American Army’s new way of war, tactics—that is, the carrying out of the “way”—have utterly eclipsed strategy.”⁴³ For Gentile and similar thinkers, COIN is simply a means and method of carrying out a specific type of warfare, “nothing more and nothing less.”⁴⁴

In response to Gentile’s criticisms of COIN as a strategy, retired COL Jack J. McCuen states:

Gentile fails to recognize the key point in any counterinsurgency strategy. The purpose of such a strategy is not “to win hearts and minds.” The purpose is not “nation building.” The purpose is to win the war

³⁹ *Id.* ¶ 5-3.

⁴⁰ *Id.* ¶ 1-2 (defining “counterinsurgency” as those political, economic, military, paramilitary, psychological, and civic actions taken by a government to defeat an insurgency).

⁴¹ See *Hearing Before the Senate Armed Services Committee to Consider the Nomination of Hon. Leon E. Panetta to be Sec. of Def.*, 112th Cong. 38 (2011), available at <http://www.armed-services.senate.gov/Transcripts/2011/06%20June/11-47%20-%206-9-11.pdf> (Senator Clare McCaskill states that “part of our mission in counterinsurgency is to secure and stabilize and enhance the infrastructure.”).

⁴² Colonel Gian P. Gentile, *A Strategy of Tactics: Population-centric COIN and the Army*, PARAMETERS 3, 6 (2009).

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 6.

against the strategy imposed upon us by our enemies who wage this type of war against us because experience has shown them that it is the only one by which they can defeat us—what Mao described as a “protracted revolutionary war.” They wage this war within the population by using the population as a shield and weapon.⁴⁵

McCuen’s advocacy of a COIN *strategy* has a robust and influential following, which has allowed it to become the leading viewpoint within U.S. military policy circles in Iraq and Afghanistan.⁴⁶ This is significant, especially if a COIN strategy is, as COL McCuen states, not about “winning hearts and minds” or “nation-building,” but about doing whatever it takes to defeat the insurgency. Under this operational paradigm, stability operations simply function as a subset of COIN, aimed at “stabilizing” conflict areas and sapping insurgent strength rather than developing long-term institutional capacity.

In March 2010, a group of leading experts on the role of developmental aid in COIN assembled at a conference at Wilton Park in the United Kingdom. The conference report found that “there is still a surprisingly weak evidence base for the effectiveness of aid in promoting stabilization and security objectives” from COIN operations.⁴⁷ More specifically, the report asserts that “aid seems to be losing rather than winning hearts and minds in Afghanistan.”⁴⁸ Adding that:

⁴⁵ Thomas E. Ricks, *A Challenge for COIN*hata Gentile, FOREIGN POL’Y (2009), http://ricks.foreignpolicy.com/posts/2009/12/04/a_challenge_for_coinhata_gentile (providing an excerpt from a discussion between journalist Thomas E. Ricks and COL McCuen).

⁴⁶ See *Hearing to Consider the Nominations of General Stanley A. McChrystal et. al. Before the U.S. Senate Committee on Armed Services*, 111th Cong. 19 (2009) (statement of General (GEN) Stanley McChrystal) (noting that the COIN strategy employed in Iraq would also be implemented in Afghanistan); see Lieutenant General William B. Caldwell, IV & Lieutenant Colonel Steven M. Leonard, *Field Manual 3-07, Stability Operations: Upshifting the Engine of Change*, MIL. REV., July/Aug. 2008, at 6, 6 (“[T]he future is not one of major battles and engagements fought by armies on battlefields devoid of population; instead, the course of conflict will be decided by forces operating among the people of the world.”).

⁴⁷ DR. EDWINA THOMPSON, WINNING HEARTS AND MINDS IN AFGHANISTAN: ASSESSING THE EFFECTIVENESS OF DEVELOPMENT AID IN COIN OPERATIONS, REP. ON WILTON PARK CONFERENCE 1022, at 1 (2010), available at <http://www.eisf.eu/resources/library/1004WPCReport.pdf>. This report reflects the findings from leading experts on the role of development in counterinsurgency.

⁴⁸ *Id.* at 3.

At a time when more aid money is being spent in Afghanistan than ever before, popular perceptions of aid are overwhelmingly negative. Despite the considerable work that has been done, including the expansion of basic social services, major investments in roads and other infrastructure, and a communications revolution, negative perceptions persist that little has been done, the wrong things have been done, what was done is poor quality, the benefits of aid are spread inequitably, and that much money is lost through corruption and waste. Research findings suggest policymakers should be cautious in assuming that aid projects help create positive perceptions of the deliverers of aid, or that they help legitimize the government.⁴⁹

The report concluded that the military had confused “the achievement of ‘popularity’ among local populations with the more important objective of competing for ‘legitimacy’ vis-à-vis the insurgency.”⁵⁰ Simply put, in the current COIN conflict the primary competition is not for the “hearts and minds” of the population but “between the *system* of the insurgent and that of the host regime,” or a battle of institutional authority and competence.⁵¹ Progress under this “institution-centric” approach can only be measured in terms of the Afghan government’s ability to plan, deliver, and control the flow of essential services, not the ability of the U.S. military to do it for them. Unfortunately, the short-term emphasis of COIN largely favors the latter, while effectively undermining the realization of the former.

The final defeat of the Taliban or an eventual political compromise will inevitably be settled on Afghan terms rather than conditions set by U.S. warfighters.⁵² The best the U.S. military can hope for, under these

⁴⁹ *Id.*

⁵⁰ *Id.* at 6. The report noted that British General Sir Gerald Templar referred to winning hearts and mind as “that nauseating phrase I think I invented.” Critical to Templar’s view is that institutional competence, rather than popularity, will carry the day. This suggests that “the current predatory behavior of many people within the state apparatus suggests that the international community should be looking to all forms of political governance in the country, including structures which do not conform to Western expectations.” *Id.*

⁵¹ *Id.*

⁵² See SETH G. JONES, COUNTERINSURGENCY IN AFGHANISTAN, at xii (2008). The study states that “the United States is . . . unlikely to remain for the duration of most insurgencies,” further noting that:

circumstances, is to ensure that the Afghan state we leave behind can continue the fight on its own terms or negotiate a final peace from a position of strength. If we continue with the current strategic course, the U.S. military will be waging a COIN fight up until the projected 2014 departure date, and advocating for a continued stake in the fight long after that date has passed.

Although total military defeat of the Taliban is a laudable goal, it is highly unlikely in today's operational environment, especially if that means complete annihilation of the enemy or securing the unconditional surrender of all hostile forces.⁵³ Instead, the most likely course of action is a protracted counterinsurgency that will continue long after U.S. military operations cease.⁵⁴

United States military operations in Afghanistan can best serve Afghan and U.S. interests by facilitating an Afghan-borne conclusion to the insurgency. In this regard, state building (i.e., stability operations) should serve as the strategic centerpiece for U.S. military operations in Afghanistan because it can best prepare the Afghan state with the capacity needed to create a final peace. COIN, on the other hand, should

An analysis of all insurgencies since 1945 shows that successful counterinsurgency campaigns last for an average of 14 years, and unsuccessful ones last for an average of 11 years . . . Governments with competent security forces won in two-thirds of all completed insurgencies, but governments defeated less than a third of the insurgencies when their competence was medium or low.

Id. at 10.

⁵³ See STABILITY REPORT, *supra* note 14, 41, 42 & 57. The report states that "efforts to reduce insurgent capacity, such as safe havens and logistic support originating in Pakistan and Iran, have not produced measurable results. . . . The insurgency continues to adapt and retain a robust means of sustaining its operations, through internal and external funding sources and the exploitation of the Afghan Government's inability to provide tangible benefits to the populace." This suggests that despite concerted efforts to purge the insurgent threat, sanctuaries in Iran and Pakistan have made getting at the enemy virtually impossible. Secondly, the disparate nature of Al-Qaeda and Taliban leadership structures make "surrender" extremely unlikely. For instance, the U.S. counterinsurgency operation in the Philippines from 1899–1902, often hailed as a model for a successful COIN operation, was ultimately concluded when its principal leader, GEN Aguinaldo, was captured in 1901 and the last vestiges of resistance, led by GEN Lukban, surrendered in 1902. It is unlikely that U.S. military forces will be able to facilitate a similar end in Afghanistan before 2014. See Timothy K. Deady, *Lessons from a Successful Counterinsurgency: The Philippines, 1899–1902*, PARAMETERS, Spring 2005, at 53, 55–56, available at <http://www.dtic.mil/cgi-bin/GetTRDDoc?AD=ADA486406.486406>.

⁵⁴ See JONES, *supra* note 52, at 10.

be seen as a *tactic* for facilitating the state-building mission, because it is concerned with fighting insurgents and establishing the “safe and secure environment” needed to execute a state-building strategy. Plainly stated, military operation in Afghanistan should more properly be understood as state-building in a COIN environment (institution-centric COIN) or conducting a state-building operation while someone is still shooting at you. The next section considers the role that contingency contracting could play in advancing an institution-centric approach.

III. The Role of Contingency Contracting in Enabling an Anti-Corruption and State-Building Agenda

A. What Is Corruption?

At times corruption can be seen as a rather elusive culturally specific phenomenon that varies throughout time and from place to place.⁵⁵ Regardless of the characterization, the common thread that defines the focal point of the corruptive act is the relationship between the state and the non-state actor.⁵⁶ More specifically, corruption is essentially “seen as transactions between private and public sector actors through which collective goods are illegitimately converted into private payoffs.”⁵⁷ This conception of corruption typically manifests itself in one of two ways:

⁵⁵ See A. J. HEIDENHEIMER ET AL., *POLITICAL CORRUPTION: A HANDBOOK* 8–11 (2002) (stating that social scientists have generally characterized corruption in three ways: public-office centered, public-interest centered, or market-centered). See J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 *AM. POLI. SCI. REV.* 417 (1967), stating that public-office centered corruption is seen as “behavior which deviates from the formal duties of a public role because of private-regarding (personal, close-family, private clique) pecuniary status gains; or violates rules against the exercise of certain types of private regarding influence.” *Id.* at 419 & n.10. See MONIQUE NUIJTEN & GERHARD ANDERS, *CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE* 7 (2008) (stating that market-centered corruption does “not focus on norms or public interest but on the office as business, the income of which the corrupt bureaucrat strives to maximize”); see Carl Friedrich, *Corruption Concepts in Historical Perspective*, in *PATHOLOGY OF POLITICS: VIOLENCE, BETRAYAL CORRUPTION, SECRECY AND PROPAGANDA* 127, 127 (1972) (stating that public-interest corruption is “deviant behavior associated with a particular motivation, namely that of private gain at public expense).

⁵⁶ Shaukat Hassan, *Corruption and the Development Challenge*, *J. OF DEV. POL’Y & PRACTICE*, Dec. 2004, at 25, 25).

⁵⁷ HEIDENHEIMER ET AL., *supra* note 55, at 6.

political corruption (high-level or grand corruption) or bureaucratic corruption (low-level or petty corruption).⁵⁸

Political corruption occurs “when the laws and regulations are abused by the rulers, side-stepped, ignored, or even tailored to fit their interests. It is when the legal bases, against which corrupt practices are usually evaluated and judged, are weak and furthermore subject to downright encroachment by the rulers.”⁵⁹ Bureaucratic corruption is bribery or extortion in connection with the implementation of existing laws, rules, and regulations.⁶⁰ This mostly occurs at the administrative level of government and includes law enforcement personnel, soldiers, and other civil servants.

Both types of corruption are particularly insidious and difficult to combat, especially when the problem is systemic rather than sporadic in nature. For definitional purposes, “systemic corruption is not a special category of corrupt practice, but rather a situation in which the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which many people have few practical alternatives to dealing with corrupt officials.”⁶¹ Examples of systemic corruption “might include contemporary Nigeria and Mobutu’s Zaire; Haiti’s tonton macoute; the deeply rooted corruption analyzed in 1960’s Thailand [and] the political machines found, often during phases of rapid urbanization, in American cities and elsewhere.”⁶² With systemic corruption in Afghanistan steadily on the rise, Afghanistan can also be added to that list.

The Integrity Watch Afghanistan (IWA) 2009 survey of 32 Afghan provinces reported that Afghans regarded corruption as the third most significant problem facing the country behind unemployment and security.⁶³ Despite the bad news, the one silver lining is that the Afghan people primarily see corruption as resulting from “poor state governance

⁵⁸ *Glossary*, U4 ANTI-CORRUPTION RESOURCE CENTRE, <http://www.u4.no/glossary/> (last visited Nov. 13, 2012).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Michael Johnston, *Fighting Systemic Corruption: Social Foundations for Institutional Reform*, in *CORRUPTION & DEVELOPMENT* 85, 89 (1998).

⁶² *Id.*

⁶³ INTEGRITY WATCH AFGHANISTAN, *AFGHAN PERCEPTIONS AND EXPERIENCES OF CORRUPTION 27* (2010) [hereinafter IWA 2010 SURVEY].

rather than a general and vague social ill.”⁶⁴ As a consequence, more citizens are now stepping forward to denounce corrupt practices “on legal [grounds] rather than on a religious or moral basis.”⁶⁵ This presents a valuable opportunity for U.S. Government (USG) policy makers, as the USG retools its own efforts in Afghanistan and examines ways to combat the spread of corruption. The most vital step in supporting this movement begins by coming to grips with the U.S. role in enabling its spread, mostly manifesting itself as “process” or “noble cause” corruption.

B. Defining Noble Cause Corruption

Much of the DoD’s anti-corruption agenda has traditionally been aimed at rooting out petty corruption involving United States and third country nationals, such as military officials receiving kickbacks for steering work to preferred contractors and rogue contractors who have fraudulently billed the USG for work they either did not perform or were not authorized to perform.⁶⁶ The moral imperative for addressing this type of malfeasance is fairly straightforward and the USG has established

⁶⁴ *Id.* at 23. In addition to issues concerning governance, Afghan perceptions of corruption may vary between perceptions held by most Americans. For example, there is some survey evidence that many Afghans consider small payments to expedite transactions with the government—which are clearly illegal—as justifiable (as long as payments are not unreasonable in amount), on the grounds that low-paid government officials are ‘poor’ due to their low salaries. At the opposite end, even though all required procedures may have been followed and there is no illegality, many Afghans may resent and consider corrupt high salaries and benefits for international consultants, expatriate Afghans, NGO employees, etc. ASIAN DEVELOPMENT BANK ET AL., *FIGHTING CORRUPTION IN AFGHANISTAN: A ROADMAP FOR STRATEGY AND ACTION* 9 (2007).

⁶⁵ *Id.*

⁶⁶ See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, QUARTERLY REPORT TO CONGRESS, at ii (Jan. 30, 2011) (according to the report Special Inspector General for Afghanistan (SIGAR) had 105 ongoing investigations, of which sixty-two were based on allegations of procurement/contract fraud. There had been four convictions and more than six million in repayments to the U.S. Government). *available at* <http://www.sigar.mil/quarterlyreports/>; *see, e.g., Australian Jailed in US over Afghan Bribes*, AUSTRALIAN BROADCASTING CO. (ABC) NEWS (Dec. 21, 2011), <http://www.abc.net.au/news/2011-12-21/australian-jailed-in-us-over-afghan-bribes/3/742652> (sentenced to two years in prison for accepting “a one-time cash payment of nearly \$200,000 to allow a sub-contractor to continue building a hospital and provincial teaching college”); *see, e.g., Press Release, Dep’t of Justice, Former U.S. Army Contracting Official Pleads Guilty to Accepting Bribes* (Aug. 7, 2009), *available at* <http://www.justice.gov/opa/pr/2009/August/09-crm-783.html> (“A former U.S. Army contracting official pleaded guilty today to accepting more than \$80,000 in bribes in exchange for providing contract work to two Afghan trucking companies”).

several specialized investigative and litigation units to directly confront these crimes.⁶⁷ Since these offenses are generally sporadic, relatively petty, and directed at offenders within the U.S. legal framework, a direct law enforcement approach is largely appropriate.

To help deal with systemic offenses within the jurisdictional purview of the Afghan government, the USG has helped to create the Major Crimes Task Force (MCTF), which is an Afghan unit focused on prosecuting Afghan nationals, such as corrupt public officials, kidnappers, and other high profile criminals.⁶⁸ The moral imperative for detecting and prosecuting such crimes is also quite clear, but Afghan internal politics (or lack thereof) often make prosecution impossible.⁶⁹

⁶⁷ The International Contract Corruption Task Force (ICCTF) is one such organization. According to the FBI website the ICCTF's "mission is to go after Americans and others overseas who steal U.S. dollars flowing into the war zone." Since 2004, the task force has initiated nearly 700 investigations. There are currently more than 100 cases pending in Afghanistan, and since 2007, thirty-seven people have been charged with crimes committed there, and all but one have been convicted, have pled guilty, or are awaiting trial. Another organization is the National Procurement Fraud Task Force (NPFTF), created in October 2006 by the Department of Justice, was designed to promote the early detection, identification, prevention and prosecution of procurement fraud associated with the increase in government contracting activity for national security and other government program according to the agency's website.

⁶⁸ See *Mission Afghanistan Part 2: The Major Crimes Task Force*, FEDERAL BUREAU OF INVESTIGATION (Apr. 22, 2011), http://www.fbi.gov/news/stories/2011/april/afghanistan_04221. According to the story,

about 40 international mentors support nearly 170 Afghans on the task force. All the Afghans—who go through a vetting process before joining the MCTF, which includes a polygraph test—receive basic law enforcement training, and many have taken additional courses at the FBI's training facility in Quantico, Virginia. Since the MCTF was formally established in January 2010—with funding from the U.S. Department of Defense—nearly 150 cases have been initiated IAW Afghan law.

Task Force 2010, a U.S. DoD organization, was stood up in the wake of the HNT contract debacle. "to ensure that the military's contracting dollars in Afghanistan don't inadvertently fund corrupt businesses, warlords or insurgents." The focus is on systemic corruption of Afghan contractors.

⁶⁹ See, e.g., Greg Miller & Ernesto Londoño, *U.S. Officials Say Karzai Aides are Derailing Corruption Cases Involving Elite*, WASH. POST, June 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/27/AR2010062703645.html> (alleging that "top officials in President Hamid Karzai's government have repeatedly derailed corruption investigations of politically connected Afghans, according to U.S. officials who have provided Afghanistan's authorities with wiretapping technology and other assistance in efforts to crack down on endemic graft"); see, e.g., Alissa J. Rubin,

Nevertheless, the MCTF is a reasonable step in the right direction and another tool to supplement the direct law enforcement approach already underway.

Noble cause corruption works differently. The moral imperative for combating it is less intuitive, and a direct law enforcement approach is less useful. However, like any form of systemic corruption, it can have an equally devastating impact on Afghan legal and cultural life if allowed to grow unabated.

The idea of “noble cause corruption” or “process corruption” is a concept from police ethics that describes

a mindset or sub-culture which fosters a belief that the ends justify the means. In other words, law enforcement is engaged in a mission to make our streets and communities safe, and if that requires suspending the constitution or violating laws ourselves in order to accomplish our mission for the greater good of society, so be it.⁷⁰

Whereas traditional notions of corruption involve the abuse of official authority for personal gain, noble cause corruption is the abuse of authority on behalf of the public good.⁷¹ Classic examples from police fiction include “Bumper” Morgan from Joseph Wambaugh’s *The Blue Knight*, who perjures himself in court to protect a confidential source, or Inspector Callahan from the 1971 film *Dirty Harry*, who tortures a suspect to try to save a dying teenage girl.

Karzai Says Foreigners Are Responsible for Corruption, N.Y. TIMES, Dec. 11, 2011, <http://www.nytimes.com/2011/12/12/world/asia/karzai-demands-us-hand-over-afghan-banker.html> (alleging that “[T]he former governor of the Central Bank, Qadir Fitrat, is living in Virginia. He fled Afghanistan, saying he feared for his life after he was involved in making public the massive fraud at Kabul Bank and removing its senior management”).

⁷⁰ Steven Rothlein, *Noble Cause Corruption*, PUB. AGENCY TRAINING COUNCIL (2008), <http://www.patc.com/weeklyarticles/noble-cause-corruption.shtml>.

⁷¹ See Peter Johnstone & Joe Frank Jones, *Noble Cause Police Corruption: Suggestions for Training*, in POLICE EDUCATION AND TRAINING IN A GLOBAL SOCIETY 317 n.5 (Philip C. Kratcoski & Dilip K. Das eds., 2011). The authors note that the phrase “noble cause corruption” was apparently first coined by Sir John Woodcock, Chief Inspector of the HM Constabulary for England and Wales, when he stated “one aspect is what is known as noble cause corruption. Someone connected with the Police Federation once said to me that there is nothing wrong with perjury committed by an honest officer in pursuit of a good cause.” *Id.* (citing House of Commons Select Committee on Home Affairs, Minutes of Evidence, Examination of Witnesses. Question 128 (Dec. 8, 1998)).

Criminologist Carl Klockars describes this as “the Dirty Harry problem,” a moral dilemma that emerges “when the ends to be achieved are urgent and unquestionably good and only dirty means will work to achieve them.”⁷² Klockars warns that embracing such a position causes “[p]olicemen [to] lose their sense of moral proportion, fail to care, turn cynical, or allow their passionate caring to lead them to employ dirty means too crudely or too readily.”⁷³ For every Dirty Harry scenario, there are many more insidious manifestations, such as the “informal control of crime through allowing preferred powerful criminals a license of ‘green light’—in return for the elimination of their competitors, the avoidance of worse criminality, and the provision of information.”⁷⁴ Professor Klockars concludes that “[t]he only means of assuring that dirty means will not be used too readily or too crudely is to punish those who use them and the agency which endorses their use.”⁷⁵ Regardless of the underlying intent, noble cause corruption is antithetical to the preservation of the rule of law and a moral quagmire for those who engage in it.

In this article, the concept of noble cause corruption has been decoupled from the context of policing ethics and applied to the operational reality of military procurement operations in Iraq and Afghanistan. The cause is noble in that commanders are earnestly trying to protect the local populace and secure the peace. But the process is corrupt because the commander’s actions undermine the very host nation institutions he seeks to preserve. The “corruptive influence” is the deteriorating impact that well-intentioned command decisions have on the state-building enterprise for the sake of achieving a short-term “COIN effect.”⁷⁶ For example, a commander may be tempted to issue a

⁷² 452 C B Klockars, *The Dirty Harry Problem*, ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 33 (1980).

⁷³ *Id.*

⁷⁴ ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, FINAL REPORT, VOLUME I: CORRUPTION 53 (1997).

⁷⁵ Klockars, *supra* note 72.

⁷⁶ The “COIN effect” used here is a descriptive term meant to describe the active cultivation of positive pro-Coalition sentiment of the local population toward U.S. military operations and host nation governance. See Colonel Ralph O. Baker, *The Decisive Weapon: A Brigade Combat Team Commander’s Perspective on Information Operations*, MIL. REV., May–June 2006, at 13, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA489185&Location=U2&doc=GetTRDoc.pdf>. The author states,

contract to a well-connected but anti-government provincial warlord even though the warlord presents a long-term problem for the Afghan state. Such dilemmas appear in the tactical setting, but the source of the problem lies in choices made at the strategic and policy levels.

This article will not focus on corruption within the Afghan government, but on the type of corruption born of U.S. policymaking decisions in support of U.S. COIN operations. Noble cause corruption, in this context, manifests as the failure to reinforce host nation institutions that are needed to facilitate just governance or the DoD's inability or unwillingness to prevent the growth of parallel power structures by promoting better procurement practices. In terms of public procurement, noble cause corruption moves in lockstep with a "MAAWS mindset" that fosters an unquestioned allegiance to COIN with little or no regard for the unintended consequences for Afghan civil institutions. This need not and should not be the case. The public procurement process, if properly resourced, could serve as a key state-building tool and anti-corruption force.

C. Public Procurement as a Tool for State-Building

The fundamental purpose for public procurement is to acquire goods and services from the private sector.⁷⁷ The government has many methods to accomplish this, but the process of public procurement typically involves five phases: (1) planning and needs assessment, (2) product design and document preparation, (3) tender process and award,

Soon after taking command of my brigade, I quickly discovered that IO [Information Operations] was going to be one of the two most vital tools (along with human intelligence) I would need to be successful in a counterinsurgency (COIN) campaign. COIN operations meant competing daily to favorably influence the perceptions of the Iraqi population in our area of operations (AO). I quickly concluded that, without IO, I could not hope to shape and set conditions for my battalions or my Soldiers to be successful.

Id.

⁷⁷ See, e.g., *Building Skills to Improve Public Procurement in Central Asia* (2011), WORLD BANK INST., <http://wbi.worldbank.org/sske/result-story/1718>. The report notes that "public procurement can make up as much as 30% of a country's total budget, and can account for as much as 15% to 20% of GDP."

(4) contract implementation, and (5) final accounting and audit.⁷⁸ This process is fundamentally utilitarian in that it is primarily concerned with getting the best value for the public in the most efficient way practicable. This, however, is not something that comes easily to any governing regime, especially those in their relative infancy. As such, it is generally not helpful to approach the corruption fight in Afghanistan or Iraq as if they were 21st century post-modern nation-states. In reality, both are post-revolutionary pre-modern multinational states, more similar to the United States' political-cultural structure during the Revolutionary War era.

In earlier periods of USG procurement history the public purse was routinely viewed as an extension of private interest, and “favoritism and nepotism were everyday aspects of government contracting.”⁷⁹ The fate of any procurement action mostly depended on the particular decency of the contracting official rather than the propriety of the system as a whole.⁸⁰ In fact, during the Revolutionary War, contractor malfeasance was so widespread that it threatened to destroy the nation's ability to secure its independence from the British.⁸¹

Logistics support was particularly troublesome. Blankets, clothes, and shoes often arrived to the war front in questionable condition, and beef was delivered spoiled along with casks of meat “containing stones and tree roots.”⁸² “Even gunpowder was debased and unusable,” leading one Continental officer to describe contractors as “destroying the Army by their conduct much faster than Howe [a British commander] and all of his army can possibly do by fighting us.”⁸³ By skimping on quality, suppliers were able to significantly enhance their profit margins by as much as 600 to 700 percent.⁸⁴ Widespread abuse and excessive profits also distorted the local economy, leading one observer to note that “the war has thrown property to channels where before it never was and that increased little streams to overflowing rivers, and what is worse, in some respect by a method that has drained resources of some as much as it has

⁷⁸ SUSANNE SZYMANSKI, HOW TO FIGHT CORRUPTION EFFECTIVELY IN PUBLIC PROCUREMENT IN SEE COUNTRIES 5 (2007).

⁷⁹ JAMES NAGLE, HISTORY OF GOVERNMENT CONTRACTING 14 (2d ed. 1999).

⁸⁰ *See id.* at 15.

⁸¹ *Id.* at 19.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 43.

replenished others.”⁸⁵ In other words, the price distortions from wartime abuses had improved the lot of a privileged few but increased transaction costs for everyone else.

During this era, institutional shortcomings were apparent and widespread but the pace of reform was slow and sporadic, evolving and devolving through relative states of progress and setbacks. The primary impediment to reform was that the Continental Congress had an “evident lack of experience, authority, and the ability to get things done,” coupled with an organizational structure that resembled the tribal system of modern day Afghanistan rather than a body of states united toward a common purpose.⁸⁶ “Each of the thirteen states not only regarded itself as absolutely independent, but was jealous both of its sister states and the Continental Congress.”⁸⁷ This persistent weakness dominated the process of reform from the outset but it did not prevent it from moving forward. Eventually the Continental Congress would enact the necessary policies to move the USG’s public procurement system from the dark ages to an age of relative rebirth.

One of the early authors for this gradual reform was Robert Morris, an experienced Philadelphia merchant and financier, who became superintendent of finance in 1781.⁸⁸ Despite being plagued by charges of fraud and “speculating with public funds,” Morris’s single most important achievement was the implementation of a contract system for provisioning the Army and procuring public goods.⁸⁹ Although bickering and internal rivalries between the states and the central government “made his job exceedingly difficult, Morris did vastly more than had previously been done to bring order out of chaos” than any other public official of his time.⁹⁰

⁸⁵ *Id.*

⁸⁶ See 1 HARRY CARMAN ET AL., *A HISTORY OF THE AMERICAN PEOPLE* 162 (1952).

⁸⁷ *Id.* at 158.

⁸⁸ ELLIS PAXSON OBERHOLTZER, *ROBERT MORRIS: PATRIOT AND FINANCIER* 90 (1903) (Morris was also an instrumental figure in the Battle of Yorktown in 1781. He loaned money from his personal holdings to help support the war effort. Without his connections, attention to detail and financial backing it is unlikely that George Washington would have been able to field an army, let alone prevail, at Yorktown).

⁸⁹ CHARLES RAPPLEYE, *ROBERT MORRIS: FINANCIER OF THE AMERICAN REVOLUTION* 288 (2010) (Morris noted that the contracting system had achieved “the cheapest, most certain, and consequently the best mode of obtaining those articles which are necessary for subsistence, covering clothing, and moving the army.”); NAGLE, *supra* note 79, at 47.

⁹⁰ CARMAN ET AL., *supra* note 86.

Prior to the implementation of a contracting system, USG procurement practices were largely driven by personalities as opposed to transparent and predictable standards.⁹¹ With the advent of a “systematic approach,” USG procurement practices were now afforded a consistent path for getting things done and enabling future success. America’s governing structure in the 1780s, like modern day Afghanistan’s, was hampered by institutional shortcomings that impeded progress but were not insurmountable. A path for success, however, is nothing without the people who must maintain and use it. In this sense, ultimate progress for the U.S. Revolutionary War era procurement regime was facilitated not only by the establishment of a sound procedural framework, but also by the fact that procurement decisions, for better or worse, were carried out by American institutions within a U.S.-controlled framework. Although money and practices were borrowed from Europe, institutional development was always a distinctly American burden.⁹²

One of earliest efforts to manage that burden was the introduction of free market principles into the USG’s procurement culture.⁹³ Now a hallmark of public procurement practice, use of these principles was aimed at driving down prices, reducing government overhead and shifting many acquisition risks from the government to the private sector. Early in American history, principal reliance on free market self-interest proved to be both a blessing and a curse, because the early market was dominated by well connected merchants and power brokers.⁹⁴ This early imbalance helped to demonstrate that the USG’s engagement with the private sector must be done from a position of strength that reflects institutional competence and an unyielding desire to promote the public’s

⁹¹ See RAPPLEYE, *supra* note 89, at 287 (The author notes that even though Morris told his friends William Duer and Philip Schuyler of the contracts to be let in support of the Yorktown campaign, “but in a testament to the integrity of the process, both found themselves underbid.”).

⁹² To support the war effort, the United States borrowed money from France and Holland. Under the stewardship of Robert Morris, the United States adopted the European contracting system, something that Morris claimed the U.S. should have implemented at the start of the war. See NAGLE, *supra* note 79, at 47–48.

⁹³ See *id.* at 68; see RAPPLEYE, *supra* note 89, at 288.

⁹⁴ See NAGLE, *supra* note 79, at 52. The author noted that “Morris had been overly optimistic in trusting economic self-interest to solve the army’s supply problems. In the hands of grasping merchants, a contract, even with arbitration clauses written into it, was a frail reed to lean upon; the agreement’s stipulations could be shoddily complied with or simply ignored.”

interest.⁹⁵ In this sense, the public's interest should be understood as the perpetual balance between the competing needs of the government and the private sector.

Over time, both practice and policy has gradually shifted to dampen private sector overreach and shifted again whenever government imperiousness began to distort the public's interest.⁹⁶ Without this "public-centered" focus, however, the USG would function as just another buyer in an otherwise consumer driven economy. This is because the USG procurement process is fundamentally amoral, *only* receiving its moral direction when governing officials act on behalf of the general welfare through the passage of laws and policies. In the 1930s, Congress enacted such laws as the Davis-Bacon Act of 1931, the Buy American Act of 1933, and the Copeland Anti-Kickback Act of 1934, just to name a few.⁹⁷ In the 1960s, Congress used the public procurement process as a means to address "societal ills [such] as poverty, discrimination, and environmental blight," by mandating the use of anti-discrimination and environmentally friendly contracting clauses and encouraging the use socioeconomic set-asides.⁹⁸

In essence, through the use of legislation and policy, elected officials have made the USG procurement process more of a *public* procurement process by imbuing the institutional framework with what author Laura Dickinson describes as "core public law values."⁹⁹ This development suggests that the USG's value-seeking calculus means more than just

⁹⁵ Although Morris's aim was to contract with men of experience and character, the contractor's desire for profit often undercut the benefits of both. By March 1782, complaints of "spoiled flour, rotten meat, bad rum and adulterated whisky," began to flood the battlefield. Washington said of one contractor, "Sir, if I have not formed a very Erroneous opinion of him is determined to make all the money he can by the contracts. Herein I do not blame him, provided he does it honestly and with reciprocal fulfillment of the agreement. Of a want of the first I do not accuse him but his thirst of Gain leads him in my opinion into a mistaken principle of Action." *Id.* at 51–52.

⁹⁶ For example, the Competition in Contracting Act (CICA), passed in 1984, was designed to enhance taxpayer value but also increase the level of participation from the business sector for government contracts, by making the government more predictable and less arbitrary in its selection decisions.

⁹⁷ Davis Bacon Act, 40 U.S.C. § 3141 (1931) (providing for the payment of a prevailing wage on public construction projects); Buy American Act, 41 U.S.C. § 10a-10d (1933) (creating a preference for domestic over foreign supply items); Copeland Anti-Kickback Act 40 U.S.C. § 276c (1934) (providing a criminal sanction against anyone who required a business to provide compensation for receiving a government construction contract).

⁹⁸ NAGLE, *supra* note 8979, at 1.

⁹⁹ LAURA DICKINSON, *OUTSOURCING WAR AND PEACE* 8 (2011).

getting the best price, but also leveraging the buying power of the state to create a better polity. In this sense, the USG is not just another buyer in a consumer driven market, but an expression of the public's interest, which must always act in a just manner. Justice, in the public procurement sense, is the attainment of value for both the buyer and the seller in the overall performance of a transaction that is contributive to the public good.¹⁰⁰

In Afghanistan, many U.S. "value-related" public procurement laws do not apply or have been exempted.¹⁰¹ This generally makes sense because most U.S. procurement laws were enacted to address peacetime domestic concerns and would not logically apply to the overseas warzone environment of Afghanistan. In the absence of legislative decree, the moral directions for warzone procurements in Afghanistan are primarily driven by the applicable federal laws, DoD policy, regulations, and a host of other patchwork considerations. Consequently, the framework for moral action is defined by the wartime strategy. In Afghanistan that strategy is COIN, which provides a commander a virtual smorgasbord of options for defeating the insurgency. However, it has also left commanders vulnerable to faulty moral thinking. Noble cause corruption remains pervasive because the DoD's moral framework for prosecuting the war and advancing its procurement strategy is concerned with supporting COIN operations *at the expense of* empowering Afghan institutions. The objective, under the COIN operational paradigm, is usually defined in starkly military terms that do not require a commander to thoughtfully consider the relevant state-building obligations.

As stated previously, the United States has one principal goal that manifests itself as two objectives. That goal is to protect U.S. security interests, by simultaneously eliminating the current armed threat in Afghanistan (objective 1), and developing a viable Afghan state that is strong enough to keep that threat from reemerging after U.S. forces

¹⁰⁰ See *N. Pac. Ry. v. United States*, 356 US 1, 4 (1958). The public expenditure of money means getting "the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions."

¹⁰¹ The Federal Acquisitions Regulation (FAR) provides approximately 1900 pages of regulatory guidance for the government procurement process, but many clauses are exempted for overseas application. For instance, small business set asides and the focus on minority owned businesses are not applicable for overseas procurements. Also, most environmental laws, policies, and regulations do not apply to governmental activities overseas.

depart (objective 2). Our procurement approach in Afghanistan must not sacrifice one objective at the expense of the other. Unfortunately, the trend of institutional short-sightedness that began during military operations in Iraq has fully taken root in Afghanistan. The next section explores that trend and what it means for DoD public procurement practices in Afghanistan and beyond.

IV. Reducing Violence at the Expense of Peace: Contracting and the Surge—from Iraq to Afghanistan

In 2008, Presidential hopeful Barack Obama campaigned on the promise of ending the war in Iraq and refocusing U.S. military efforts to Afghanistan.¹⁰² In 2009, President Obama made good on his promise by increasing the number of U.S. ground forces in Afghanistan by 17,000 within a month of taking office, by authorizing another 30,000 troops later in the year, and by naming General (GEN) Stanley McChrystal as the International Security Assistance Force (ISAF) and U.S. Forces-Afghanistan (USFOR-A) Commander.¹⁰³

As a student of COIN, GEN McChrystal believed that a “well resourced” COIN campaign was critical to success in Afghanistan.¹⁰⁴ He believed that the most critical requirement of COIN was to “protect the people,” but also recognized the importance of state-building, stating that:

¹⁰² *Obama Calls Situation in Afghanistan ‘Urgent,’* CABLE NEWS NETWORK (CNN) (July 20, 2008), http://articles.cnn.com/2008-07-20/politics/obama.afghanistan_1_presumptive-democratic-presidential-nominee-afghanistan-afghan-president-hamid-karzai?_s=PM:POLITICS (stating that “I think one of the biggest mistakes we’ve made strategically after 9/11 was to fail to finish the job here, focus our attention here. We got distracted by Iraq”).

¹⁰³ Helene Cooper, *Putting Stamp on Afghan War, Obama Will Send 17,000 Troops*, N.Y. TIMES (February 17, 2009), <http://www.nytimes.com/2009/02/18/washington/18web-troops.html>.

¹⁰⁴ *Hearing to Consider the Nominations of General Stanley A. McChrystal et. al. Before the U.S. Senate Committee on Armed Services*, 111th Cong. 19 (2009) [hereinafter *Hearing to Consider the Nominations of General McChrystal et al.*] (statement of GEN Stanley McChrystal); see also Robert Downey, Lee Grubs, Brian Malloy & Craig Wonson, *How Should the U.S. Execute a Surge in Afghanistan*, SMALL WARS J. (2008), <http://smallwarsjournal.com/jrnl/art/how-should-the-us-execute-a-surge-in-afghanistan> (arguing that although Iraq is not Afghanistan “there are similarities that should be considered . . . and the differences do not negate the transferability of certain operational concepts learned from the Iraq surge”).

[e]fforts to convince Afghans to confer legitimacy on their government are only relevant if Afghans are free to choose. They must be shielded from coercion while their elected government secures their trust through effective governance and economic development at all levels. This must be Afghanistan's effort, with our committed support.¹⁰⁵

In this sense, GEN McChrystal understood that the road to victory in Afghanistan meant empowering an Afghan institutional system that was capable of providing good governance. However, how this understanding would manifest at the tactical level was not immediately clear.

In practice, the surge strategy in Afghanistan would assume the same strategic and operational posture as that in Iraq. This meant that the MAAWS ethos that began in Iraq would emerge as the tactical arm of COIN operations in Afghanistan. General McChrystal's "new strategy" called for an aggressive focus on protecting and supporting the local Afghan population, coupled with a "properly-resourced force and capability level" to fight and defeat the insurgency.¹⁰⁶ A surge in troops also meant increasing the intensity of contingency contracting operations. However, to fully understand the implications of this way of thinking on contracting efforts in Afghanistan, we must first look back and examine what those same principles led to in Iraq.

A. The COIN-MAAWS Ethos and Iraq

1. The Path to War and the Surge

In the summer of 2003, U.S. forces invaded Iraq "to disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people," with the aim of "helping the

¹⁰⁵ *Hearing to Consider the Nominations of General McChrystal et al.*, *supra* note 104.

¹⁰⁶ *Id.* at 2-1 to 2-2. General McChrystal boldly asserts, "Accomplishing the mission requires defeating the insurgency, which this article defines as a condition where the insurgency no longer threatens the viability of the state." He goes on to add that "the situation in Afghanistan is serious. The mission is achievable, but success demands a fundamentally new approach—one that is properly resourced and supported by a better unity of effort." *Id.*

Iraqis achieve a united, stable, and free country.”¹⁰⁷ However, the prospect of a quick peace and an early withdrawal gave way to a protracted insurgency. In 2006, after several years of stalled progress, the Bush administration set forth a new national security strategy.¹⁰⁸ The essence of the new strategy called for aggressive violence reduction “by committing more than 20,000 additional American troops to Iraq,” coupled with tangible reconstruction efforts.¹⁰⁹ In his address to the nation, President Bush was clear to note that,

A successful strategy for Iraq goes beyond military operations. Ordinary Iraqi citizens must see that military operations are accompanied by visible improvements in their neighborhoods and communities. So America will hold the Iraqi government to the benchmarks it has announced.¹¹⁰

This reflected the belief that if U.S. forces could provide the Iraqis “breathing space,” the Iraqi government could use that opportunity to unify the *nation* and shore up the *state*.¹¹¹

With this dual-mandate in hand, GEN David Petraeus, the architect of FM 3-24 for conducting counterinsurgency operations, was charged with creating the strategic and operational blueprint for military operations in Iraq. General Petraeus’s strategy called for “increased base dispersion, increased local national partnering at the tactical and operational level, hostile party reconciliation, co-option of the Sunni

¹⁰⁷ *President Discusses Beginning of Operation Iraqi Freedom: President’s Radio Address*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (March 22, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html>.

¹⁰⁸ *See Fact Sheet: The New Way Forward in Iraq*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Jan. 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-3.html> (setting forth “six fundamental elements” for the President’s new Iraq strategy: (1) let the Iraqis lead; (2) help Iraqis protect the population; (3) isolate extremists; (4) create space for political progress; (5) diversify political and economic efforts; and 6) situate the strategy in a regional approach).

¹⁰⁹ George W. Bush—Full Transcript of Bush’s Iraq Speech, <http://www.cbsnews.com/stories/2007/01/10/iraq/main2349882.shtml>.

¹¹⁰ *Id.* The benchmarks referenced in the Bush speech refer to the benchmarks “articulated by the Iraqi government beginning in June 2006 and affirmed in subsequent statements by Prime Minister Maliki in September 2006 and January 2007.” U.S. GOV’T. ACC. OFFICE, GAO-07-1195, SECURING, STABILIZING, AND REBUILDING IRAQ: IRAQI GOVERNMENT HAS NOT MET MOST LEGISLATIVE, SECURITY, AND ECONOMIC BENCHMARKS 70 (Sept. 2007).

¹¹¹ *Id.*

population, local defense initiatives such as Sons of Iraq, and an increase of civil-military operations.”¹¹² This phase of the Iraq war was labeled “the Surge,” and its governing strategy was called counterinsurgency (COIN).

Armed with a new strategy, the DoD executed Surge operations from January 2007 to July 2008; and, in terms of reducing violence, the Surge proved to be a tactical success by almost any objective standard. But in terms of bringing Iraq closer to becoming a stable state, the answer depends on what one means by stability. If stability is simply understood as leaving behind a state with reduced or manageable levels of violence, then the answer is almost certainly “yes.” If stability is understood as leaving behind indigenous state institutions that are stable, legitimate, and relatively uncorrupt, then the answer is much less certain.¹¹³

The billions of dollars poured into the battlefield to “stabilize” the security situation have been credited with helping to reduce the violence. However, rather than taking advantage of the developing Iraqi procurement framework, this money was spent in accordance with the limited contracting methodology provided in the MAAWS Standard Operating Procedure (SOP). This approach enabled commanders to quickly turn thousands of potential insurgents into U.S. contractors, but it did very little to build Iraqi institutional capabilities or deter the growth of parallel power structures outside the Iraqi government. To fully understand this point, it is important to look at the existing host nation procurement framework before and during Surge operations as well as the path the DoD chose in developing its “COIN contracting” philosophy. This examination will aid understanding what impact “surge-like” efforts in Afghanistan are likely to have on the procurement model for operations there and possibly beyond.

¹¹² Joshua Thiel, *The Statistical Irrelevance of American SIGACT Data: Iraq Surge Analysis Reveals Reality*, SMALL WARS J. (2011), available at smallwarsjournal.com.

¹¹³ See, e.g., Tim Arango, *U.S. Marks End to 9-Year War, Leaving an Uncertain Iraq*, N.Y. TIMES (Dec. 16, 2011), <http://www.nytimes.com/2011/12/16/world/middleeast/panetta-in-baghdad-for-iraq-military-handover-ceremony.html?pagewanted=all> (“Iraqis will be left with a country that is not exactly at war, and not exactly at peace. It has improved in many ways since the 2007 troop ‘surge,’ but it is still a shattered country marred by violence and political dysfunction, a land defined on sectarian lines whose future, for better or worse, is now in the hands of its people.”).

2. *A Path to Empowering a Just State—the Existing Public Procurement Framework Under Iraqi Law*

On January 20, 2003, President Bush signed National Security Presidential Directive (NSPD) 24, which established the Office of Reconstruction and Humanitarian Assistance (ORHA) and gave the DoD civil and military responsibility for the Iraqi state.¹¹⁴ The ORHA was responsible for providing humanitarian and reconstruction assistance to post-war Iraq, but its entire rule-making authority fell under the “supervision of the Under Secretary of Defense for Policy.”¹¹⁵ On May 13, 2003, the Coalition Provisional Authority (CPA) was created;¹¹⁶ and by June 2003, it had subsumed and replaced the ORHA as the operational lead for Coalition reconstruction efforts.¹¹⁷ The CPA, like its predecessor, still remained in the DoD chain of command;¹¹⁸ but, in practice, the DoD exercised little, if any, actual authority over the day-to-day operations of the CPA.¹¹⁹ Instead, the CPA functioned as the semi-autonomous *de facto* sovereign of Iraq and the primary conduit for

¹¹⁴ U.S. DEP’T OF DEF., OFFICE OF THE INSPECTOR GENERAL, CONTRACTS AWARDED FOR THE COALITION PROVISIONAL AUTHORITY BY THE DEFENSE CONTRACTING COMMAND-WASHINGTON 1 [hereinafter CONTRACTS AWARDED FOR CPA].

¹¹⁵ *Id.*

¹¹⁶ See L. ELAINE HALCHIN, THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 32 (2005). The report states that

[t]he status of this organization [the CPA] remains open to question. While a letter exists that states that the United States, and the United Kingdom, created the authority, in 2005 Justice Department attorneys identified General Franks as the individual who established CPA. No explicit, unambiguous, and authoritative statement has been provided that declares how CPA was established, under what authority, and by whom, and that clarifies the seeming inconsistencies among alternative explanations for how CPA was created.

¹¹⁷ CONTRACTS AWARDED FOR CPA, *supra* note 114, at 2.

¹¹⁸ U.S. Office of Management and Budget, “Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11),” (June 2, 2003) (letter), *available at* http://pdf.usaid.gov/pdf_docs/PCAAB790.pdf.

¹¹⁹ See HALCHIN, *supra* note 116, at 16 (explaining that there is no explicit writ of authority that explains whether or not the CPA was a component of the DoD or whether the CPA was a non-DoD agency that simply received support from DoD).

implementing the USG's state-building strategy until it was formally dissolved on June 30, 2004.¹²⁰

From the very beginning, the CPA took several affirmative steps to shape the Iraqi governing framework and state institutions. For instance, it passed orders establishing banks, ministries, a new Iraqi Army, administrative bodies and other state institutions. Of particular note, on July 13, 2003, the CPA issued Regulation 6, which established the Governing Council of Iraq (GCI).¹²¹ The GCI would serve "as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq, consistent with [United Nations (UN)] Resolution 1483."¹²² The GCI was also responsible for appointing temporary ministers, but it did not have any significant direct governing authority over the Iraqi state. The CPA would work on behalf of U.S. interests, while the GCI, in theory, worked with the CPA on behalf of the Iraqi people. In practice, this meant that the initial state-building activities would be conceived through CPA-GCI coordination, but implemented solely through CPA authority. As a practical matter, this also meant that the burden of state-building fell squarely on the shoulders of the CPA and, by extension, the DoD.

The CPA managed its operations and promoted reconstruction efforts with funds provided from four primary sources: (1) appropriated funds, (2) vested funds, (3) seized funds, and (4) development funds for

¹²⁰ See Brief of the United States in Response to the Court's Invitation at p. 4, United States *ex rel.* DRC, Inc. and Robert Isakson v. Custer Battles, LLC, 376 F. Supp. 2d 617, 2005 WL 871352 (E.D. Va. 2005) (No. 1: 04CV199). This brief states in part that:

[T]he Secretary of Defense designated the presidential envoy to be the head of the CPA with the title of Administrator. You [Ambassador Bremer] shall be responsible for the temporary governance of Iraq, and shall oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility, including humanitarian relief and reconstruction and assisting in the formation of an Iraqi interim government.

Id.

¹²¹ COALITION PROVISIONAL AUTHORITY (CPA) REG. 6 (2003), available at http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

¹²² *Id.*

Iraq (DFI).¹²³ In terms of contracting authority, the CPA satisfied its own requirements in accordance with U.S. procurement laws and regulations.¹²⁴ However, Iraq reconstruction and state-building projects were procured in accordance with the laws and regulations promulgated by the CPA until the Iraqi government assumed those responsibilities in June 2004. Of particular note were CPA Order 87 (Public Contracts – 2004), the Regulations for Implementing Governmental Contracts (2007), and the Instructions for Government Contract Execution (2008).

Coalition Provisional Authority Order 87 was issued in May 2004 as the principal regulation for public procurement activities.¹²⁵ This order formally recognized that:

[P]ublic contracts laws should conform to international standards of transparency, predictability, fairness of treatment; provide for dispute resolution mechanisms; be free from corruption and undue influence; and create a system to procure goods and services at the best possible value for the government, *Noting* that the concept of full, fair and open competition is of critical importance to the economy of Iraq and the goal of free trade among nations, *Building on* the existing Iraqi laws in the field, including administrative instructions, and modernizing

¹²³ *Id.* at 5; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-902R, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE, ESSENTIAL SERVICES, AND OVERSIGHT ISSUES 10 n.3 (June 2004) [hereinafter GAO-04-902R]:

A vested asset refers to former Iraqi regime assets held in U.S. financial institutions that the President confiscated in March 2003 and vested in the U.S. Treasury. The United States froze these assets shortly before the first Gulf War. The U.S.A. PATRIOT Act of 2001 amended the International Emergency Economic Powers Act to empower the President to confiscate, or take ownership of, certain property of designated entities, including these assets, and vest ownership in an agency or individual. The President has the authority to use the assets in the interests of the United States. In this case, the President vested the assets in March 2003 and made these funds available for the reconstruction of Iraq in May 2003. Seized assets refer to former regime assets seized within Iraq.

¹²⁴ See HALCHIN, *supra* note 116, at 15.

¹²⁵ Headquarters, Coalition Provisional Authority Order No. 87 (14 May 2004), available at http://www.iraqcoalition.org/regulations/20040516_CPAOED_87_Public_Contracts.pdf.

them in accordance with best international practice

....¹²⁶

Coalition Provisional Authority 87 addressed the basic elements of public procurement; such as, authority to contract, basic rules for free and open competition, and provided the basis for a dispute resolution system. It also established the Office of Government Public Contract Policy (OGPCP) to implement the 2004 law and vested it with the following responsibilities: (1) To serve as coordinating public procurement agency for all ministries and public institutions, (2) to establish a dispute resolution tribunal, (3) to provide contracting expertise for improving public procurement regulations and instructions, (4) to establish and implement standard government contract provisions, and (5) to train a cadre of public contracting personnel.¹²⁷

In furtherance of the OGPCP's mandate, the order empowered the Minister of Planning and Development Cooperation (MoPDC), through the OGPCP to "issue and publish implementing regulations and include standard public contracting provisions."¹²⁸ However, the MoPDC did not get around to formalizing a process until 2007, with the publication of the Regulations for Implementing Governmental Contracts–2007 (also known as the 2007 Procurement law).

Once established, the 2007 Procurement law, in conjunction with CPA Order 87, provided the legal framework for Iraqi public procurement procedures until early 2008.¹²⁹ In addition to the law, the OGPCP in coordination with the Iraqi Ministry of Planning—Procurement Assistance Center (PAC) produced and distributed the *Quick Start Contracting Guide–2007* to serve as a user-level contracting SOP and to "simplify executing contracts within the intent of the Implementing Regulations."¹³⁰ In 2008, the MoPDC issued the Instructions for Government Contract Execution–2008 (also known as

¹²⁶ *Id.* § 1.

¹²⁷ *See id.* § 2(1)(a), (b).

¹²⁸ *Id.* § 14(1).

¹²⁹ The 2007 Procurement law was put into legal force by the Council of Ministers (CoM), because the CPA had been formally dissolved in June 2004. However, many CPA orders, to include CPA Order 87, remained in force long after the June 2004 dissolution date.

¹³⁰ OFF. OF GOV. PUB. CONTRACT POL'Y, QUICK START CONTRACTING GUIDE (2007), available at http://trade.gov/static/iraq_pdf_contractingguide.pdf (parallel texts in English and Arabic).

the 2008 Procurement law), which replaced and superseded CPA Order 87 and the 2007 Procurement law.¹³¹ Despite this relatively rapid change, the 2008 law reiterated much of the 2007 law, but provided more detailed explanations in some sections. In general, it attempted to establish overarching principles for the execution of public contracts that were signed and administered by Iraqi state officials.

The measures described here were important developments for several reasons. First, these laws are the first steps at developing a uniform process for obligating public funds through the Iraqi state and spending those funds on behalf of the Iraqi people. Second, these laws created state policymaking institutions that could be responsive to the needs of Iraqis. Third, the regulations and institutions created under these laws emphasized and promoted the ideas of transparency, accountability and predictability within the public procurement process. Fourth, and perhaps most importantly, the evolution of these laws demonstrated a maturing procurement process that began under the occupation authority of the DoD and the CPA, but ended in the eager hands of Iraqi state authority. So what *could* this have meant to the DoD state-building strategy?

The procurement laws and related institutions could have served as interface points between DoD procurement activities and the procurement activities of Iraqi state-builders. For example, between 2003 and 2008, the DoD was one of the largest and wealthiest “public institutions” in the Iraqi state. With that wealth, the DoD spent billions of dollars to support its own warfighting capabilities and conduct reconstruction and humanitarian activities on behalf of the Iraqi people. However, the DoD procurement process was not subject to the laws and regulations the DoD encouraged the Iraqis to adopt. In essence, the DoD, through the CPA, set the legal framework for the Iraqi procurement process in motion, but exempted all DoD reconstruction contracting activities from that system. This asymmetrical relationship between reconstruction and humanitarian contracts constituted under Iraqi law and those constituted under DoD procedures was most stark in the area of Commander’s Emergency Response Program (CERP)-funded contracts.

¹³¹ Ministry of Planning and Development Cooperation, Instructions for Government Contract Execution (2008) [hereinafter Iraqi 2008 Procurement Law].

3. Deviating from the Path—The CERP and the MAAWS

After the fall of Saddam's regime, U.S. and Coalition forces uncovered cash stockpiles from hidden Ba'athist coffers.¹³² In March 2003, the President confiscated these funds on behalf of the Iraqi people and made them "available for the reconstruction of Iraq in May 2003."¹³³ That same month, the CPA created the Commander's Emergency Response Program (CERP) using seized Iraqi assets and proceeds from the Development Fund for Iraq (DFI).¹³⁴ The CERP was designed as a tactical-level fund source that could be used by U.S. field commanders to provide urgent humanitarian relief and execute reconstruction projects for the benefit of the Iraqi people.¹³⁵ The uniqueness of the CERP was its command-centric structure, which allowed commanders to "work directly with local citizens, through civil affairs experts, to identify and respond to immediate needs with low-cost, high-impact projects."¹³⁶ It also lacked any meaningful restraints, since it was not subject to U.S. or Iraqi procurement laws.¹³⁷ In the absence of formal contracting procedures, U.S. field commander's relied on the limited instructions issued by the CPA, which primarily focused on cash accountability and managing the cash dispersal process. Additional guidance was provided at the operational level via military fragmentary orders (FRAGO). For instance, Combined Joint Task Force-7 issued operational guidance for

¹³² GAO-04-902R, *supra* note 123.

¹³³ *Id.*

¹³⁴ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER'S EMERGENCY RESPONSE PROGRAM IN IRAQ FUNDS MANY LARGE SCALE PROJECTS, SIGIR-08-006, at i (Jan. 25, 2008) [hereinafter SIGIR-08-006].

¹³⁵ See Lieutenant Colonel Mark S. Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, 1, 3 n.14 (providing an invaluable historical primer on the origins and early successes of CERP in Iraq); see also Captain Charles Bronowski & Captain Chad Fisher, *Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq*, ARMY LAW., Apr. 2010, 50 (discussing in some detail the use of CERP in Iraq from January 2008 through April 2009); see also Major Marlin Paschal, *Knowing When to Say No and Providing a Way Forward: The Commander's Emergency Response Program (CERP) and the Advising Judge Advocate*, ARMY LAW., Sept. 2011, at 13 (discussing the history of CERP and the limitations placed on it over time by Congress and the DOD).

¹³⁶ *Coalition Provisional Authority Briefing, Commander's Emergency Response Program*, U.S. DEP'T OF DEF. (Jan. 14, 2004), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1417> (briefing of Brigadier GEN David N. Blackledge, Commander, 352d Civil Affairs Command).

¹³⁷ *Id.*

the CERP with the publication of FRAGO 89, dated June 19, 2003.¹³⁸ FRAGO 89 provided minimal procurement guidance, but instructed commanders to concentrate efforts on the following focus areas:

The building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq. This includes but is not limited to: water and sanitation infrastructure, food production and distribution, healthcare, education, telecommunications, projects in furtherance of economic, financial, management improvements, transportation, and initiatives which further restoration of the rule of law and effective governance, irrigation systems installation or restoration, day laborers to perform civic cleaning, purchase or repair of civic support vehicles, and repairs to civic or cultural facilities.¹³⁹

In its early stages of the CERP, the CPA and FRAGO 89 provided structure and direction for the program; and by most accounts the CERP served as an effective commander's tool.¹⁴⁰ The reason was simple, in the absence of an effective and functioning civil government, U.S. field commanders were uniquely situated to quickly identify problems and leverage cash to provide quick and decisive solutions.

These early successes prompted Congress and the President to extend the program's life in the latter part of 2003 with the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan (2004).¹⁴¹ The Act was significant in at least two

¹³⁸ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR COALITION PROVISIONAL AUTHORITY, COALITION PROVISIONAL AUTHORITY COMPTROLLER CASH MANAGEMENT CONTROLS OVER THE DEVELOPMENT OF IRAQ FUNDS, REP. NO. 04-009, at 2 (June 2004), *available at* www.sigir.mil (search for 04-009) (citing HEADQUARTERS, COMBINED-JOINT TASK FORCE 7, FRAGMENTARY ORDER (FRAGO) 89 to CJTF-7 OPERATIONS ORDER (OPORD) 03-036 (19 June 2003)).

¹³⁹ *Id.*

¹⁴⁰ See Martins, *supra* note 135, at 3. According to now-Brigadier General (BG) Martins "From early June to mid-October [2003], Iraqis benefited noticeably from the seized funds entrusted to commanders. More than 11,000 projects were completed in this time, resulting in the purchase of \$78.6 million of goods and services, mostly from local economies that were being brought to life after decades of centralized rule from Baghdad." *Id.* at 8.

¹⁴¹ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2004).

regards. First, it continued the CERP's "bureaucracy free mandate," by providing the Secretary of Defense (SECDEF) with the authority to waive any provision of law that might undermine the CERP's intended purpose.¹⁴² Second, it continued the CERP's broad mandate to essentially address any humanitarian or reconstruction need a U.S. field commander deemed fit. Simply put, there were no practical limitations on what a commander could do with CERP assuming he chose projects that provided a benefit to the Iraqi people.

Despite its successes, the CERP was not without its critics, especially from those agencies responsible for fiscal oversight, such as the Government Accountability Office (GAO) and the Special Inspector General for Iraq Reconstruction (SIGIR). The SIGIR was especially concerned that the program appeared to be moving beyond a "small project focus" to the area of major reconstruction activities.¹⁴³ The SIGIR noted that projects costing over \$500,000 climbed from 8 percent to over 40 percent of the CERP budget between 2004 and 2007.¹⁴⁴ In 2008, the GAO reiterated the SIGIR's concern.¹⁴⁵ All in all, the command uses for the CERP were steadily growing from program inception up until the time President Bush was announcing a shift in America's strategy for Iraq. As the program's uses grew, however, the procurement regime used to implement CERP funds remained relatively static and permissive. For instance, the Under Secretary of Defense (Comptroller) (USD(C)) issued general guidance for administering CERP funds on November 25,

The act stated that "during the current fiscal year, from funds made available in this Act to the Department of Defense for operation and maintenance, not to exceed \$180,000,000 may be used, notwithstanding any other provision of law, to fund the Commander's Emergency Response Program."

¹⁴² *Id.*

¹⁴³ See SIGIR-08-006, *supra* note 134, at 11. The SIGIR noted that although "CERP program guidance emphasizes small-scale, urgent humanitarian relief and reconstruction projects, the program devotes a major portion of its funding to larger-scale, more expensive projects, many estimated to cost over \$500,000 in value."

¹⁴⁴ *Id.* at 6.

¹⁴⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-736R, MILITARY OPERATIONS: ACTIONS NEEDED TO BETTER GUIDE PROJECT SELECTION FOR COMMANDER'S EMERGENCY RESPONSE PROGRAM AND IMPROVE OVERSIGHT IN IRAQ 3 (23 June 2008) [hereinafter GAO-08-736R]. The report noted that during our [GAO] visit to Iraq, we observed three projects: a multimillion-dollar sewage lift station, a several hundred thousand dollar sports center and community complex, and a fruit and vegetable stand that had been renovated with a \$2500 grant. Commanders typically defined urgent as restoring a basic human need, such as water and electricity, or projects identified by the local Iraqi government as its most pressing requirement for the area. As a result, the scale, complexity, and duration of projects selected vary across commands.

2003.¹⁴⁶ The memorandum did not provide any specific contracting procedures; but instead, it directed commanders to rely on CPA Memorandum Number 4, dated August 19, 2003, to “the maximum extent practicable.”¹⁴⁷

Coalition Provisional Authority Memo 4 provided a relatively uncomplicated contracting process for spending seized assets and DFI.¹⁴⁸ More specifically, it *necessitated* competition for most requirements and a formal determination of responsibility for any contractor who receives a contract award.¹⁴⁹ It also provided a standardized contracting form, which included a bid protest procedure and a disputes resolution mechanism. Interestingly, the disputes clause stated that these contracts were “not subject to the Contract Disputes Act of 1978,” but permitted an aggrieved contractor to file a claim with a Contracting Officer “in accordance with the United States Federal Acquisition Regulation Clause 52.233-1, Disputes.” It further permitted a contractor to appeal the Contracting Officer’s “final decision” to the Armed Services Board of Contracting Appeals (ASBA).¹⁵⁰ However, a commander could elect to follow CPA Memo 4 in its entirety, partially, or not at all. In any event, the “practicability standard” provided in the USD(C) memo remained relatively unchanged until the publication of the MAAWS SOP.¹⁵¹

In June 2007, Multinational Corps–Iraq (MNC–I) J8 published the MAAWS SOP.¹⁵² The MAAWS SOP provided not only guidance for CERP spending, but also provided a comprehensive overview for other funding policies, from buying commander’s coins to ordering items under the Logistics Civil Augmentation Program (LOGCAP). With

¹⁴⁶ Memorandum from Undersec’y of Def. (Comptroller), to Commander, U.S. Central Command and Sec’y of the Army, subject: Guidance on the Use of Appropriated Funds for the Commander’s Emergency Response Program (CERP) (25 Nov. 2003) (on file with author).

¹⁴⁷ *Id.*

¹⁴⁸ Coalition Provisional Authority Memorandum Number 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq (2003), *available at* http://www.iraqcoalition.org/regulations/20030820_CPA_MEMO_4_Contract_and_Grant_Procedures_and_Appendix_A_-_D.pdf.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Prior to the publication of Money as a Weapon System (MAAWS), the Undersecretary of State (Comptroller) (USD(C)) republished the 2003 guidance Memo and codified the basic tenets of that memo in volume 12, chapter 27 of the Department of Defense Financial Management Regulation (DoDFMR) in April 2005.

¹⁵² U.S. FORCES–IRAQ (USF–I) J8, STANDARD OPERATING PROCEDURES (SOP), MONEY AS A WEAPON SYSTEM (2007) [hereinafter MAAWS SOP].

respect to the CERP, the MAAWS SOP dictated a cradle-to-grave process from project selection to final closeout. But, compared with CPA Memo 4, CERP contracting procedures were much more permissive and far less exacting under the MAAWS SOP. For instance, competition was encouraged but not required and there was no mention of bid protest or dispute resolution procedures.¹⁵³ The SOP codified the use of Project Purchasing Officers (PPO), rather than warranted contracting officers, for most CERP-funded contracts.¹⁵⁴ The SOP contained some standardized forms, but it did not put forth a standardized contract template with standard clauses or details concerning contracting methods. Instead, the “contracting process” was left to the discretion of the battlefield commander.

This approach certainly promoted creativity and rapid implementation, but it failed to generate and capture the processes needed to sustain and promote the modest intent of the 2007 or 2008 Iraqi Procurement Laws. A major reason for this shortcoming was that the MAAWS SOP, as a J8-Comptroller product, was **not** created to function as an acquisitions SOP; it was designed to function as a money management SOP to help commanders spend money as quickly and efficiently as possible. In fact, the MAAWS SOP describes the CERP in the following manner:

The CERP family of funds is an effects enabler that provides Commanders with a non-lethal weapon system for high payoff projects and services. CERP provides a quick and effective method to institute an immediate positive impact on the Iraqi people. The keys to project selection are (1) execute quickly; (2) employ many Iraqis; (3) benefit the Iraqi people; and (4) be highly visible.¹⁵⁵

As an “effects enabler,” the MAAWS SOP was written to support COIN operations; it was not designed to develop and support host nation institutions. The only significant hard and fast rules were the ones establishing approval authorities for specific spending thresholds; these rules did not define the right and left limits of contracting authority. Additionally, the MAAWS SOP did not mention or even contemplate the

¹⁵³ *Id.*

¹⁵⁴ *Id.* at B-1-7 (contracting officers were only required for projects that exceeded 500k).

¹⁵⁵ *Id.* at B-5.

use of host nation or CPA procurement procedures. This meant that the loose contracting guidance provided under the “practicability standard” discussed earlier was even more permissive under the MAAWS SOP.¹⁵⁶

These factors helped to cultivate a “MAAWS contracting mindset” that measured success in terms of producing quick, high-visibility, labor-intensive projects that provided a benefit to the local populace. Whether the benefits fit within a larger state-building framework was immaterial to project selection and implementation. What mattered was supporting COIN operations by providing quick-win quantifiable projects that could gain the support of the local population and sap the strength of the insurgency. The MAAWS contracting methodology became the centerpiece of Surge-related security and reconstruction project development and execution. This led to the creation of thousands of projects that were tactically useful (because they supported the combat aims of COIN operations) but strategically subversive (because in the long term they failed to benefit and even frustrated Iraqi state-building).¹⁵⁷ The essential point here is that the DoD, through CPA Memo 4, had a viable path for synchronizing its COIN procurement activities with Iraqi public procurement law, but it chose to deviate from that path and follow the MAAWS money-spending ethos.

The procurement framework set forth by the CPA and later adopted by the Iraqi government was much more comprehensive than the one established under the MAAWS contracting regime. More importantly, this system would be in place long after the DoD mission concluded and

¹⁵⁶ *Supra* Part IV.A.3 (discussing CPA Memo 4).

¹⁵⁷ *See, e.g.,* Dana Hedgpeth & Sarah Cohen, *Money as a Weapon System: A Modest Program to Put Cash in Iraqis' Hands Stretches Its Mandate with Big Projects*, WASH. POST, 11 Aug. 2008, http://o.seattletimes.nwsourc.com/html/nationworld/2008107036_iraqcash12.html. Relying on statements from GEN Peter W. Chiarelli, the authors noted that “the military may not be equipped to maintain the schools, clinics and water projects it builds with CERP money. In one case in 2005, he [GEN Chiarelli] said, he brought water to 220,000 houses in the Sadr City section of Baghdad using CERP funds. But when he went back a year later to check on whether the program had been expanded to more houses, it hadn't. ‘The problem is follow-through.’” *See also c.f.* Seth G. Jones, *Stabilization from the Bottom Up: Testimony before the Commission on Wartime Contracting in Iraq and Afghanistan* (Feb. 5, 2010) [hereinafter Jones Testimony], *available at* http://www.rand.org/pubs/testimonies/2010/RAND_CT340.pdf (“counterinsurgency and sustainability should go hand-in-hand. Sustainable programs in eastern, southern, or western Afghanistan without a significant counterinsurgency impact can be tactically useful but strategically irrelevant. Yet programs with a positive counterinsurgency impact that are not sustainable can be counterproductive over the long run.”).

the only one that could establish long-term stability. It would be the one responsible for building roads, improving schools and feeding and moving the army. All in all, in the battle for “institutional authority and competence” it would ultimately be the only system that mattered vis-à-vis the Iraqi people.

During the course of COIN operations in Iraq, the U.S. military became better at planning and executing combat missions. It also improved its competence at training and mentoring the Iraqi Security Forces (ISF). The training mission was initially very difficult, but it grew easier over time as ISF gained in competence and became more adept at asserting their authority. In addition to the combat mission, U.S. commanders have always had significant fiscal and contracting authority to shape the COIN environment with civil-military operations. Like the security mission, the Iraqi government would be expected to assume that responsibility as well, but there was rarely any effort made to effectuate a “trainer to trainee” transfer from United States hands to the appropriate Iraqi public procurement regime.

As discussed in Part II, the COIN fight should not be focused on “the achievement of popularity” but in winning the battle of institutional authority and competence. Progress under this “institution-centric” approach can only be measured in terms of the host government’s ability to plan, deliver, and control the flow of essential services, not the ability of the U.S. military to do it for them. In the next section, we will take a look at two types of requirements, security and reconstruction, that were key to the “tactical success” of COIN, but strategically problematic for the overall state-building mission in Iraq. The issue is not whether or not COIN contracting could have been done more cheaply or efficiently, because that is mostly irrelevant if the mission is accomplished. Instead, this section will examine how these operations largely missed the mark in supporting the fight for institutional authority and competence.

B. COIN Contracting and the Surge

1. The SoI Program

a. Background

Sunni tribes that had enjoyed a position of status and privilege under Saddam were pushed to the fringes of Iraqi cultural and political life after

the Ba'athist defeat.¹⁵⁸ In response to this loss, they aligned themselves with local and foreign jihadis such as al-Qaeda in Iraq (AQI) to defeat the Coalition and the Shiite-dominated Iraqi government.¹⁵⁹ As early as 2005, however, U.S. commanders began to notice a rift between the Al Anbar Sunni tribes and AQI, which one sheik described as a “blood feud.”¹⁶⁰ This feud stemmed primarily from differences in the ideological aims of the insurgency, AQI’s assertion of its own dominance, and AQI infringement on tribal “business enterprises.”¹⁶¹

In late 2006, the situation came to a head with a string of sensational killings and kidnappings of Sunni tribal members by AQI.¹⁶² In the aftermath of this “campaign of murder and intimidation,” one leader asserted that these actions had “left resistance groups with two [bitter] options: either to fight al Qaeda and negotiate with the Americans or fight the Americans and join the Islamic State of Iraq.”¹⁶³ In late 2006, Sheikh Abdul Sattar Buzaigh al-Rishawi, leader of the largest Al Anbar tribe, chose the first option, by “signing a manifesto denouncing Al Qaeda and pledging support to coalition forces;” a pledge that included the allegiance of eleven other Al Anbar Sheiks.¹⁶⁴ The movement, known as the Anbar Awakening (Sahwa), took root and began to grow. For the Al Anbar sheiks, this marriage between the Sunnis Al Anbar tribes and U.S. forces was one of convenience, aimed at “killing al Qaeda” and building enough political capital to serve as a political counterweight to the Shiite-dominated Iraqi state.¹⁶⁵

In January 2007, the National Intelligence Estimate (NIE) on Iraq recommended “deputizing, resourcing, and working more directly with

¹⁵⁸ CATHERINE DALE, CONG. RESEARCH SERV., RL34387, OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS 115 (2009).

¹⁵⁹ *Id.*; see Steven Simon, *The Price of the Surge*, REALCLEARPOLITICS (2008) http://www.realclearpolitics.com/articles/2008/04/the_price_of_the_surge.html.

¹⁶⁰ DALE, *supra* note 158, at 115. The report notes that “the first rising in Al Anbar took place in 2005—a movement that became known as the “Desert Protectors.” Members of local tribes in al Qaim and Haditha volunteered to begin working with some U.S. Special Operations Forces and later with the Marines.”

¹⁶¹ See Simon, *supra* note 159 (The article notes that the “Albu Risha tribe . . . had lost control over portions of the road from Baghdad to Amman, undermining its ability to raise revenue by taxing or extorting traders and travelers.”).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ DALE, *supra* note 158, at 115. Abdul Sattar’s father and two brothers were killed by al-Qaeda.

¹⁶⁵ *Id.*

neighborhood watch groups and establishing grievance committees to help mend frayed relationships between tribal and religious groups, which have been mobilized into communal warfare over the past three years.”¹⁶⁶ The rift between Sunni tribal groups and AQI created an opening to act on that recommendation. In early 2007, the Awakening movement began to spread beyond Al Anbar, creating volunteer movements throughout Iraq.¹⁶⁷ Initially known as “concerned local citizens,” these volunteers operated as “neighborhood watch-like initiatives by Iraqis who self-organized and ‘deployed’ to key locations in their own communities, to dissuade potential trouble-makers.”¹⁶⁸

United States commanders, realizing the opportunities this movement could create, “provided volunteers in their areas with equipment, or payments in kind for information, or other forms of support,” mostly on an *ad hoc* basis.¹⁶⁹ However, these initial *ad hoc* measures would quickly blossom into one of the largest DoD-funded security contracts of the Iraq war: the Sons of Iraq (SoI) program.¹⁷⁰ The experience with the Anbar Awakening would now serve as the centerpiece of Surge operations throughout Iraq,¹⁷¹ and ultimately the single most significant factor in reducing violence throughout Iraq.¹⁷² However, in terms of advancing a state-building agenda and countering the growth of corruption, the results are, at best, debatable.

b. The SoI Program as an Engine for Noble Cause Corruption

The SoI program was one of the largest programs funded by DoD contract during the Iraq War. At its height, the U.S. military placed approximately 100,000 Iraqi nationals under DoD control through 779 contractual agreements valued at approximately \$370 million.¹⁷³ Since DoD authority permitted the use of CERP funds to fund “Temporary

¹⁶⁶ NAT’L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE (2007), *available at* http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/20070202_release.pdf.

¹⁶⁷ DALE, *supra* note 158, at 116.

¹⁶⁸ *Id.* at 118.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, SONS OF IRAQ PROGRAM: RESULTS ARE UNCERTAIN AND FINANCIAL CONTROLS WERE WEAK, SIGIR-11-110, at 3 (Jan. 28, 2011) [hereinafter SIGIR-11-010].

¹⁷² *Id.*

¹⁷³ *Id.*

Contract Guards for Critical Infrastructure,” commanders used CERP to fund all SoI-related contracts. Doing so permitted commanders to issue these contracts in accordance with the MAAWS SOP, with minimal controls.¹⁷⁴

Little if any effort was made to use the Iraqi institutional framework to execute SoI-related contracts or align the mission’s purpose with Iraqi institutional capacity. Instead, the SoI program permitted tactical-level commanders to issue contracts on an *ad hoc* basis at the local level without the blessing of the Iraqi state.¹⁷⁵ The terms of the contracts were chosen in accordance with U.S. law and policy and issued by U.S. military personnel. This undoubtedly contributed to the speed and efficiency of contract execution, but did little to inform and develop the Iraqi public procurement system.

Using a U.S.-dominated public procurement approach in the early stages of the Anbar Awakening was probably a military necessity. However, once the program grew beyond the borders of Al Anbar, an Iraqi-based approach should have been used. Such an approach would have undoubtedly been slower and less efficient, at least in the early stages, but it would have codified Iraqi buy-in and situated the procurement process within the context of Iraqi institutional capacity and the broader interest of the Iraqi state.¹⁷⁶ Because U.S. forces developed, implemented, and managed the program, the initiative was largely seen as a “U.S.-backed effort,” even after U.S. forces transferred the program to Iraqi control in 2009.¹⁷⁷ One former SoI member noted “The Americans did not betray us. They sentenced us and our families to

¹⁷⁴ DALE, *supra* note 158, at 119.

¹⁷⁵ See Colonel Dale C. Kuehl, Unfinished Business: The Sons of Iraq and Political Reconciliation 15 (Mar. 25, 2010) (unpublished paper submitted in partial fulfillment of Master of Strategic Studies Degree, U.S. Army War College) (on file at U.S. Army War College). The author notes that “at the local level, the Sons of Iraq (SoI) were generally tied to reconciliation efforts between CF commanders and local Sunni civil leaders. While the ultimate goal was to bring Sunnis into the political process, reconciliation started with an accommodation between the Sunni populace and CF.”

¹⁷⁶ At the time U.S. forces were preparing to transfer the SoI program to the Iraqi government, over 100,000 members were on the U.S. payroll. Integrating these members into the Iraqi government and providing them with jobs has proven to be an arduous and politically sensitive task.

¹⁷⁷ On September 8, 2008, the Prime Minister of Iraq issued Executive Order 118-C, which mandated that all SOI members under contract with U.S. Forces move from U.S. control to the Government of Iraq (GOI) payroll, beginning on October 1, 2008. Prime Ministerial Order No. 118C (Sept. 8, 2008) (on file with author).

death. They supported us in fighting al-Qaida, but then suddenly they left us caught between two enemies—al-Qaida and Iran. That is America's legacy here.”¹⁷⁸ This sentiment is not uncommon and steadily grows as former SoI members continue to be targeted by AQI death squads.¹⁷⁹

It is difficult to say what could have been done to better protect SoI members after U.S. forces departed, but the manner in which the SoI program was conceived inevitably created expectations for SoI members that the Iraqi government could never fulfill. Unfortunately, the COIN focus for the SoI program was on attaining high recruitment numbers and curbing violence, rather than aligning the recruitment mission with Iraq's institutional capacity and the needs and capabilities of SoI members. For instance, the Iraqi government has repeatedly indicated that in addition to capacity constraints, recruitment of former SoI members is slow because of the low literacy rates among former SoI members.¹⁸⁰ This suggests that a holistic Iraqi-borne approach was needed from the start to ensure that promises made by U.S. forces on *behalf* of the Iraqis could *actually* be accomplished by the Iraqi government. In this sense, genuine “buy-in” meant more than brokered agreements authored at the top levels of government, but developing and adopting a strategic framework that sought to align the capabilities of the tactical level commander with the capacity and willingness of the host nation-state.

Another unintended consequence of the SoI program was that it encouraged and facilitated the growth of warlordism. SoI procurements were generally issued as 90-day renewable contracts subject to minimal higher level guidance.¹⁸¹ Commanders were not required to

¹⁷⁸ Lourdes Garcia-Navarro, *Bitterness Grows Amid U.S.—Backed Sons of Iraq*, NPR, (Jun. 24 2010), <http://www.npr.org/templates/story/story.php?storyID=128084675>.

¹⁷⁹ See Dan Morris, *Former ‘Sons of Iraq’ Targeted by Insurgents After U.S. Pullout*, WASH. POST (Jan. 27, 2012), http://www.washingtonpost.com/world/middle_east/former-sons-of-iraq-targeted-by-sunni-insurgents-after-us-pullout/2012/01/14/gIQAjf49VQ_story_1.html (noting that “as more of the Sahwa get picked off, those who remain and feel abandoned by the government may be more willing to stake their loyalties elsewhere.”); see also Greg Bruno, *Finding a Place for the “Sons of Iraq,”* COUNCIL ON FOREIGN RELATIONS (2009), <http://www.cfr.org/iraq/finding-place-sons-iraq/p16088> (noting that in 2008, 528 SOI members were killed and 828 were wounded); Martin Chulov, *Sons of Iraq Turned the Tide for the US. Now They Pay the Price*, GUARDIAN, (May 13, 2010), <http://www.guardian.co.uk/world/2010/may/13/sons-of-iraq-withdrawal-rebels> (noting that early in 2010, “15 Awakening members were killed in one night in Abu Ghraib”).

¹⁸⁰ *Id.*

¹⁸¹ SIGIR-11-010, *supra* note 171.

competitively bid these efforts, nor was there any need to justify a sole sourcing decision.¹⁸² Instead, commanders largely used the SoI program as an “effects enabler” by selecting “contractors” who could dry up the pool of potential insurgents and fight AQI. This naturally meant funneling contract money to those contractors that had the most regional influence, regardless of the contractors’ commitment to the Iraqi central government. Some outsiders have described this as the Pentagon’s “make-a-sheik program,” or the process of offering no-bid contracts to any community strongman willing to support the Surge and Coalition forces in Iraq.¹⁸³

This methodology undoubtedly contributed to advancing the DoD’s violence reduction strategy, but it also allowed connected strongmen to establish local footholds within their areas of influence. In essence, commanders, through contract, enabled non-state power brokers, like sheiks, to regain the legitimacy they had lost as a result of the U.S. invasion “and demand the fealty of their tribesmen as they had done in the past.”¹⁸⁴ One study notes,

The alliance and allegiance of tribal leaders, both Sunni and Shi’a throughout Iraq, is tenuous but remarkably effective at reducing violence. Although it remains to be seen whether these tribal militias can be successfully converted to state-run security forces or a civilian sector job force, the hard earned lessons from both sides on how to form an alliance to reduce violence and root out destabilizing extremists certainly merit closer examination.¹⁸⁵

This does not mean that the contracting process was *per se* destabilizing, but it does suggest that the MAAWS contracting methodology used to implement the SoI program supported the growth of parallel power structures at odds with Iraqi central authority. This

¹⁸² John A. McCary, *The Anbar Awakening: An Alliance of Incentives*, WASH. Q., Jan. 2009, at 43, 50 (“U.S. military leaders began a drastically different approach by actively courting Sunni tribal sheikhs in al Anbar. The U.S. military almost completely changed its reconstruction and security policy in the province, sending money through Sunni tribal sheikhs instead of contract bids or the central government.”).

¹⁸³ See generally Shane Bauer, *The Sheikh Down: How the Pentagon Bought Stability in Iraq by Funneling Billions of Taxpayer Dollars to the Country’s Next Generation of Strongmen*, MOTHER JONES (Sept./Oct. 2009), <http://motherjones.com/politics/2009/09/sheik-down?page=2>.

¹⁸⁴ McCary, *supra* note 182, at 50.

¹⁸⁵ *Id.* at 45.

approach is not problematic if these decisions were a part of the institutional design of the COIN mission and the host nation national strategy. In Iraq, this certainly was not the case. Instead, the growth of warlordism was mostly on an *ad hoc* basis with little regard to the long-term impact on the state-building mission.

An analogous situation has been seen in Afghanistan with the rise of warlord-run “security contracting.” The congressional investigation of the HNT contract noted:

Both the old and new warlords’ interests are in fundamental conflict with a properly functioning government. . . . Warlordism is antithetical to the Afghan state, and ultimately to U.S. counterinsurgency strategy in Afghanistan, yet these warlords have flourished providing security for the U.S. supply chain there.¹⁸⁶

The desperation spawned by the escalating violence in pre-Surge Iraq created a unique opportunity for well positioned power brokers and a moral crisis for U.S. military commanders. Commanders generally solved the moral crisis by backing away from the high-mindedness of state-building and focusing on immediately reducing violence by staking their fortunes on well resourced strongmen. For many commanders, supporting questionable figures was often seen as the “cost of doing business” in a lawless wasteland.¹⁸⁷ This often led to ignoring the prior conduct of unsavory characters as long as SoI recruitment was up and violence was down.¹⁸⁸ A 2009 article commenting on the U.S.-backed rise of local power brokers noted:

¹⁸⁶ *Id.*

¹⁸⁷ Joshua Partlow, Ann Scott Tyson & Robin Wright, *Bomb Kills a Key Sunni Ally of U.S.*, WASH. POST (Sept. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/13/AR2007091300490.html>. The article stated that “Abu Risha, was called a warlord and a highway bandit, an oil smuggler and an opportunist, who sold out the Sunni resistance for American military friendship”; *see also* Jim Michaels, *An Army Colonel’s Gamble Pays Off in Iraq*, USA TODAY, April 20, 2007, http://www.usatoday.com/news/world/iraq/2007-04-30-ramadi-colonel_n.htm (profiling Colonel Sean MacFarland as a commander who “was also willing to overlook the ‘checkered past’ and questionable allegiance of many of the sheikhs, claiming, ‘I’ve read the reports. . . . You don’t get to be a sheik by being a nice guy. These guys are ruthless characters. . . . That doesn’t mean they can’t be reliable partners.’”).

¹⁸⁸ *See* SIGIR-11-010, *supra* note 171, at 12. The SIGIR report indicates that many commanders were well aware that contractors were skimming money off the total contract amount, but “speculated that this would happen regardless of whether or not

Funneling billions of dollars into an unstable country “has raised the stakes of corruption considerably,” says the U.S. Institute of Peace’s Parker . . . Payoffs and profiteering are widely seen as “the cost of doing business” in Iraq, Parker says. He believes the U.S. government doesn’t care whether Iraqis are left with a corrupt country when our troops leave. “We are fine with letting the Iraqis have their own corrupt system for themselves.”¹⁸⁹

The essential point here is that the SoI program was a series of security contracts that *should* have fallen under a comprehensive institutional process nested within an Iraqi-centered state-building framework. The MAAWS, as a COIN fund disbursement SOP, provided tactical level commanders with a fast and efficient money-spending tool that could be used to influence the security situation. However, the MAAWS did not provide a “public procurement framework” to help commanders synchronize the security mission with the political aspirations of SoI members and the broader interests of the Iraqi state. The contracting process reasonably advanced the dictates of COIN, but conflicted with the long-term aims of the state-building mission.

2. *Construction Contracting and COIN*

The DoD COIN practitioners often incorporate the language of “capacity building” within their operational vernacular, which has largely meant funding schools, clinics, water treatment facilities, and other “brick and mortar” structures that *relate* to civil institutions and good governance. Taken to its logical conclusion, the larger the project the greater the impact; thus, a large project delivered expeditiously is a potential capacity building windfall for any aspiring COIN practitioner—or so the logic goes.

From a state-building perspective, the concept of capacity building has less to do with brick and mortar projects and more to do with developing a responsive bureaucratic regime capable of administering

funds were disbursed directly to the SOI leader or to each SOI member.” One commander told SIGIR “that he believed that it was likely that some portion of the U.S. payments to the SOI was provided to a local insurgent group as protection money.”

¹⁸⁹ Bauer, *supra* note 183.

effective governance and providing essential services. For instance, if a commander determines that child illiteracy rates are high in his area of operation, the problem might not be a lack of schools. The community might have a shortage of teachers and administrative staff, or lack a viable funding stream to make sure that the teachers, staff, and utilities are paid for once the school is up and running. The institutional shortcomings, in such an instance, are systemic and cannot be remedied with a “shovel ready” solution.

United States forces have already left Iraq and are scheduled to leave Afghanistan by 2014, but the sustainment cost for U.S.-funded projects will linger on in both countries long after the last warfighter leaves. The World Bank said of Afghanistan:

These investments and programs are creating substantial expenditure liabilities for the future—roads will need to be maintained, teachers paid, and the sustaining costs of the Afghan National Army and other security services covered. The same will be true of investment programs in sectors like electric power and irrigation.¹⁹⁰

The task of future sustainment becomes even more daunting when Afghan government authorities are not even aware that a liability exists. A Special Inspector General for Afghanistan Reconstruction (SIGAR) report on U.S. development projects in Nangarhar Province in October 2010 revealed that twenty-four of the twenty-six projects for fiscal years 2009 and 2010 it reviewed “did not contain a U.S. and Afghan sustainment agreement or the signature of a government official accepting responsibility for operation and maintenance,” and large doubts loomed about the Afghan government’s capacity and willingness to sustain these projects.¹⁹¹ A January 2011 SIGAR audit made a similar finding for Laghman Province.¹⁹² The Commission on Wartime

¹⁹⁰ THE WORLD BANK, AFGHANISTAN PUBLIC FINANCE MANAGEMENT PROJECT, REP. NO. 34582-AF, AFGHANISTAN: MANAGING PUBLIC FINANCES FOR DEVELOPMENT 8 (2005).

¹⁹¹ See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, WEAKNESSES IN REPORTING AND COORDINATION OF DEVELOPMENT ASSISTANCE AND LACK OF PROVINCIAL CAPACITY POSE RISKS TO U.S. STRATEGY IN NANGARHAR PROVINCE, SIGAR AUDIT 11-1, at 11 (Oct. 2010) [hereinafter SIGAR-AUDIT 11-1], available at <http://www.sigar.mil/audits/reports.html>.

¹⁹² See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM IN LAGHAM PROVINCE PROVIDED SOME BENEFITS, BUT OVERSIGHT WEAKNESS AND SUSTAINMENT CONCERNS LED TO QUESTIONABLE OUTCOMES AND POTENTIAL WASTE, SIGAR AUDIT-11-7, at ii (Jan. 2011)

Contracting in Iraq and Afghanistan added that such projects will likely result in “billions of dollars in waste” directly stemming from “failure to apply realistic analysis and effective acquisition discipline in the stress of a contingency setting.”¹⁹³

To the tactical level commander, the concept of future sustainability is generally an unknown variable that he cannot control, whether or not the host nation formally agrees to sustain the project. What he does know is that he has a deteriorating security situation and millions of dollars at his disposal to solve it. He also knows that he has a MAAWS-inspired mandate that encourages the funding of high-impact, high-visibility projects that can get young men off the streets and undermine support for the insurgency. This COIN-centered approach fits well within the capabilities of a tactical level framework and a year-to-year deployment cycle. A state-building-centered approach, conversely, does not naturally fit within that scheme because it focuses on developing institutional capabilities over several years with the involvement of many different commanders and organizations. Most tactical level commanders do not have the time or capability to consistently implement state-building practices.

Consequently, in an effort to simply get something done, military and political considerations tend to dominate the planning process. In Iraq, this has led to a long list of questionable construction endeavors in support of COIN operations.¹⁹⁴ This is not to suggest that every

This report noted that 92 percent of the \$53 million invested in Lagham province Afghanistan related to projects that were at risk of failure or of questionable value.

¹⁹³ COMM’N ON WARTIME CONTRACTING, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COST, REDUCING RISK 102 (31 Aug. 2011) [hereinafter the WCT], available at http://www.wartimecontracting.gov/docs/CWC_FinalREport-lowres.pdf. The Commission noted that

[f]ailure by Congress and the Executive Branch to heed a decade’s lessons on contingency contracting from Iraq and Afghanistan will not avert new contingencies. It will only ensure that additional billions of dollars of waste will occur and that U.S. objectives and standing in the world will suffer. Worse still, lives will be lost because of waste and mismanagement.

Id. at 13.

¹⁹⁴ See, e.g., Hedgpeth & Cohen, *supra* note 157; see also, e.g., OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: PROJECTS AT BAGHDAD AIRPORT PROVIDE SOME BENEFITS, BUT WASTE AND MANAGEMENT PROBLEMS OCCURRED, SIGIR-10-013, at 2–3 (26 Apr. 2010) [hereinafter

reconstruction project in Iraq has failed or will eventually fail,¹⁹⁵ but the overall strategic tone did not *consistently* provide tactical level commanders with an effective way for reconciling the tactical dictates of COIN with a far reaching state-building strategy. In Iraq, few projects have exemplified this dilemma more directly than the U.S.-led effort to build the Fallujah Waste Water Treatment System.

The Fallujah Waste Water Treatment System (FWWTS), with an initial estimated cost of \$35 million, was one of the largest U.S. reconstruction projects ever undertaken in Iraq.¹⁹⁶ The stated purpose of the project was “to provide a sewage treatment facility for 100,000 residents” that could reduce the contaminating effects “on the receiving waters in [the Euphrates].”¹⁹⁷ Originally conceived by the CPA in June 2004, this project arose at a time when the term COIN was not yet fashionable in U.S. military policy circles. However, the driving impetus for the project was decidedly influenced by the COIN ethos. According to SIGIR,

[T]his project addressed the CPA goal of focusing on large infrastructure projects that would provide stability by increasing essential services, such as sewage treatment. At the time the project was initiated, Falluja was widely considered the most dangerous place in Iraq. The CPA awarded this project as a “carrot” to stabilize the local population by providing an essential service and jobs to Falluja residents.¹⁹⁸

SIGIR-10-013]. The main Baghdad Economic Zone (BEZ) represented \$35.5 in CERP funds on forty-six individual projects. Twenty-four of the forty-six projects representing 46% of funds spent resulted in outcomes with questionable value. *Id.*

¹⁹⁵ See, e.g., OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: MUHALLA 312 ELECTRICAL DISTRIBUTION PROJECT LARGELY SUCCESSFUL, SIGIR-09-025 (26 July 2009) [hereinafter SIGIR-09-025]. The Muhalla 312 Electrical Distribution Grid project was an \$11.7 million CERP project administered by the Joint Contracting Command–Iraq. The SIGIR found that “although the project took longer to complete than anticipated because of GOI approval delays and security issues, this was a successful CERP project.”

¹⁹⁶ OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, FALLUJAH WASTE WATER TREATMENT SYSTEM: A CASE STUDY IN WARTIME CONTRACTING, SIGIR 12-007, at 1 (30 Oct. 2011) [hereinafter SIGIR-12-007].

¹⁹⁷ *Id.* at 5.

¹⁹⁸ *Id.*

The original contract task order indicated that the project would take 3½ years to complete, but the CPA wanted to increase the “hearts and minds” impact on the local populace.¹⁹⁹ To do this, the CPA accelerated the completion schedule to 18 months.²⁰⁰ As of September 2011, after costing some \$107.9 million, the project was still unfinished, and would take the Iraqi government at least two more years and 87 million more dollars to complete.²⁰¹ Worst than that, there is little evidence to suggest that the project helped to alleviate violence or endear the Iraqi government to the people.²⁰²

The problems with the FWWTS were legion, beginning with a flawed funding scheme that hampered the entire project. The initial requirement was funded from the Iraq Relief and Reconstruction Fund (IRRF), but as the project dragged on, it increasingly took funds from other sources, to include the DFI, the CERP, and the Economic Support Fund (ESF). Unfortunately, these various funding sources came from different government authorities with different rules for disbursing funds. This piecemeal funding approach heavily influenced execution of the contract. Funds from IRRF, CERP, and DFI could not be mixed and varied in amount, so that various components of the project “needed to be severable and of varying sizes.”²⁰³

Splitting the project into smaller components was probably the only way to move forward under this arrangement, but doing so created a series of complex interdependencies that “adversely impacted other contracts and then eventually the project overall.”²⁰⁴ For example,

[t]he Ministry of Finance’s refusal to pay DFI-funded contract invoices in late 2006 resulted in work stoppages of critical path construction contracts. Specifically, the

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1.

²⁰² *Id.* at 28 (SIGIR “found no information on whether the project has impacted local residents’ feelings towards their government, either local or national.”); *see also* Timothy Williams, *U.S. Fails to Complete, or Cuts Back, Iraqi Projects*, N.Y. TIMES (3 July 2010), http://www.nytimes.com/2010/07/04/world/middleeast/04reconstruct.html?_r=1&pagewanted=1&hp (discussing the feelings of resentment that some Iraqi people felt toward U.S. forces when large scale projects go unfinished. One Iraqi complained of the unfinished sewer line from the waste water treatment project, stating that “this project was supposed to be a mercy . . . but it has been nothing but a curse.”).

²⁰³ SIGIR-12-007, *supra* note 196, at 21.

²⁰⁴ *Id.*

earthworks contractor left the project site over the non-payment of more than \$1.3 million in invoices, which delayed the start of the construction of the facility.²⁰⁵

Further complicating matters, “award of individual contracts required construction throughout the still very dangerous city.”²⁰⁶ A former Gulf Region District commander stated “that it made no sense to award a contract and require the contractor to begin construction throughout a city that was not secure.”²⁰⁷ It was as if the Governor of California had ordered a large infrastructure project in the most dangerous part of Los Angeles during the 1992 riots. Most observers would see this as foolish, but the COIN practitioner only sees opportunity.

Of more concern to this article, the project and the resulting problems fell solely on U.S. shoulders, leading to U.S.-based solutions for an Iraqi need. The FWWTS project was almost entirely developed, awarded, and managed by the U.S. military, even though the Iraqi government would ultimately take ownership of the project. This led to significant conflicts throughout all phases of project development and execution, resulting in wasted time, wasted money, and a wasted chance to empower the host nation’s institutional authority and professional competence.²⁰⁸ It is unlikely that the Iraqi institutions in place would have been equipped to take on a project as grand as the FWWTS. That fact alone should have fostered an approach more in line with actual Iraqi desires and institutional capabilities, giving U.S. military commanders the role of *supporting* those institutions.

Government institutions are only as strong as the people responsible for operating the bureaucracy. A bureaucracy gains competence by executing its assigned mission and being judged on the results. Although military commanders have a natural aversion to civilian bureaucracies, it is only through properly assembled bureaucracies that a failing state can secure some degree of institutional stability and professional

²⁰⁵ *Id.* at 22.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *See id.* at 24. At some point during the project design and the award phase, the representatives from Fallujah disagreed with the Ministry about the overall project design. In an effort to get the project moving forward, however, the U.S. Marine authority stationed in Fallujah instructed the contracting office to essentially side with the Fallujah Reconstruction Council. The command eventually reversed the decision several months later.

competence. Consequently, whenever a military commander circumvents the civil bureaucracy, for whatever reason, he contributes to corruption in the host nation. Too often, tactical level commanders are placed in difficult positions without the necessary tools to align their noble intentions with sound state-building practices. To reverse this trend, the DoD should address the strategic shortcomings that breed this type of corruptive influence by adopting an “institution-centric” public procurement approach.

V. State-Building as a Tool for Combating Corruption and Providing a Way Forward

As shown throughout this article, the strategic failings of the DoD policymaking regime have created a vacuum for procurement practices at the operational and tactical levels to facilitate consistent state-building activities. In the absence of meaningful strategic guidance, battlefield commanders have adopted a “COIN-focused” utilitarian posture for approaching procurement efforts in Iraq and Afghanistan. This way of thinking has proven to be intellectually durable and practically useful for securing short-term tactical objectives. However, many of those tactical successes have proven to be strategically problematic, because Iraqi and Afghan institutions continue to be hobbled by ineffectiveness made worse by systemic corruption. The only way to move beyond these strategic limitations is to adopt a strategic and moral framework that values institutions and the rule of law over the expediency of COIN. To accomplish this, the DoD must learn to see its contingency contracting operations as an extension of its rule of law mission and a vital part of a stability operation. This is especially true when conducting a COIN fight within a failed or failing state.

When the military is caught between the competing responsibilities of state-building and managing the COIN fight, a commander should immediately assess three things. First, understand the procurement capabilities of the host nation government. Second, understand the right and left limits of one’s own procurement capabilities and its impact on the operational environment. Third, if the host nation system is not fully capable to meet its reconstruction needs, assess what has to be done to get it there and where the military fits in that process. The table below provides a simplified framework for initially assessing host nation capabilities and the anticipated level of DoD involvement.

Stage	Host Nation Procurement Capability	DoD Involvement
0	No formal supporting legal framework or procurement institutions.	Significant (lead element)
1	Legal framework but limited to no supporting institutions (paper system).	Significant (lead element)
2	Basic legal framework and supporting institutions (non self-sustaining).	Moderate (supporting element)
3	Developed legal framework and semi-capable supporting institutions (self-sustaining).	Minimal (supporting element)
4	Developed legal regime and capable supporting. Institutions (self-sustaining).	Limited (as needed but no direct supporting role)

The point here is that DoD procurement activities should be guided by the needs and the capabilities of the host nation government. For instance, at Stage 2, the DoD might still be actively involved with reconstruction efforts, but at this point, the host nation should be primarily responsible for determining what projects need to be done, where it needs to happen, and whether the project can be sustained upon completion. In Afghanistan, host nation procurement capabilities appear to be somewhere between Stage 2 and 3, but DoD involvement seems to be hovering around stage 0 and 1. This disconnect is a key driver for the noble cause corruption discussed throughout this article, but there are some steps the DoD can take to mitigate this problem today and to better anticipate it when planning future operations.

A. Supporting Afghan Public Procurement Institutions as a Component of the DoD Rule of Law Mission

Military relations between the United States and Afghanistan have been governed by a series of ad hoc agreements and “diplomatic notes.”²⁰⁹ Public procurement policies and spending priorities, however, are not controlled by either. Instead, two separate and distinct budgetary tracks have evolved: the core budget, managed by the Afghanistan Ministry of Finance (MoF), and the external budget, managed by donor nations and international organizations.²¹⁰ According to Article 4 of the 2008 Afghan Procurement Law (APL), “all municipalities and other units funded under the government [core] budget are required to procure goods, works and services in accordance with the provisions of this Law”

²⁰⁹ See R. CHUCK MASON, CONG. RESEARCH SERV. RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 7 (2011).

²¹⁰ ISLAMIC REPUBLIC OF AFGHANISTAN—MINISTRY OF FINANCE, DEVELOPMENT COOPERATION REPORT 2 (2010) [hereinafter DCR].

unless an enumerated exception applies.²¹¹ The external budget, conversely, is governed by donor nation law and policy.²¹²

Speed, efficiency, and familiarity have been the driving forces for this bifurcated approach, but it “is now seen as undermining public confidence in the government as the majority of funds are still passed through the external budget using donor driven systems.”²¹³ In fact, over 90% of the monies expended in Afghanistan are funded by external sources, which means that “most economic activity takes place outside of the government’s fiscal control systems” undermining the “legitimacy and relevance of the government to the Afghan people.”²¹⁴ According to the MoF, this parallel procurement regime has created “unbalanced and inequitable” development throughout Afghanistan and denied Afghan ministries the opportunity to “learn by doing and thereby develop the required capacity to design, implement, monitor and report on development programs.”²¹⁵

Afghanistan’s procurement system is by no means a model of perfection, but after considerable support from the international community, Afghanistan has established a viable legal framework and established key supporting institutions.²¹⁶ Of particular note, Article 80

²¹¹ Procurement Law, 2008, art. 4 (as amended Jan. 2009) (Afghanistan) [hereinafter APL], available at <http://moi.gov.af/Content/files/Procurement%Law%202009%20English.pdf>.

²¹² See ISLAMIC REPUBLIC OF AFGHANISTAN—MINISTRY OF FIN., PUBLIC FINANCIAL MANAGEMENT ROADMAP 5 (2010) [hereinafter FIN. MGMT. ROADMAP]. It is currently estimated that approximately 30% of all donor funds are currently channeled through the core budget.

²¹³ DCR, *supra* note 210.

²¹⁴ See ORG. FOR ECON. CO-OPERATION AND DEV., STRENGTHENING COUNTRY PROCUREMENT SYSTEMS: RESULTS AND OPPORTUNITIES 23 [hereinafter RESULTS AND OPPORTUNITIES], available at http://siteresources.worldbank.org/INR/ALBANIA/Resources/Strengthening_Procurement_Systems.pdf.

²¹⁵ DCR, *supra* note 210. The MoF adds that the U.S. emphasis on addressing security requirements, representing roughly 51% of total external assistance, has caused the aid process to become “politicized and militarized.”

²¹⁶ Prior to 2005, Afghanistan operated under a loose series of procurement regulations, but these regulations functioned largely as a set of bid and contract preparation guidelines than regulations designed to ensure competitive bidding. In 2005, a new procurement law was passed to overhaul and modernize the legal framework. In July 2008, the 2005 law was replaced by the pre-amended version of the current law. However, several major donor nations took issue with the new law because it failed to comply with international standards. After consultation with the World Bank, sixty-six observations were made. Twenty-seven observations out of the 66 would be addressed as amendments to the law, while the rest were resolved via legal and policy documents. The 2008 law was formally

of the APL established the Procurement Policy Unit (PPU) to oversee the implementation of the APL and to update and amend the law as necessary. Similar to the OGPCP in Iraq, the PPU does not consider award recommendations or act as an award authority. It is a policy hub, whose most significant responsibilities include developing, standardizing and enforcing procurement policy. The PPU has acted on its mandate and developed key public procurement policies and processes to implement the APL.²¹⁷ According to the World Bank, “with donor assistance, Afghanistan has made considerable efforts to establish the legal and regulatory framework for public procurement over the last five years.”²¹⁸ However, that same report notes that “while the law provides a very modern legal system for procurement, effective implementation of the law may encounter difficulties in the current weak institutions and capacity of the government.”²¹⁹ This suggests that the current gains are real but fragile and could be lost if not properly reinforced.

As it did with its contracting regime in Iraq, the DoD is operating along a public procurement path that is consistent with its MAAWS money spending ethos, but inconsistent with reinforcing the APL and related institutions. This inconsistency is a lead contributor to the type of noble cause corruption discussed in Part III of this article. Not in the sense that the DoD is intentionally undermining the success of Afghan public procurement institutions, but is failing in its duty as a state-builder to support the host country institutions that it can. More specifically, the

amended in 2009. *See* CAPACITY FOR AFGHAN PUB. SERV. PROJECT, INSTITUTION BUILDING IN PROCUREMENT POLICY UNIT OF MINISTRY OF FINANCE, *available at* http://www.undp.org.af/Projects/CAP/CAP.SuccessStories/ImplementationProcurementLaw.SS4_CAP.pdf.

²¹⁷ RESULTS AND OPPORTUNITIES, *supra* note 214, at 23. The Procurement Policy Unit (PPU) has issued thirty-seven procedural circulars/guidelines to support implementation including “Rules of Procedures for Public Procurement.” The “Procurement Appeal and Review Mechanism” initially issued in 2007, has been reconstituted and re-issued. The PPU also prepared standard bidding documents and the MOF mandated their use for procurement of goods, works and services. A Procurement Management Information System (PMIS) has been developed and piloted in three line ministries. The PPU is currently working to include data from all line ministries on the website. The PPU is also actively working on the accreditation of line ministries in order to decentralize the procurement function which is currently handled primarily through a central procurement facilitation unit established in the Ministry of Economy. *Id.*

²¹⁸ *Id.* (citing WORLD BANK, EMERGENCY PROJECT PAPER ON A PROPOSED EMERGENCY RECOVERY GRANT IN THE AMOUNT OF SDR 32.8 MILLION TO THE ISLAMIC REPUBLIC OF AFGHANISTAN FOR A SECOND SUSTAINABLE DEVELOPMENT OF NATURAL RESOURCES PROJECT ¶ 44 (2011)).

²¹⁹ *Id.*

U.S. should reform both its procurement model and its dispute resolution practices for contracting in Afghanistan.

1. Employ an Integrated Procurement Model

Some DoD procurements in Afghanistan are “U.S. military specific” in that they primarily relate to the combat mission, such as the HNT logistics contracts or buying fuel for U.S. military helicopters. Others, however, primarily benefit the Afghan state, such as a CERP funded contract to build a local clinic or an Afghanistan Security Force Funds (ASFF) financed contract to provide logistical support to the Afghan National Army (ANA).²²⁰ The former should remain within normal U.S. procurement channels, while the latter should be procured through the Afghan procurement process as a matter of DoD policy. Several adjustments would be needed to integrate DoD funds into the Afghan procurement framework.

To make these adjustments, the DoD must recognize that the Afghan Public Financial Management System (PFMS) is highly centralized when compared to the U.S. system. Paragraph 2.4 of the Defense Institution Reform Initiative for Afghanistan summarizes those differences as follows:

In the United States, the responsibilities and processes of resource management are found in multiple government institutions. At the national level, overall responsibility for the annual President’s Budget resides in the Office of Management and Budget (OMB). The responsibility to disburse and collect funds resides in the Department of Treasury. Within the U.S. Military Services, the Defense Finance and Accounting Service (DFAS) disburses funds. The OSD Comptroller is responsible for budget execution and OSD Cost Analysis and Program Evaluation (CAPE) is responsible for determining how well programs. In

²²⁰ The difference between the two funding sources is that one can only be used to support non-military humanitarian and reconstructive priorities for the direct benefit of the Afghan people (CERP), and the other is meant to solely support Afghan security forces (ASFF). However, both essentially support the Afghan state. In any event, for the purpose of this article “reconstruction funding” will consist of CERP, ASFF, and Afghanistan Infrastructure Funds (AIF).

Afghanistan, each of the aforementioned functions is performed by the MoF. The MoF budget office provides top-line budget guidance to all government departments to prepare each year's annual budget. MoF determines the final budget for each government department -- to include the funding of specific programs within each government department's budget. MoF submits the budget to the President and eventually the Parliament. All GIROA disbursements are made by the MoF-Treasury. MoF control of the resource management process also includes the allocation of funds for individual development projects in Afghanistan. In the U.S. DoD, this particular resource management function is called programming and is done by the individual services and then collectively by DoD.²²¹

Thus, in the Afghan system, funding (payment) of a contract is controlled by the MoF, while requirement development and contract preparation occur under the stewardship of whichever government ministry is responsible for the requirement.

Under the proposed model, the DoD would still fund projects, but delegate requirement development and contract preparation to the responsible Afghan ministries. Before submitting funds to those ministries, the DoD would provide the MoF a detailed breakdown of disbursed funds. This additional funding would act as a "supplemental budget" to the funds already provided by the MoF. As DoD funds were obligated, the ministries would report those obligations to the DoD for disbursement and to the MoF for recording and informational purposes. This approach would ensure that the MoF is included in the budgetary process, with minimal disruption to normal U.S. military funding practices.

The authority to obligate U.S. funds via contract is limited to duly appointed contracting officers by 41 U.S.C. § 414 and FAR 1.602-1. However, this authority could be expanded to include properly certified Afghan procurement officials, just as PPOs have been authorized to issue CERP funded contracts.²²² Absent such authority, a warranted

²²¹ DEF. INST. REFORM INITIATIVE AFGHANISTAN, RESOURCE MANAGEMENT LINE OF OPERATION MASTER PLAN, vers. 3, sec. 2.4 (Oct. 14, 2011) [hereinafter DIR].

²²² See U.S. DEP'T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270313 (Jan. 2009) [hereinafter DODFMR].

contracting officer would be required to finalize any U.S.-funded contract. A contracting officer would also be needed, in some instances, to ensure the inclusion of relevant clauses required by U.S. procurement law.

Funds from three key DoD sources would likely flow through this procurement model: CERP funds, Afghanistan Infrastructure Funds (AIF), and ASFF. The first, CERP funding, is exempt from virtually all U.S. procurement laws, while the latter two, ASFF and AIF, are subject to most U.S. procurement laws and regulations.²²³ For CERP-funded contracts, full compliance with the APL could be required as a matter of DoD policy, subject to congressional notification requirements and funding limits.²²⁴ Since AIF and ASFF fall under the normal U.S. procurement regime, the DoD would need to either (1) seek congressional waiver of normal U.S. procurement laws for all contracts generated under this model or (2) comply with U.S. procurement laws in making contracts, but supplement those contracts with APL provisions that are consistent with U.S. law and policy. Either way, Afghan procurement personnel would still be heavily involved in the requirement development, solicitation, and evaluation stages without any changes to U.S. procurement law or significant modifications of DoD policy.²²⁵

²²³ See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1212(c)(2), 1217, 1513, 124 Stat. 4137, 4389–90 (2011) [hereinafter NDAA FY11]. The CERP is a one-year appropriation, whereas funds under the AIF are available for two-years. ASFF is a single year appropriation, subject to all applicable U.S. procurement laws. Additionally, AIF is can only be spent with concurrence of State Department officials. See Policy Memorandum for U.S. Embassy Kabul and USFOR—A Consolidated Policy for Executing Afghanistan Infrastructure Fund (AIF) Procedures (12 Feb. 2011) (on file with author). The memorandum is signed by Karl Eikenberry, U.S. Ambassador to Afghanistan, and GEN David H. Petraeus, Commander, International Security Assistance Force/U.S. Forces—Afghanistan. The memorandum further discusses the Department and the Department of State working groups and the types of projects suitable for funding under the AIF.

²²⁴ See *id.* § 1212(c)(2). The notification (to Congress) of projects exceeding \$5 million must include (1) the location, nature, and purpose of the proposed project, including how the project is intended to advance the military campaign for Afghanistan; (2) the budget and implementation timeline for the proposed project; and (3) a plan for the sustainment of the proposed project. *Id.* Of the \$500 million set-aside for CERP, \$100 million could be used for operations in Iraq, while the remaining \$400 million would be set aside for programs in Afghanistan. *Id.* § 1212(a)(3).

²²⁵ Afghanistan Reconstruction and Development Services (ARDS) already provide the type of support generally contemplated in this article for select high-value Afghan procurements using Afghan or donor nation funds. According to its website,

Whether implemented all at once or in stages, the proposed model would undoubtedly serve as an “effects enabler” for the PPU, by providing real world contracting opportunities to Afghan officials, as well as mentorship support and institutional development of ministry level contracting bureaucracies. Additionally, this approach would likely cause the flow of money into the local economy to better mirror actual Afghan capacity. According to the Report of the Commission on Wartime Contracting in Iraq and Afghanistan, “if a host country has limited absorptive capacity, influxes of external aid may reach a point at which the net benefit of additional funds turns *negative* as economic distortions proliferate and grow.”²²⁶ The report went on to state that external aid essentially oversaturated Iraq’s absorptive capacity, causing distortions in the competitive landscape and encouraging corruption.²²⁷ In Afghanistan, the cause for concern is even greater because it “does not have the kind of bureaucracy or operations or resources that Iraq has and, therefore, will have a much more gradual or much lower absorptive capacity.”²²⁸ Consequently, the DoD should adopt a public procurement model that encourages the synchronization of spending (DoD + MoF

ARDS was established in December 2003 as a government institution to put in place emergency procurement capacity to facilitate rapid and transparent utilization of donor resources for reconstruction and development of Islamic Republic of Afghanistan with the primary task to assist Line Ministries in carrying out procurement in conformity with the guidelines of funding agency(ies), for all goods, works and services under operations financed directly by IDA, IDA-administered Trust Fund as well as non-IDA funded contracts including domestic funded contracts.

Who We Are, ARDS, <http://www.ards.gov.af/WhoWeAre.php> (last visited Oct. 4, 2012). The ARDS primary value is that it assists line ministries with developing procurements in accordance with provisions of the APL and host nation procedures. The key component of the ARDS approach is that ownership of the procurement process remains with Afghan line ministry as envisioned in Article 87 of the APL. The ARDS merely serves as a central facilitation and supporting unit during the procurement process. See ISLAMIC REPUBLIC OF AFGHANISTAN—MINISTRY OF FINANCE, REPORT ON ASSESSMENT OF NATIONAL PROCUREMENT SYSTEMS 15 (2007). Since 2003, ARDS has assisted the Afghan government with approximately 600 procurements.

²²⁶ WCT, *supra* note 193, at 100.

²²⁷ *Id.*

²²⁸ *Id.*; see FIN. MGMT. ROADMAP, *supra* note 212, at 5. According to this assessment Afghanistan has significant capacity restraints in its provincial administrations. “Less than 2% of the Afghan population is estimated to work in the public sector, which is relatively low even for low-income countries.” *Id.* This suggests that a major impediment to absorptive capacity is the availability of effective administrators to implement and manage projects.

contributions) with actual Afghan institutional capabilities. The model proposed here offers a meaningful step in that direction, by providing U.S. military commanders with a “state-building tool” that balances spending with host nation capability while developing the Afghan institutional expertise needed to meet future challenges.

In terms of application and scope, this model could be easily implemented in and around U.S. power centers in Kandahar and Bagram. It would also improve prospects in provinces where GIRoA authority is weakest, but the U.S. security presence is more trusted. For instance, the U.S. military could establish procurement advisory cells (PACs) to advise the government offices of any province benefiting from DoD reconstruction funds. These cells would not be authorized to undercut the centralized Afghan procurement system by encouraging local officials to bring their needs directly to the U.S. military. Instead, they would be required to support that system by assisting local officials to formulate proposals to bring to their own central government (which would, under this system, be responsible for negotiating and implementing the contracts). This model would bolster the capabilities of the central government and provide a path for an orderly transition to a less centralized approach in the future. It would also move the U.S. reconstruction emphasis away from short-term tactical COIN thinking and toward a genuine state-building strategy.

2. Enable the Use of an Afghan-Based Dispute Resolution Process

Article 71 of the APL states that “a bidder that has suffered damage due to the violation of the Law is entitled to seek review by submitting a written application for review identifying the specific decision, act, or failure to act alleged to violate the procurement legislation.” On January 6, 2010, the PPU issued the *Manual of Procedures for Procurement Appeal and Review* to provide a general process for aggrieved bidders to enforce their rights by challenging improprieties in the issuance of public contracts by Afghan agencies.²²⁹ To initiate the process, the aggrieved party submits an application to the Secretariat of the PPU for processing. If the application conforms to the procedural guidelines, the PPU

²²⁹ See ISLAMIC REPUBLIC OF AFGHANISTAN—MINISTRY OF FINANCE, MANUAL OF PROCEDURES FOR PROCUREMENT APPEAL & REVIEW (2010), available at [http://moi.gov.af/Content/files/Manual%20Of%20Procedure%20for%20Procurement%20Appeal%20and%20Review\[1\].pdf](http://moi.gov.af/Content/files/Manual%20Of%20Procedure%20for%20Procurement%20Appeal%20and%20Review[1].pdf).

assembles a Review Board and the application is then submitted to the board for decision.²³⁰ Finally, any order issued by the Review Board is confirmed by the PPU. The procedure manual does not describe the remedial powers of the Review Board, but presumably it has broad authority to rectify any deviation from the APL.²³¹ This process is still in its infancy and there is little evidence by which to gauge its overall effectiveness. Some evidence suggests that the process is not widely used. For example, all orders issued by the Review Board must be published on the PPU website.²³² As of the writing of this article, no such orders have been published there. Aggrieved bidders may be reluctant to request a review for fear of incurring additional costs. For instance, the

²³⁰ *See id.* at 8. The review board consist of three independent experts chosen from administrative review committee consisting of a maximum of twenty-one members.

²³¹ *Id.* at 11. The Application shall be submitted within the following time limits:

- (a) if the contract has not been awarded yet:
 - (i) the application for review must be submitted to the Head of the procuring entity itself within ten (10) working days of the date when the bidder became aware of the circumstances giving rise to the application for review.
 - (ii) the decision on the application for review shall be issued by the head of the procuring entity within seven (7) working days after its submission; and
 - (iii) the decision of, or the failure to decide within the required time by the head of the procuring entity may be appealed to the Administrative Review committee within ten (10) working days after either the decision or the expiry of the time for issuing the decision.

- (b) if the contract has been awarded, the application for review must be submitted within ten (10) working days after the applicant knew the alleged violation.

²³² *Id.* at 15. The manual states:

ARTICLE 28: PUBLICITY OF ORDERS:

- (1) The Secretariat shall produce a summary of each Order which shall include the basic facts, reasoning and findings of the Review Board.
- (2) The Secretariat shall publish such a summary on the website of the PPU.
- (3) The Secretariat shall maintain copies of the full text of each Order and make it available to interested parties on request. The PPU may prescribe a charge for reproducing the Order.

PPU can assess a fee for submitting an application for review and the Review Board can apportion the cost of review proceedings between the aggrieved party and the Afghan agency as it sees fit.²³³ So, regardless of whether the aggrieved bidder wins or loses, he or she could end up paying a considerable price just to be heard.

Despite these shortcomings, this process offers a step in the right direction by providing a meaningful legal and procedural framework for adjudicating acquisition disputes. In this regard, the Review Board is akin to the bid protest division of the U.S. GAO Procurement Law Branch, which serves a similar function,²³⁴ with the aim of providing “an objective, independent, and impartial forum for the resolution of disputes concerning the awards of federal contracts.”²³⁵ This system gives the private sector an incentive to act as a regulatory force for ensuring government compliance with its own procurement rules. Aggrieved contractors, rather than government officials, identify defects within the procurement process and bring these problems to the GAO for resolution.²³⁶ If Afghan private sector actors could be galvanized in a similar fashion, it might transform the competitive environment and encourage Afghan ministries to act with greater fairness. The DoD could

²³³ *Id.*:

ARTICLE 29: RECOVERING THE COSTS OF THE PROCEDURE

(1) In addition to delivering its Order on the merits of the case, the Review Board may also make an award on the costs, including administrative costs, of the case and decide which of the parties shall bear the costs or the proportions of the costs to be borne by each party.

²³⁴ See generally U.S. GOV'T ACCOUNTABILITY OFFICE—OFFICE OF GEN. COUNSEL, *BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE* (9th ed. 2009). The bid protest process at GAO begins with the filing of a written protest. Unless the protest is dismissed because it is procedurally or substantively defective (for example, the protest is untimely or the protest fails to clearly state legally sufficient grounds of protest), the agency is required to file a report with GAO responding to the protest and to provide a copy of that report to the protester. The protester then has an opportunity to file written comments on the report. Other parties may be permitted to intervene, which means that they will also receive a copy of the report and will be allowed to file written comments on it. *Id.* at 6. Government contractors may also bring their protest to the U.S. Court of Federal Claims (COFC), whose jurisdictional statute is 28 U.S.C. § 1491 (b).

²³⁵ *Id.* at 5.

²³⁶ Although GAO opinions are not binding on a U.S. Government agency, those agencies tend to abide by GAO rulings because of the GAO's special relationship with Congress.

encourage this process by following the dictates of FAR provision 33.103.

Section 33.103 of the FAR encourages agencies to establish inexpensive, informal, procedurally simple, and expeditious protest forums separate and apart from the GAO.²³⁷ This means that the DoD could create an agency-level protest branch designed to work in synch with host nation dispute resolution institutions and processes.²³⁸ Currently, the DoD employs an agency level protest process in Afghanistan, but it is completely independent from the host nation system. The solution proposed here is to align these two systems to leverage the procedural sophistication of the U.S. legal regime as a means to hasten the procedural development of Afghan disputes resolution institutions. This is especially true if the DoD elects to align this approach with the alternate procurement model discussed above. But even as a standalone model, this approach would increase the perception of fairness throughout the entire system and encourage the growth of host nation institutional competence.

B. Reforming the DoD's Approach to Contingency Contracting

Contingency contracting is the point in the acquisition process where public funds are transformed into the goods and services the DoD needs to conduct military operations in a deployed environment. The ability to draft and execute legally enforceable contracts is essential. Over the last several years, however, DoD contingency contracting has come under a storm of criticism for fraud, waste, abuse, and general mismanagement.²³⁹ On September 24, 2007, the Secretary of the Army established the Commission on Army Acquisition and Program Management in Expeditionary Operations to "review the Army's policies, procedures, and operations in [Army contracting] and make findings and recommendations as to their effectiveness and compliance with applicable laws and regulations."²⁴⁰ The Commission completed its

²³⁷ FAR 33.103(c) (2012) (July 2012).

²³⁸ This approach would mean that contracts financed with non-reconstruction type funds could also participate in this process if the contracting action involves an Afghan vendor.

²³⁹ The most significant reports were generated by the Gansler Commission, The Commission on Wartime Contracting, and the Subcommittee on National Security and Foreign Affairs Committee on Oversight and Government Reform.

²⁴⁰ COMM'N ON ARMY ACQUISITION AND PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 22 (Oct.

work forty-five days later and filed its final report (the Gansler Report) on October 31, 2007.²⁴¹ The Commission found that “the ‘Operational Army’ is expeditionary and on a war footing, but does not fully recognize the impact of contractors in expeditionary operations and on mission success.”²⁴² The Commission concluded that the “acquisition failures in expeditionary operations require a systemic fix of the Army acquisition system.”²⁴³ In 2008, Congress established the Commission on Wartime Contracting in Iraq and Afghanistan to further assess the effectiveness of DoD-wide contingency contracting and provide recommendations.²⁴⁴ After three years of extensive research, this Commission reiterated the concerns described in the Gansler report, concluding that contingency contracting is broken and is in dire need of extensive reform.²⁴⁵ The reports agree that the DoD has an undertrained and understaffed contingency contracting regime, and will need to improve training and oversight to become effective now and for future operations.

Although the commissions’ findings highlight a critical shortcoming in the DOD contingency contracting regime, they fail to appreciate that no amount of additional training or oversight can cure a bad requirement or misguided strategy. The DoD procurement strategy is mostly adrift and does not provide a meaningful way for tactical commanders to assess

31, 2007) [hereinafter GANSLER REPORT], *available at* http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf. The report concluded that the “Army’s acquisition workforce is not adequately staffed, trained, structured, or empowered to meet the Army needs of the 21st Century deployed war fighters. Only fifty-six percent of the military officers and fifty-three percent of the civilians in the contracting career field are certified for their current positions.” Also of note, of the seventy-eight active contract-related fraud investigations in 2007 in Iraq and Afghanistan, seventy-seven involved Army personnel.

²⁴¹ *Id.*

²⁴² *Id.* at 1.

²⁴³ *Id.*

²⁴⁴ National Defense Authorization Act (NDAA) for Fiscal Year 2008: Commission on Wartime Contracting in Iraq and Afghanistan, Pub. L. No. 110-181, § 841, 122 Stat. 3 (2008).

²⁴⁵ *See* WCT, *supra* note 193, noting that,

Failure by Congress and the Executive Branch to heed a decade’s lessons on contingency contracting from Iraq and Afghanistan will not avert new contingencies. It will only ensure that additional billions of dollars of waste will occur and that U.S. objectives and standing in the world will suffer. Worse still, lives will be lost because of waste and mismanagement.

costs or mitigate damage to the state-building mission. This is because the DoD's current procurement strategy is mostly "inward looking," in that it is primarily concerned with providing goods and services to U.S. Soldiers and to advance the COIN effort. An "outward looking" strategy would focus on building up and supporting host nation public procurement institutions. This article has argued for a comprehensive approach, with a special emphasis on pursuing "outward looking" objectives in fragile states like Iraq and Afghanistan. This includes not only adopting an integrated framework like the one proposed in the previous section, but also rethinking how the DoD issues contracts that fall outside the host nation system. More to the point, the DoD should (1) limit the money commanders can spend at the tactical level and (2) require commanders to assess the collateral impact of *all* contracting decisions.

1. Limit the CERP Spending Authority for Tactical Level Commanders

On January 27, 2010, the *New York Times* reported that a dispute between the Shinwari tribe and the Taliban over land and control of smuggling routes from Pakistan to Kabul enabled a U.S.-Shinwari "anti-Taliban pact."²⁴⁶ Shinwari leaders "agreed to support the American-backed government, battle insurgents and burn down the home of any Afghan who harbored Taliban guerrillas."²⁴⁷ In return for support, "U.S. commanders pledged \$200,000 for small development projects and promised an additional \$1 million for future projects."²⁴⁸ To minimize corruption, "the senior U.S. commander in eastern Afghanistan decided to [bypass the central government] and disburse the aid through the local government and fund projects approval by a tribal *shura*." The decision to bypass the central government "drew complaints from senior Afghan officials, who argued it undermined the Karzai administration."²⁴⁹ Some alleged that the development contracts were not disbursed equitably, "even amongst Shinwaris," and that other tribes were angered because

²⁴⁶ Dexter Filkins, *Afghan Tribe, Vowing to Fight Taliban, to Get U.S. Aid in Return*, N.Y. TIMES (Jan. 27, 2010), <http://www.nytimes.com/2010/01/28/world/asia/28tribe.html?pagewanted=all>. The Shinwari tribe includes over 400,000 Pashtun Afghans.

²⁴⁷ *Id.*

²⁴⁸ Bethany Matta, *Tribal Dispute in Afghanistan Benefits Taliban*, VOICE OF AMERICA (Oct. 11, 2011), <http://www.voanews.com/english/news/asia/south/Tribal-Dispute-in-Afghanistan-Benefits-Taliban-131515658.html>.

²⁴⁹ *Id.*

they had been excluded from the deal.²⁵⁰ The U.S. military denied these allegations, but the plan created such a backlash that it was ultimately disavowed by the U.S. Embassy, which issued a policy memo effectively quashing the agreement.²⁵¹ The actions of the U.S. commander were undoubtedly well intended but distinctly “anti-statist,” and were largely made possible by the heavy influx of CERP funds within his authority to disburse.

The DoD cannot implement any variant of the “integrated procurement model” described above if battlefield commanders are permitted to spend CERP funds as they see fit. The National Defense Appropriation Act (NDAA) for FY2011 and FY2012 provided \$400 million each year in CERP funds for Afghanistan and the DoD requested another \$400 million for FY2013.²⁵² The infusion of \$1.2 billion over three years into the Afghan economy is significant. To put this in perspective, the developmental budget for Afghanistan was roughly \$1.53 billion for 2011, which means that CERP spending alone is equivalent to over 26% of the Afghan developmental budget for that year.²⁵³ As in Iraq, the CERP in Afghanistan is a decentralized program that provides broad spending authority for tactical level execution. For instance, an O-5 battalion commander has the authority to approve a project up to \$100k and an O-6 brigade combat team (BCT) commander has a \$500k approval authority.²⁵⁴ However, this authority to spend is not coupled with a comprehensive state-building strategy. Although coordination with local Afghan officials is often required, there is no formal requirement for a tactical level commander to synchronize his actions with the Afghan central government or other military

²⁵⁰ Joshua Partlow & Greg Jaffe, *U.S. Military Runs into Afghan Tribal Politics After Deal with Pashtuns*, WASH. POST (May 10, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903257.html>.

²⁵¹ *Id.*

²⁵² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1201, 125 Stat. 1298, 1619 (2011).

²⁵³ ISLAMIC REPUBLIC OF AFGHANISTAN MINISTRY OF FINANCE, 1390 NATIONAL BUDGET 10 (2011), available at http://siteresources.worldbank.org/INTAFGHANISTAN/Resources/Afghanistan-Reconstructional-Trust-Fund/SY1390_Government_AFG_Budget.pdf.

²⁵⁴ U.S. FORCES–AFGHANISTAN J8, PUB. 1-06, MONEY AS A WEAPONS SYSTEM–AFGHANISTAN (MAAWS–A), COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) STANDARD OPERATING PROCEDURES (SOP) 32 (Feb. 2011) [hereinafter CERP SOP]. The CERP SOP is the primary field guide for issuing CERP funded contracts but it is slightly more informative than its Iraq MAAWS counterpart. For example, the CERP SOP contains a two-page contract template and some general contracting pricing principles. However, like its counterpart, good contracting practices are largely discretionary.

commanders. As for anti-corruption measures, the best practices section of the Afghanistan CERP SOP states that a commander “should appoint a Threat Finance & Corruption Analyst to evaluate vendors and focus on anti-corruption operations with regards to the CERP,” but it fails to provide any details for implementing this brief recommendation.²⁵⁵ The best way to align the CERP with the broader state-building strategy and to minimize corruptive influences is to *decrease* tactical level spending authority and shift most CERP spending into more formal Afghan procurement channels.

The Afghan Rules of Procedure for Public Procurement (RPPP) offer a streamlined contracting process called a Request for Quotations (RFQ).²⁵⁶ This process is not much more detailed or paperwork-intensive than a CERP funded contract, but spending authority for this type of contract is limited to 500,000 Afghanis or about \$10K.²⁵⁷ There would be few drawbacks and much to gain if tactical level commanders accepted similar limitations. Limitations on spending would finally get tactical commanders out of the “big project business,” which would likely improve genuine COIN efforts and return the CERP to its small project focus. Limiting spending authority also reduces the chance that commanders will fund large, unsustainable infrastructure projects. This is especially relevant given that past practice has shown that even when commanders are required to coordinate large projects with the Afghan government, they will not do it if doing so impedes the operational pace.²⁵⁸

Additionally, and perhaps most importantly, after U.S. forces depart, host nation contractors will have to learn to rely, for better or worse, on their own country’s public procurement procedures. In this sense, limiting CERP spending authority effectively encourages commanders to support those Afghan institutions that will be there for the long haul.

²⁵⁵ *Id.* at 191.

²⁵⁶ ISLAMIC REPUBLIC OF AFGHANISTAN—MINISTRY OF FINANCE, THE RULES OF PROCEDURE FOR PUBLIC PROCUREMENT 20 (2009).

²⁵⁷ APL, *supra* note 211, art. 21. These spending limits are generally consistent with the spending authority of a Government Purchase Card (GPC) holder. In garrison, that authority is limited to \$3000 but can be increased to \$25,000 in support of contingency operations. The procurement method for a GPC acquisition is fairly straightforward with minimal bureaucratic oversight. The CERP, under a \$25,000 spending ceiling, could be treated in a similar fashion.

²⁵⁸ See SIGAR-AUDIT 11-1, *supra* note 191. This report notes that twenty-four of the twenty-six reconstruction projects reviewed lacked sustainment agreements from the Afghan government, despite there being a MAAWS SOP requirement to have them.

Encouraging commanders to adopt this approach might be difficult at first, but the key is to emphasize that the ultimate goal in Afghanistan is to have the Afghan civil authorities to take the lead before the U.S. military departs.

2. Implement a Collateral Impact Assessment (CIA) Tool for All DoD-Funded Contracts during Contingency Operations

Military operations in Iraq and Afghanistan have been fraught with foreign policy implications and the heavy influx of money into the battle space has provided military commanders an oversized role in shaping it. At times that shaping has been intentional, as with the SOI program, and other times it has been unintentional, as with the “security arrangements” of the HNT contract discussed in the introduction. Whatever the case, whenever the U.S. military engages in contracting, its actions could disrupt the fragile balance between powerful private actors and the host nation regime. As a result, U.S. commanders should not only consider the cost, speed, and quality of the contract’s requirements, but also who is filling that need and how they plan to fill it.

More often than not, tactical level commanders are better positioned to identify real-time problems early in the procurement process than contracting personnel or higher headquarters are later. At the requirement phase a commander can leverage his intelligence-gathering assets to determine “who’s who” within the Afghan contracting world, and “who fits where and how” within the state-building scheme. If the only persons who could possibly fulfill a contract are connected to criminal networks or insurgent groups, the proposed contracting should be treated as a high risk endeavor even if a commander ultimately determines that the need outweighs the risk.

When a targeteer directs a round of ordnance at an area where civilians or civilian structures are likely to be, he conducts a Collateral Damage Assessment (CDA). The commander is responsible for fully assessing the potential casualty toll or collateral impact. If he determines that the likelihood of civilian deaths is high, he can take steps to mitigate that risk before taking action. Even if casualties result, the decision made will have been the best any commander could have made under the circumstances.

Something similar could be done in risky contracting actions in a failed or failing state. This could be described as a collateral impact assessment (CIA), which would serve as a tool for gauging the feasibility of a specific contracting action before money is obligated to a specific effort. If the CIA index is unreasonably high, this will tell the contracting official that the requirement cannot be addressed via contract without causing significant damage to governing capacity. This would not preclude commanders and contracting officers from issuing risky contracts, but would force the award decision to be better informed and better disciplined. Although the analysis would be conducted on a contract-by-contract basis, a database of assessments could be used to create baseline profiles for “high-risk contractors” and to develop methods for mitigating the risks such actors pose.²⁵⁹ Prior assessments would also provide future commanders and planners with useful information from deployment to deployment to help them govern their expenditures and chart a path for future operations.

A principal drawback of the SoI contracts was the lack of any meaningful assessment of the persons who received those awards and the risks undertaken during the acquisition process. The same shortcomings were in play when the U.S. military sought to fill the requirements of the HNT contract. Although the HNT contract was generally regarded as “successful” in terms of filling the military’s logistic needs, it was distinctly unsuccessful in curbing the growth of parallel power structures. To avoid these shortcomings, the CIA must consider both the risks associated with the choice of prime contractor and the collateral impact of subprime vendors and partnership arrangements. The purpose of the CIA is not to develop a bright-line test for rejecting and approving projects, but to encourage a disciplined way of thinking before awarding contracts. If commanders and contracting officials understand the collateral consequences of a contracting action to host nation institutional integrity, they will be in a better position to mitigate the factors that undermine it. See Appendix for an example of what a possible CIA worksheet and analysis might look like. Here, a Judge Advocate can be useful to the command in helping to analyze the collateral impact of a given contracting action and, if necessary, to craft a mitigation strategy.

²⁵⁹ The Joint Contingency Contracting System (JCCS) is already in use in Afghanistan for vetting and eliminating “high risk” vendors from the procurement process. However, JCCS vendor vetting is only required for non-CERP contracts valued at \$100k or greater. This article calls for expanding JCCS to all contingency contract actions or require a CIA tool for those projects below that threshold or outside the reach of the JCCS database.

VI. Conclusion

In September 2010, GEN David Petraeus, serving as the ISAF and USFOR-A commander, issued a memorandum outlining his guidance for “COIN Contracting” in Afghanistan.²⁶⁰ He stated:

The scale of our contracting efforts in Afghanistan represents both an opportunity and a danger. With proper oversight, contracting can spur economic development and support the Afghan’s government’s and ISAF’s campaign objectives. If, however, we spend large quantities of international contracting funds quickly and with insufficient oversight, it is likely that some of those funds will unintentionally fuel corruption, finance insurgent organizations, strengthen criminal patronage networks, and undermine our efforts in Afghanistan.²⁶¹

General Petraeus went on to state that in order to alleviate this plight “contracting has to be ‘Commander’s business’” and that “we must use intelligence to inform our contracting and ensure those with whom we contract work for the best interest of the Afghan people.”²⁶²

Those words are most certainly true, but it is troubling that after over ten years of military operations in Afghanistan and a completed campaign in Iraq, GEN Petraeus felt compelled to express something so basic. Long before he said this, U.S. tactical commanders were aware of the dubious mix of money and COIN that followed the Anbar Awakening. The *Nation* piece cited at the beginning of this article aptly states the problem as follows:

In any case, the main issue is not that the U.S. military is turning a blind eye to the problem [fueling corruption]. Many officials acknowledge what is going on while also expressing a deep disquiet about the situation. The trouble is that—as with so much in Afghanistan—the United States doesn’t seem to know how to fix it.²⁶³

²⁶⁰ Memorandum for the Commanders, Contracting Personnel, Military Personnel, and Civilians of NATO ISAF and US Forces-Afghanistan, subject: COMISAF’s Counterinsurgency (COIN) Contracting Guidance (8 Sept. 2010).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Roston, *supra* note 6.

Unfortunately, if we do not fix it, the U.S. will likely leave Afghanistan more corrupt than it found it and will undoubtedly repeat similar mistakes in future operations. Getting beyond “good enough” in Afghanistan means more than manageable levels of violence and acceptable levels of public corruption. Instead, it means helping to create a government that is “good enough” to effectively govern today, but also contain the seeds of possibility to be something more in the time to come. This should be the U.S. policy aim in Afghanistan and similar endeavors that have yet to emerge.

Appendix

Collateral Impact Assessment for Contracting Action XX	
Initial Assessment (Requiring Activity)	<p>This section is prepared by the requiring activity to briefly describes the following:</p> <ul style="list-style-type: none"> • What is the requirement? • Who will the requirement benefit? • When must it be executed? • Where will it be executed? • How much will it cost?
Market Evaluation	<p>This is a unit level (requiring activity) function primarily through S2/S9 channels that does the following:</p> <ul style="list-style-type: none"> • Formally determine, through local officials, whether or not a need actually exist. • Evaluate and formally determine the prevailing wage rate and market prices in the area and how this requirement conforms to those rates. • Determine how much of this requirement can be procured locally. • Formally determine whether the host nation can procure requirement without US assistance.
Market Risk Assessment	<p>This is a unit level (requiring activity) function that leverages S2/S9 resources to determine the following:</p> <ul style="list-style-type: none"> • Formally determine if pursuing this requirement will have any adverse impact on the local marketplace in terms of economic displacement and shifting wealth. For instance, if this contract offers significantly more than the prevailing wage rate or market prices, this section should explain why and assign a risk value to it. Comparison and contrast to other USG contracts and Afghan efforts should be considered.
Contractor Evaluation	<p>This is a unit level (requiring activity) function that leverages S2 resources to determine the following:</p> <ul style="list-style-type: none"> • Formally determine the pool of potential contractors likely to benefit from this requirement. • Formally determine whether or not any of these potential contractors poses some risk to US operations or host nation effectiveness. For instance, if Tribe X is hostile to host nation interest and Tribe X dominates the construction industry this assessment should mitigate that as a potential risk.
Contractor Risk Assessment	<p>This is a unit level (requiring activity) function that leverages S2 resources to determine the following:</p> <ul style="list-style-type: none"> • Formally determine if pursuing this requirement will likely bolster the standing of a particular class of contractors. Also, identify if this is essentially a "sole source" environment and who will likely benefit from this effort. For instance, only contractor X can fill this requirement, but that poses minimal risk because of it poses high risk because this contractor is tied to XXX.
Commander's Overall Risk Assessment/Mitigation Plan	<ul style="list-style-type: none"> • Overall risk should be described as low, medium, or high. If it is greater than low, then the Commander must also describe his risk mitigation plan for this project. If risk has been sufficiently mitigated, the commander will decide whether or not to forward the action to contracting and/or higher HQ.
Final Assessment (Contracting Office)	<p>This section is prepared by the contracting and higher HQ once the project plan has been submitted. Here, the milestone dates can be established describing when the solicitation will coordinated through proper channels and ultimately awarded:</p> <ul style="list-style-type: none"> • Date XX – Coordination with Central Govt. • Date XX – PWS/SQW Development • Date XX – Solicitation for proposals. • Date XX – Award Date.
Requirement Coordination with Central Government	<p>Prepared by HN Official and/or Higher HQ to ensure adequate coordination with the central government to determine the following:</p> <ul style="list-style-type: none"> • Does the central government have the ability to acquire this on its own? • If not, does it have sufficient budgetary resources to sustain and manage the project once it is completed? • Are there any political objections to moving forward with this project?
Preliminary Award Decision	<p>Prepared by Contracting Personnel. This section is completed after proposals are evaluated and final award is issued. Here the contracting official can make a determination/ based on the risk mitigation plan if award of this contract will likely have on the following:</p> <ul style="list-style-type: none"> • Market Saturation: How does this award compare with other awards of like services/ supply? • Competition: Will award impact competitive landscape? How often, have we awarded to this vendor? • Level of Host Nation Involvement in contracting action: Here the contracting official will assess how much host nation was involved during procurement.
Contracting Officer Overall Risk Assessment	<p>Here, the Contracting official makes a determination as to the overall collateral impact of this contracting action and informs commander prior to the award decision. Final decision to accept risk rest with the responsible commander.</p>