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MILITARY LAW REVIEW

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BOOK REVIEW

The Law of Armed Conflict: An Operational Approach

Reviewed by *Dan E. Stigall, Esq.*

Department of Army Pamphlet 27-100-213

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MILITARY LAW REVIEW

Volume 213 **Fall 2012**

FAILURE TO REPORT: THE RIGHT AGAINST SELF-INCRIMINATION AND THE NAVY'S TREATMENT OF CIVILIAN ARRESTS AFTER *UNITED STATES v. SERIANNE*

LIEUTENANT RANDALL LEONARD[*]
&
LIEUTENANT JOSEPH TOTH[†]

"Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. . . ."

—Chief Justice Earl Warren in *Miranda v. Arizona*[1]

---

[*] Judge Advocate, U.S. Navy. Presently assigned as Assistant Professor of Military Law, Leadership, Education, and Development Division, U.S. Naval Academy. J.D., 2007, University of Florida; B.A., 2004 Yale University. Previous assignments include Rule of Law Field Support Officer, Rule of Law Field Force–Afghanistan (ROLFF–A), Arghandab River Valley, Afghanistan; Defense Counsel and Physical Evaluation Board Representative, Naval Legal Service Office North Central (NLSO NC), Washington, D.C.; Member of the Bar of the State of Florida. Lieutenant (LT) Leonard thanks the following contributors: Commander (CDR) Julia Crisfield, for her steady direction and example; Ms. Hadley Berryhill, Esq., for her measured—if not biased—confidence; Mr. Nicholas DeArmas, for always having the right answer in the right question; and Legalmen Second Class Victor Rolling, a Lexis maestro, for his research assistance.

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This article is dedicated to the man who inspired it, LT Jentso James Hwang, Judge Advocate General's Corps, U.S. Navy. Lieutenant Hwang was the trial defense attorney

I. The Catch-92

Navy enlisted Sailor Chief Edwin Nately takes weekend leave to attend his best friend's bachelor party in Las Vegas. Chief Nately parties all weekend, casino-hopping and imbibing free drinks. He avoids the seedier elements of Vegas, but not the free drinks.

En route to the airport on Monday morning, Chief Nately is pulled over by a Las Vegas trooper, who, suspecting intoxication, asks Chief Nately to step out of his vehicle. Chief Nately is tired, but he does not feel drunk. He agrees to a roadside sobriety test and performs well, but recalling advice from an old lawyer-friend, he refuses a roadside breathalyzer test. Based in large part on this refusal, the trooper arrests Chief Nately on suspicion of Driving Under the Influence (DUI).[2]

Back at the station, his blood-alcohol content (BAC) is tested. He blows a .05, below the *per se* unlawful level in Nevada.[3] Nevertheless, Chief Nately is booked for DUI, and later released to his friends on bond.

Chief Nately returns to his homeport scared. He knows the case against him is weak, but he also knows that his exoneration will not come cheaply. He will likely have to fly back to Nevada to face trial, and he will have to hire an attorney to represent him at that trial. Moreover, Chief Nately fears the impact his arrest will have on his career. Although he is not versed in the legion of Navy regulations, he is familiar with Article 92 of the Uniform Code of Military Justice (UCMJ)—Failure to Obey Order or Regulation.[4] He also knows that under Article 92 he has a duty to report his Vegas arrest to his chain of command.[5]

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for the article's title character, Chief David Serianne. Lieutenant Hwang's vision and advocacy saved Chief Serianne's career and—as this article hopes to display—reshaped Fifth Amendment jurisprudence in the Navy. Lieutenant Hwang died unexpectedly in July 2011. In his career, LT Hwang provided legal representation to hundreds of Sailors and Marines, served bravely in Operation Iraqi Freedom, and mentored one of this article's authors. It is inadequate—to say the least—that LT Hwang's name appears in this article as a mere footnote; to the authors, his legacy is anything but.

[1] 384 U.S. 436, 443 (1966) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

[2] NEV. REV. STAT. §§ 484C.010–484C.150 (2011).

[3] *Id*. Like other states, Nevada deems a Blood Alcohol Content (BAC) of .08 or above unlawful. A BAC below that level, however, may still be unlawful if other circumstances indicate to the arresting officer that the suspect is intoxicated.

[4] UCMJ art. 92 (2012).

[5] Article 92, Uniform Code of Military Justice imposes a general duty to obey lawful orders, not a duty to report arrests. This specific duty was ordered, formerly, in

But Chief Nately has bigger problems. His report could inform the Navy of a possible infraction they otherwise knew nothing about and lead to a second charge under the UCMJ for the same offense.[6] In short, Chief Nately's weekend adventure ends not only in arrest, but with a precarious choice: come clean to his command and invite a second prosecution for the same offense; or he can roll the dice and keep quiet. The latter choice, and therefore the arrest, could avoid detection altogether. But if it does not, his silence violates Article 92 of the UCMJ. On top of his legal predicament in Nevada, Chief Nately could face a court-martial for DUI and Failure to Report.

Chief Nately faces this dilemma brazenly. Again recalling some old advice, he resolves that "it is better to die on one's feet than live on one's knees."[7] Chief Nately lets what happened in Vegas stay in Vegas.

This article explores Chief Nately's catch-22. It will first bring the Nately hypothetical to life by recounting the case of *United States v. Serianne*, in which a Navy Chief was similarly arrested by civilian police and, after failing to notify his chain of command, was charged under the UCMJ for DUI and Article 92. Part II of the article will discuss the case and its treatment in the military appellate courts. Part III will briefly examine the scope of the self-incrimination clause in the military context, the duty to report crimes in the military, and that duty as it applied in *Serianne*. Part IV will address the Chief of Naval Operations' (CNO's) response to the *Serianne* case, specifically his decision to reinstitute a new version of the order—albeit in a different Navy Instruction—after the Navy's appellate court declared the order unconstitutional. The article then focuses on this reinstituted order and concludes in Part V that it, too, is unconstitutional.

OPNAVINST 5350.4D and now in OPNAVINST 3120.32C. The order has undergone various iterations, which this article will address.

[6] The military's jurisdiction to charge crimes under the UCMJ rests in the status of the servicemember. Nothing precludes the Navy or any other service from charging the same offense as a state does, provided the conduct is criminal under the UCMJ. *See* UCMJ art. 2; *see also* Solorio v. United States, 483 U.S. 435, 439–40 (1987).

[7] JOSEPH HELLER, CATCH-22 248 (Simon & Schuster) (1961). Chief Nately is a fictional character used to make a nonfictional illustration. Chief Nately's wisdom is borrowed from his fictional namesake, *Catch-22*'s Lieutenant Nately, a naïve Air Corps officer who, in Joseph Heller's classic novel, represents American optimism. Lieutenant Nately proudly professes this wisdom to an old drunkard in a bar only to be corrected by the amused old man: "'But I'm afraid you have it backward. It is better to *live* on one's feet than die on one's knees. That is the way the saying goes.'"

II. *Serianne*

In 2009, Aviation Electrician Chief David Serianne was arrested by Maryland State Police on suspicion of DUI. Three days later his chain of command learned of his arrest by searching arrest records online.[8] Charges against Chief Serianne were referred to special court-martial for the following offenses: UCMJ Article 111—Drunken Operation of a Vehicle; and dereliction of duty under Article, 92, UCMJ for failing to report his arrest as required by Navy Instruction 5350.4C (the "Serianne Instruction").[9]

Chief Serianne moved to dismiss his Article 92 charge on the grounds that the instruction ordering him to report his alcohol-related arrest violated his right against compulsory self-incrimination under the Fifth Amendment to the U.S. Constitution. The instruction requiring Chief Serianne to report his arrest was one of six orders instructing Sailors to report or disclose arrests in various contexts.[10] Thus, when Chief Serianne challenged the constitutionality of his instruction, much was at stake for the Navy's leadership. Few in the Navy's legal community, if they even knew about it, thought the motion would succeed. But it did.[11]

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[8] The authors learned this information from Chief Serianne's defense counsel, LT Hwang.

[9] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, DRUG AND ALCOHOL ABUSE PREVENTION AND CONTROL, OPNAVINST 5350.4C ¶ 8r (4 June 2009) [hereinafter OPNAVINST 5350.4C].

[10] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, STANDARD ORGANIZATION AND REGULATIONS OF THE NAVY, OPNAVINST 3120.32C (16 June 2011); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVY CAREER INTERMISSION PILOT PROGRAM GUIDELINES, OPNAVINST 1330.2A (30 Aug. 2010); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, SUITABILITY SCREENING FOR OVERSEAS AND REMOTE DUTY ASSIGNMENT, OPNAVINST 1300.14D (9 Apr. 2007); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, APPLICATION FOR FEDERAL ATTENDANCE AT THE FEDERAL BUREAU OF INVESTIGATION NATIONAL ACADEMY, OPNAVINST 1500.64C (6 Jan. 2004); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, POLICY AND PROCEDURES FOR CONDUCTING HIGH RISK TRAINING, OPNAVINST 1500.75B (4 Mar. 2010).

[11] United States v. Serianne, 68 M.J. 580, 581 (N-M. Ct. Crim. App. 2010), *aff'd on other grounds*, 69 M.J. 8 (C.A.A.F. 2010).

A. *Serianne* at the Navy-Marine Corps Court of Criminal Appeals

After the military judge dismissed Chief Serianne's Article 92 charge, the government filed and was granted an interlocutory appeal before the Navy-Marine Corps Court of Criminal Appeals (NMCCA).[12]

1. The Self-Incrimination Clause

"No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."[13] This clause from the Fifth Amendment was the basis for the government's appeal. The NMCCA was asked to determine whether Chief Serianne's duty to report his own arrest violated the clause. The order creating his duty was contained in a Navy-wide instruction entitled "Drug and Alcohol Abuse Prevention and Control" (i.e., the Serianne Instruction), which ordered the following:

> All personnel are responsible for their personal decisions relating to drug and alcohol use. . . . Members arrested for an alcohol-related offense under civil authority, which if punished under the UCMJ would result in punishment of confinement for 1 year or more, or a punitive discharge or dismissal from the Service (e.g. DUI/DWI), shall promptly notify their [Commanding Officer]. Failure to do so may constitute an offense punishable under UCMJ Article 92, UCMJ.[14]

The NMCCA first noted that this challenge was the first of its kind to come before it. It therefore relied heavily on Supreme Court precedent in reaching its findings. To qualify for Fifth Amendment protection, according to this precedent, a communication "must be testimonial, incriminating, and compelled."[15]

The NMCCA spent little time addressing the compulsory component of the alcohol abuse instruction; [16] it was a standing order to all sailors,

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[12] *Id*.
[13] U.S. CONST. amend V.
[14] OPNAVINST 5350.4C, *supra* note 9, ¶ 8n, *quoted in Serianne*, 68 M.J. at 581.
[15] *Serianne*, 68 M.J. at 581 (quoting Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 189 (2004)).
[16] The Navy, like its uniformed brethren, promulgates directives that govern virtually every facet of Navy life. Navy regulations are the principal regulatory apparatus of the

and by its terms failure to comply with it constituted a criminal offense. The court's decision would turn on whether the mere report of arrest, absent other information, qualified as both testimonial and incriminating. The court, following Supreme Court precedent, identified testimonial communication as one that "explicitly or implicitly relates a factual assertion or discloses information."[17] Interpreting this broadly, the court concluded, "[t]here are very few instances in which a verbal statement, either oral or written, will not convey or assert facts. The vast majority of statements will be testimonial."[18] Communicating a civilian arrest to a command—even the simple fact that an arrest took place—constituted a testimonial communication.[19]

The NMCCA then turned to the harder issue: whether the communication was incriminating. The court quoted Supreme Court authority to the effect that, for a statement to be incriminatory, it must pose "a real danger of legal detriment,"[20] one that is "real and appreciable" rather than "of an imaginary and unsubstantial character."[21] With this guidance, the court turned to military cases that examined orders requiring servicemembers to report the crimes of others. Briefly, these cases established that servicemembers could be required to report crimes generally, but could not be required to report crimes they themselves were involved in. These cases adopted the Supreme Court standard laid out in *United States v. Kastigar*, which held that the right against self-incrimination "'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to evidence that might be so used' against the declarant."[22]

The NMCCA applied this standard and found that it was reasonable for Chief Serianne to believe that reporting his own arrest would lead his command to discover evidence that could be used in a prosecution against him—evidence that had already been gathered by the Maryland

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Navy. Countless other directives, such as OPNAV instructions or personnel manuals, address more specific topics. The Drug and Alcohol Abuse Prevention Instruction, which this article will refer to as the "Serianne Instruction," is one such instruction.

[17] *Serianne*, 68 M.J. at 581–82 (citing Doe v. United States, 487 U.S. 201, 210 (1988)).

[18] *Id.* at 582 (quoting *Doe*, 487 U.S. at 213).

[19] *Id*. (finding no difference between an oral or written conveyance of that fact: "We see no basis, however, to distinguish between the testimonial aspect of an oral versus written notification of one's arrest and, in the context of OPNAVINST 5350.4C, both are testimonial.").

[20] *Id*. (quoting Rogers v. United States, 340 U.S. 367, 372–73 (1951)).

[21] *Id.*

[22] *Id.* at 583 (quoting Kastigar v. United States, 406 U.S. 441, 445 (1972)).

State Police when he was arrested. The required disclosure was therefore incriminating. Since it was also compelled and testimonial, it fell within the Fifth Amendment protection against self-incrimination.

At the Government's urging, the court considered whether the "regulatory exception" should apply to the Serianne Instruction's reporting requirement.[23] This exception—usually called the "required records exception"—softens self-incrimination protection when the government requires "items or information" for a legitimate administrative purpose.[24] The NMCCA concluded that an order concerning drunk driving—an activity "widely prohibited under both [military] and state law"[25]—which authorizes commanders to take punitive action against those who fail to comply with it, is "decidedly punitive," not merely administrative.[26] The regulatory exception did not apply.

2. Conflicting Regulation

Finally, the court noted that the Serianne Instruction conflicted with a superior order, Navy Regulation Section 1137,[27] which requires Sailors to report criminal offenses that come under their observation except when they themselves are criminally involved in the offense.[28] This "valid and permissible" regulation,[29] which the court described as "superior competent authority," contradicted the Serianne Instruction.[30]

However, the NMCCA ultimately based its ruling on constitutional grounds, holding that "[i]n requiring the disclosure of a servicemember's arrest for driving under the influence . . . OPNAVINST 5350.4C compels an incriminatory [and] testimonial communication for which no

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[23] *Id*.
[24] *Id*. (citing United States v. Swift, 53 M.J. 439, 453 (C.A.A.F. 2000)). According to the Navy-Marine Corps Court of Criminal Appeals (NMCCA), the term "required records exception" is used when the information when the information sought is documentary rather than verbal, which is a more frequent occurrence in the case law.
[25] *Id*. (quoting Marchetti v. United States, 390 U.S. 39, 44 (1968)).
[26] *Id*.
[27] *Id*. at 584–85.
[28] *Id*.; UNITED STATES NAVY REGULATIONS sec. 1137 (Sept. 14, 1990).
[29] *Serianne*, 68 M.J. at 584–85 (quoting Bland v. United States, 39 M.J. 921, 923 (N.M.C.M.R. 1994)).
[30] *Id.* at 584.

exception exists."[31] Having invalidated the order, the court affirmed the dismissal of Chief Serianne's dereliction charge.

B. *Serianne* at the Court of Appeals for the Armed Forces

The government pursued its appeal in the Court of Appeals for the Armed Forces (CAAF). That court sidestepped the constitutional question. Instead, it decided the case exclusively on the superior, conflicting regulation mentioned by the NMCCA.[32] The CAAF agreed with the NMCCA's assessment of the regulations, namely that the order contained in the Serianne Instruction conflicted with Navy Regulation 1137, a permissible regulation with a reporting exception.[33] Therefore, the court held, the subordinate Serianne Instruction could not provide a legal basis for holding Chief Serianne criminally liable.[34]

The CAAF affirmed both lower courts and held the order in the Serianne Instruction invalid.[35] But its terse opinion[36] left unanswered the question of how it would rule on the constitutionality of the Navy's many reporting requirements. By failing to deal squarely with the constitutional question, the CAAF, wittingly or not, invited the order's eventual resuscitation.

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[31] *Id.* at 585. The published majority opinion, written by Judge Perlak, was joined by six other judges. The two remaining judges, including Chief Judge Geiser, filed separate opinions, concurring only in the result, not the rationale.

[32] *Id*. ("[W]e may take into account the nonconstitutional regulatory matter discussed by the court below—the relationship between the self-reporting requirement in the Instruction and the exclusion from self-reporting provided in Article 1137 of the United States Navy Regulations.") (citing Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 347 (1936)) (noting that courts may avoid a constitutional question before it "if there is also present some other ground upon which the case may be disposed of").

[33] *Serianne*, 69 M.J. at 11 ("The lower court's description of Article 1137 as 'superior competent authority' is consistent with Article 0103 of the United States Navy Regulations, which states that the United States Navy Regulations serve as 'the principal regulatory document of the Department of the Navy,' and specifically states that '[o]ther directives issued within the Department of the Navy shall not conflict with, alter or amend any provision of Navy Regulations.'")

[34] *Id*.

[35] *Id*.

[36] With a summary of facts and procedural history, the opinion was barely four pages long.

C. The *Serianne* Aftermath

The *Serianne* decisions caused a stir in the Navy's legal community. The Navy's Judge Advocate General, the chief legal advisor to the Secretary of the Navy and CNO, publicly commented on the case's impact: "This is going to change the way we do business."[37]

And for a time it did. After the CAAF's ruling, the Secretary of the Navy revised the Navy Regulations in a message titled "Change to U.S. Navy Regulations in light of U.S. v. Serianne." The change required Sailors to report all civilian criminal *convictions*, not arrests.[38] As Navy Regulations are the principal regulatory document of the Navy, the amendment to those regulations superseded any instruction containing orders to report arrests**.** Indeed, it appeared to change the way the Navy was going to do business.[39]

But the change also authorized the Chief of Naval Operations and Commandant of the Marine Corps to "promulgate regulations or instructions that require servicemembers to report civilian arrests…if those regulations or instructions serve a regulatory or administrative purpose."[40] This provision would later serve as justification for a revised order from the CNO to report not just alcohol-related arrests, but all civilian arrests—but this time with an assertion that it was needed for administrative purposes.[41]

Meanwhile, the CAAF's *Serianne* opinion failed to answer the constitutional questions the NMCCA grappled with—namely, whether

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[37] *See* Andrew Tilghman, *Court Rejects Rule Forcing Sailors to Report DWIs*, NAVY TIMES, December 7, 2009, *available at* http://www.navytimes.com/news/2009/12/navy_dwi_ruling_120709w/.

[38] SEC'Y OF THE U.S. NAVY, ALNAV 047/10, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (2010) [hereinafter ALNAV 047/10], *available at* http://www.public.navy.mil/BUPERSNPC/REFERENCE/MESSAGES/ALNAVS/Pages/ALNAV2010.aspx. This message amended Article 1137 of the Navy Regulations. U.S. DEP'T OF NAVY, U.S. REGULATIONS 1990 § 1137 (Sept. 14, 1990). The Navy regulations were published in 1990. They have not undergone a wholesale revision since. Instead, updates are announced piecemeal—alongside other administrative matters—via Navy messages, which are then stored in an online database.

[39] United States v. Serianne, 69 M.J. 8, 11 (C.A.A.F. 2010) (quoting U.S. NAVY REGULATIONS art. 0103 (1990)).

[40] ALNAV 047/10, *supra* note 38.

[41] CHIEF OF NAVAL OPERATIONS, NAVADMIN 373/11, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (2011). *See infra* Part IV (providing further discussion).

self-reporting an arrest is an incriminatory statement implicating the Fifth Amendment, or, if it is, whether the regulatory exception applies. It failed to provide parameters for similar orders to report civilian arrests, which the amended Navy regulation authorized. As a consequence, the CNO's revised order, issued just fourteen months after *Serianne*, would suffer from the same infirmities as the Serianne Instruction, if not more. This article examines those infirmities. In order to do so, we must briefly revisit the self-incrimination clause.

III. The Self-Incrimination Clause Revisited

"[H]e puts not off the citizen when he enters camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier."

—William Blackstone in *Commentaries on the Laws of England*, 1765[42]

A. The Scope of the Clause in the Civilian Context

In 1769, Sir William Blackstone noted that it was an established rule of the common-law of England that "no man shall be bound to accuse himself; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men."[43] This simple principle represented a powerful check on both state and ecclesiastical power over the individual.[44] The Declaration of Rights of the Virginia Constitution, the oldest in the United States, included a protection that no "man…be compelled to give evidence against himself."[45] In fact, of the eight states to have Bills of Rights pre-dating the Constitution, each contained a self-incrimination clause.[46] The prevailing understanding at the time of the

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[42] 1 WILLIAM BLACKSTONE, COMMENTARIES *408 (1765).
[43] 4 WILLIAM BLACKSTONE, COMMENTARIES *293 (1769).
[44] *See* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1001 (2003) (tracing the history of the privilege against self-accusation, dating back to an era when common law courts issued writs to prevent inquisitorial interrogation in the ecclesiastical courts, and when it was used to combat abuses of the infamous Court of Star Chamber).
[45] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 406 (Ivan R. Dee ed., 1999).
[46] *Id*. These bills of rights omitted the now-sanctified freedoms of speech, assembly, and petition, as well as the right to habeas corpus, grand jury proceedings, and counsel. *Id.* at 409.

founding was that such rights were essential to free citizens who would not be subject to criminal charges absent a substantial accusation alleging a specific crime and presented by a complainant or prosecutor with personal knowledge and sufficient evidence.[47]

The purpose was twofold: to prohibit baseless, open ended investigations; and to ensure that the government did not effectively deputize the suspect by compelling him to provide evidence against himself. Additionally, the Founders wanted to limit the ability of legislatures to relax common-law criminal procedure standards,[48] which were broadly understood to relate to the total enterprise of criminal justice, not only to trial.[49]

In fact, the right against self-incrimination was recognized even in instances where a person was not the subject of a criminal trial. Chief Justice John Marshall ruled that a witness at the criminal trial of another person was not bound to answer a question if it was possible that such testimony might "criminate" the witness.[50] Significantly, Marshall noted that the determination as to whether a statement may be incriminating "must rest with himself, who alone can tell what it would be, to answer the question or not."[51] In subsequent years, the Supreme Court has recognized the right as applying to a host of areas beyond criminal trials, to include police interrogations,[52] grand jury proceedings,[53] bankruptcy proceedings,[54] congressional investigations,[55] state statutory inquiries,[56]

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[47] *Id.* at 1002 (arguing that the framers intended to "preserve the accusatory character of common-law procedure," which required the complainant to swear to personal knowledge of the crime before an arrest warrant could be issued, and to bring evidence to convince a grand jury of the "apparent truth" of the accusation before a trial could take place).

[48] *Id*. at 1007.

[49] *Id.* at 999–1000.

[50] United States v. Burr, 25 F. Cas. 38, 39–40 (C.C.D. Va. 1807).

[51] *Id.*

[52] According to Davies, *supra* note 44, at 1000, "the Framers did not address how the right would apply to police interrogation because there was no such thing as police interrogation during the framing era; indeed, there were no police officers as we now understand that term." The Supreme Court has interpreted the right as applying to police interrogations, most famously in *Miranda v. Arizona*. 384 U.S. 436, 467 (1966).

[53] Counselman v. Hitchcock, 142 U.S. 547, 559 (1892), *superseded by statute in irrelevant part as recognized in* Kastigar v. United States, 406 U.S. 441, 453–54 (1972).

[54] McCarthy v. Arndstein, 26 U.S. 34, 40–41 (1924) ("The government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled . . . [The government] claims that the constitutional privilege does not relieve a bankrupt from the duty to give information

and juvenile proceedings.[57] In each of these contexts, the right applies to prevent compelled statements that might be used later in a criminal proceeding.[58]

B. The Scope of the Clause in the Military Context

The right against self-incrimination under the Fifth Amendment applies with full force to servicemembers.[59] As noted by the Court of Military Appeals (the CAAF's precursor) ("COMA"), the privilege was extended at the courts-martial of British spy Major John André in 1780, eleven years before the Bill of Rights was ratified, and Commodore James Barron in 1808. It was also referred to in the 1786 version of the Articles of War, which required the trial judge advocate to object to "any question to the prisoner, the answer to which might tend to criminate himself."[60] It has since been supplemented by Congress by Article 31 of the Uniform Code of Military Justice, which provides even broader protections.[61] This protection is a marked contrast to other constitutional

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which is sought for the purpose of discovering his estate . . . [T]he constitutional prohibition of compulsory self-incrimination has not been so limited.").

[55] Watkins v. United States, 354 U.S. 178, 188 (1957).

[56] Malloy v. Hogan, 378 U.S. 1, 3, 11 (1964).

[57] *In re* Gault, 387 U.S. 1, 55 (1967).

[58] *See* Michigan v. Tucker, 417 U.S. 433, 440–41 (1974) (citing *Counselman*, *McCarthy*, *Gault*, and *Malloy*). The Court has held, however, that the right does not extend to certain non-criminal proceedings, such as involuntary psychiatric commitment. Allend v. Illinois, 478 U.S. 264, 372–73 (1986).

[59] *See* United States v. Tempia, 37 C.M.R. 249, 253–54 (1967) (holding that rights warnings under *Miranda* are required for military as well as civilian interrogations).

[60] *Id.* at 634 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 196–97, 972–73 (2d ed. 1920)).

[61] United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982) (noting that protections of Article 31 are broader than those provided under the Fifth Amendment). Article 31 provides that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him," and that "[n]o person subject to this chapter may interrogate, or request any statement from . . . a person suspected of an offense without [a rights warning]"; and "[n]o statement obtained from any person in violation of this article . . . may be received in evidence against him in a trial by court-martial." 10 U.S.C. § 831 (2012). The rights warning requirement of Article 31 is not limited to custodial interrogations by law enforcement. The military appellate courts have taken a very broad view of what "interrogation" means and when a statement has been "obtained" for purposes of this article. United States v. Borodzik, 44 C.M.R. 149, 151 (C.M.A. 1971) ("When conversation is designed to elicit a response from a suspect, it is interrogation, regardless of the subtlety of the approach."); *see also* United States v. Dowell, 10 M.J. 36, 40 (C.M.A. 1980) ("When one takes action which foreseeably will induce the making of a statement and a statement does result, we

rights, notably those secured by the First and Fourth Amendments, which Congress and the courts view as applying more narrowly to servicemembers than to their civilian counterparts.[62]

1. Duty to Report Crimes

When military regulations have required a servicemember to report offenses in which the servicemember was not personally involved, military courts have upheld those regulations and criminal liability based on failure to obey them. In *United States v. Heyward*, the COMA upheld the validity of an Air Force Instruction requiring servicemembers to report occasions on which they witnessed others using drugs.[63] Similarly, in *United States v. Medley*, the same court recognized a general duty by military leaders to report blatant criminal conduct of their subordinates.[64] In both cases, the court exempted those instances in which the witness was an accessory or principal to the illegal activity; in such cases, the right against compelled self-incrimination excuses non-compliance with the duty to report.[65]

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conclude that the statement has been 'obtained' for purposes of Article 31."). These extra protections are designed to counteract "the subtle pressures which exist[] in military society," where, conditioned to obey, "a serviceperson asked for a statement about an offense may feel himself under a special obligation to make such a statement." United States v. Armstrong, 9 M.J. 374, 378 (1980).

[62] *See* United States v. McCarthy, 38 M.J. 398, 401 (C.M.A. 1993) (discussing reduced expectation of privacy, and thus reduced protection against searches and seizures, in military barracks); 10 U.S.C. § 888 (2012) (forbidding commissioned officers to express contempt towards designated public officials); *but see* H.F. Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25, 35 (pointing out that the Court of Appeals for the Armed Forces (CAAF) applies the Bill of Rights will full force to servicemembers absent "a specific exemption for the military justice system or some demonstrated military necessity that would require a different rule," and arguing that the CAAF in general "more readily recognizes servicemembers' constitutional rights than does the Supreme Court") (internal quotes omitted) (Judge Gierke was then Chief Judge of the CAAF).

[63] United States v. Heyward, 22 M.J. 35, 36–37 (C.M.A. 1986) ("In attempting to maintain high standards of health, morale, and fitness for duty, it is entirely reasonable for the Air Force to impose upon its members a special duty to report drug abuse").

[64] United States v. Medley, 33 M.J. 75, 77 (1991) ("We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility").

[65] *Heyward*, 22 M.J. at 37; *Medley*, 33 M.J. at 76.

In so holding, military courts recognize self-incrimination as the touchstone for testing orders to report crimes. The right against self-incrimination does not restrict orders to report behavior so long as the order does not potentially implicate criminal charges. For example, when Marines stationed at the U.S. Embassy in Moscow were required by order to report all contacts with local nationals, a Marine who had contact with Soviets was still criminally liable for failing to report those contacts—because the contacts were not in themselves criminal.[66] Courts specifically focus on the subject of the disclosure to determine whether it potentially subjects the servicemember to criminal charges. If it does, then the servicemember is excused from the duty to report. Suppose, for example, that a servicemember witnesses a series of criminal offenses that are related to other offenses in which he personally participates. The military courts have held that the duty to report extends only to those offenses for which the servicemember has no criminal liability.[67] The operative inquiry, then, is about the subject of the compelled statement. If it brings the servicemember himself within the ambit of the UCMJ, it is incriminatory and may not be compelled.

2. The NMCCA's Serianne *Opinion*

The NMCCA followed this broad line of cases in recognizing that the touchstone inquiry in *Serianne* was whether the Serianne Instruction imposed a duty to report self-incriminating information. The duty to report alcohol-related offenses, unlike the duty to report minor contacts with foreign nationals, required "incriminatory" statements, statements that posed "a real danger of legal detriment" to the servicemember who

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[66] United States v. Kelliher, 35 M.J. 320, 322 (C.M.A. 1992). Close contact (or "fraternizing") with Soviet nationals was forbidden, so that a failure to report such contact would fall within the right against self-incrimination; but the accused in that case had failed to report his initial, casual contacts, which were not in themselves criminal, so that he could properly be convicted for failing to report them. *Id.*

[67] *Medley*, 33 M.J. at 76–77 (accused was present at parties where drugs were used by servicemembers and sometimes used them herself; she was excused from reporting drug use only on the occasions where she herself used them, notwithstanding her fear that other persons would retaliate by reporting her own use); *but see* United States v. Brunton, 24 M.J. 566, 571 (N.M.C.M.R. 1987) (court dismissed "failure to report" specification for an incident of drug distribution because, while the accused did not distribute drugs himself on that occasion, he was allegedly involved in a conspiracy to distribute with the person who did, so that reporting the distribution would tend to incriminate him for that conspiracy).

self-reported to his command.[68] This was true even if the statements, standing alone, were not sufficient to support a conviction, but merely "furnish[ed] a link in the chain of evidence needed to prosecute [an individual] for a federal crime."[69] The NMCCA rightly dismissed the government's argument that the existence of a public arrest record nullified the incriminating nature of the disclosure, stating that the determination of "whether a disclosure would be 'incriminatory' has never been made dependent on an assessment of the information possessed by the Government at the time of the interrogation."[70] Furthermore, the court quoted the Supreme Court as having identified the Fifth Amendment right against self-incrimination as being designed to "spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense…."[71] The court found that the Serianne Instruction compelled an accused to reveal just such facts.[72]

In finding that the duty to report an arrest violated the constitutional rights of servicemembers, the NMCCA was not going out on a limb, but was acting within a broad current of military jurisprudence. Neither written orders nor unwritten rules and customs can impose upon servicemembers a duty to report their own criminal offenses.[73] In

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[68] 68 M.J. 580, 582 (N-M. Ct. Crim. App. 2010) (quoting Rogers v. United States, 340 U.S. 367, 372–73 (1951)).
[69] *Id*. (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).
[70] *Id*. (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 81 (1965)).
[71] *Id.* (quoting Doe v. United States, 487 U.S. 201, 213 (1988)).
[72] *Id*.
[73] Thus, in *United States v. Dupree*, 24 M.J. 319, 321 (C.M.A. 1987), cited in *Serianne*, 68 M.J. at 583, a noncommissioned officer (NCO) took two prisoners off base, where he drank liquor with them and they used marijuana. He pleaded guilty to dereliction of duty in part for failing to report their drug use, the dereliction being based on his duties as an NCO rather than any specific regulatory reporting requirement. However, the COMA held that this conviction could not be sustained on these grounds, because his failure to report this drug use was "inextricably intertwined" with the crimes of taking the prisoners off base and drinking with them, so that he could not report one without implicitly reporting the others. (The Air Force Court of Military Review afterwards sustained the dereliction conviction on other grounds, because the accused had failed to *prevent* the marijuana use. United States v. Dupree, 25 M.J. 659, 662 (A.F.C.M.R. 1987)). However, in *United States v. Bland*, the Navy-Marine Court of Military Review upheld a failure-to-report conviction when the accused had committed one crime (an assault) with other persons, whom he later saw driving a stolen car and attempting to steal from two automated teller machines. The car and the card they attempted to use to take the money were both stolen from the man the accused had helped assault; nonetheless, the court upheld his duty to report these other crimes. "Appellant could have disclosed to proper authorities what he saw and heard regarding the theft of the car and the attempted thefts of currency without incriminating himself in the assault." The others might have

Serianne, the NMCCA recognized that within the ambit of potential UCMJ charges, the duty to report an arrest for drunk driving was no less repugnant to the constitutional rights of servicemembers than a duty to report other criminal behavior. In striking down such an order, the NMCCA merely recognized the robust protections afforded to servicemembers against self-incrimination. In short, the NMCCA was right to declare the Serianne Instruction unconstitutional.

IV. The Catch-92 Returns: "Affirmed on Other Grounds" and the Regulatory Exception

In December 2011, the CNO promulgated a new general order to all Sailors to report not just alcohol-related arrests, but any civilian arrest. The current order is OPNAVINST 3120.32D (the "Revised Order"). In pertinent part it reads as follows:

> Any person arrested or criminally charged by civil authorities shall immediately advise their immediate commander of the fact that they were arrested or charged. The term arrest includes an arrest or detention, and the term charged includes the filing of criminal charges. Persons are only required to disclose the date of arrest/criminal charges, the arresting/charging authority, and the offense for which they were arrested/charged. No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure of the arrest is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force . . . .[74]

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afterwards reported the assault, but in the court's words, "it was most likely that the reporting of the assault would have come from persons other than the appellant"—so his privilege against self-incrimination was not implicated. United States v. Bland, 39 M.J. 921, 924 (N.M.C.M.R. 1994).

[74] OFFICE OF THE CHIEF OF NAVAL OPERATIONS, OPNAVINST 3120.32D ¶ 5.1.6 (16 July 2011), as amended by NAVADMIN 373/11 (8 Dec. 2011) [hereinafter OPNAVINST 3120.32D ¶ 5.1.6] (as amended by NAVADMIN 373/11).

In a section on disciplinary action, the CNO authorized commanders to impose discipline on personnel who fail to comply with the order.[75] This includes a criminal charge under Article 92.

In a tacit acknowledgment of the NMCCA's *Serianne* opinion, the CNO implemented additional changes to the regulations. First, he invalidated the Serianne Instruction. Second, in keeping with the Secretary of the Navy's new exception,[76] the CNO justified the new requirement as "required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force." And third, he emphasized that no person reporting an arrest under the Revised Order is required to disclose the facts surrounding the arrest, but just the date, charges, and arresting authority.

This acknowledgment, however, was a mere tip of the cap; the revised order followed the CAAF's *Serianne* decision but not the NMCCA's. Despite the "regulatory" language, the Revised Order is still an order to report civilian arrests, and failure to comply with it is a criminal offense. It imposes the same duty, with the same consequences, that the NMCCA identified as compelled, testimonial, and incriminating in *Serianne*.

The CAAF, however, did not rule that the Serianne Instruction was unconstitutional, but that it conflicted with another regulation. As CAAF is the military's highest judicial authority before the Supreme Court, perhaps the CNO interpreted the CAAF's ruling as nullifying the NMCCA's constitutional one. Alternatively, perhaps the CNO believed the new "regulatory" language in the Revised Order qualified it for the regulatory exception and thus satisfied the Fifth Amendment. These are the only plausible justifications for the Revised Order, which otherwise bears a striking resemblance to the Serianne Instruction. For the reasons that follow, these justifications fail.

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[75] *Id*. intro., para. 4, at I (Rules printed in uppercase italics, as section 5.1.6 is: "are regulatory general order. . . . Penalties for their violation include the full range of statutory and regulatory sanctions, including the Uniform Code of Military Justice (UCMJ)").

[76] ALNAV 047/10, *supra* note 38 (allowing the Chief of Naval Operations (CNO) to promulgate regulations or instructions requiring self-reporting "if those regulations or instructions serve a regulatory or administrative purpose").

A. The NMCCA's Constitutional Holding Remains Intact

It is axiomatic that military appellate courts have the power and the duty to rule on constitutional questions to protect the rights of servicemembers.[77] It is equally well established that published decisions of the Navy-Marine Court of Criminal Appeals are precedential for Navy and Marine courts-martial,[78] and that a case affirmed or even reversed "on other grounds" is still valid authority for those parts of the opinion that remain undisturbed by the higher court.[79] That is why such cases are frequently cited as persuasive authority by the Supreme Court[80] and as persuasive or even binding authority by the military appellate courts.[81]

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[77] *See* Schlesinger v. Counselman, 420 U.S. 738, 758 (1975); Burns v. Wilson, 346 U.S. 137, 142 (1953); United States v. Tempia, 37 C.M.R. 249, 253–54 (C.M.A. 1967); United States v. Bowles, 1 C.M.R. 474, 477 (N.B.R. 1951).

[78] NAVY-MARINE CT. CRIM. APP. R. PRAC. & P. 18.1(a) (2011) ("Published opinions [of the Navy-Marine Court of Criminal Appeals] serve as precedent providing the rationale of the Court's decision to . . . military practitioners, and judicial authorities."); 20 AM. JUR. 2D *Courts* § 142 (1962) (appellate court's decision generally has *stare decisis* effect on a court of lower rank); 21 C.J.S. 2D *Courts* § 209 (1936) (decision of an intermediate appellate court is "the law of the jurisdiction" until reversed or overruled).

[79] "A decision may be *reversed* on other grounds, but a decision that has been *vacated* has no precedential authority whatsoever." Durning v. Citibank, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (this distinction would be meaningless if reversal or affirmance on other grounds destroyed the precedential value of the rest of the holding); *see also* Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1145–48 (2006) (suggesting that even cases vacated "on other grounds" are gaining precedential value in federal court).

[80] *See, e.g.*, Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (citing Katz v. Nat'l Archives and Records Admin., 862 F.Supp. 476 (D.D.C. 1994), *aff'd on other grounds*, 68 F.3d 1438 (C.A.D.C. 1995)); Ingalls Shipbuilding, Inc. v. Dir., Off. of Workers' Comp. Programs, 519 U.S. 248, 266 (1997) (citing Pittson Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 43 n.5 (2nd Cir. 1976), *aff'd on other grounds*, 432 U.S. 249 (1977)); Rapanos v. United States, 547 U.S. 715, 744 (2006) (citing Daque v. Burlington, 935 F.2d 1343, 1354–55 (2nd Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992)).

[81] *See, e.g.*, United States v. Kreutzer, 59 M.J. 773, 776 (A. Ct. Crim. App. 2004) (citing United States v. Loving, 41 M.J. 213, 250 (C.A.A.F. 1994), *aff'd on other grounds*, 517 U.S. 748 (1996)); United States v. Earls, No. 34840, 2003 WL 1792556, at *2 (A.F. Ct. Crim. App. Mar. 24, 2003) (citing United States v. Edmond, 41 M.J. 419, 420 (C.A.A.F. 1995), *aff'd on other grounds*, 520 U.S. 651 (1997)); United States v. Butz, No. 200000790, 2002 WL 31729507, at *2 (N-M. Ct. Crim. App. Dec. 5, 2002) (citing United States v. Solorio, 21 M.J. 251, 255–56 (C.M.A. 1986), *aff'd on other grounds*, 483 U.S. 437 (1987)); United States v. Matthews, 68 M.J. 29, 38 (C.A.A.F. 2009) (citing Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), *rev'd on other grounds*, 466 U.S. 668 (1984)); United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000) (citing United States v. Davis, 36 M.J. 337 (C.M.A. 1993), *aff'd on other grounds*, 512 U.S. 452 (1994)).

The CAAF did not address the NMCCA's constitutional holding. Instead, it chose to avoid the constitutional question, citing the longstanding Avoidance Doctrine,[82] which holds that courts "ought not to pass on the questions of constitutionality . . . unless such adjudication is unavoidable."[83] Though this doctrine has been attacked by legal theorists for decades,[84] the CAAF properly adhered to precedent by deciding the case on a regulatory conflict rather than the constitutional question. The CNO may have interpreted the CAAF's constitutional silence as a repudiation of the NMCCA's holding, thereby justifying the Revised Order. If so, his reliance was improper.

The CAAF affirmed the NMCCA "without reaching the constitutional questions."[85] It neither vacated nor reversed the NMCCA's holding, which found the Serianne Instruction unconstitutional. The NMCCA's holding, therefore, is binding law, leaving the regulatory exception as the only remaining justification for the Revised Order. This justification fails.

B. The Regulatory Exception

The movie producer Samuel Goldwyn is said to have told his writers, "Give me the same thing, just make it different." The CNO did something similar in the aftermath of *Serianne.* The result was a new order that, though packaged in regulatory language, reinstituted the same duty the court had declared unconstitutional.

The Revised Order attempts to justify the duty under the judicially recognized "regulatory exception" to the Fifth Amendment. Traditionally known as the "required records exception," the exception allows the government "to gain access to items or information vested with [a]

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[82] United States v. Serianne, 69 M.J. 8, 10–11 (C.A.A.F. 2010).
[83] Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944).
[84] *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 852 (2001). Professor Kelley and other legal scholars criticize the avoidance doctrine on a number of grounds. One such ground is that in the name of Separation of Powers, courts in fact undermine that principle by forcing lawmakers to guess—rather than know—the constitutional limits of their law or regulation. The revised order in the wake of *Serianne*, the authors believe, exemplifies the problem they identify. *See also* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85 (1995).
[85] *Serianne*, 69 M.J. at 11.

public character," such as bookkeeping and business records.[86] In proper circumstances, servicemembers may be required to produce information under the exception.

For example, in *United States v. Swift*, the accused had apparently contracted a bigamous marriage. His First Sergeant questioned him about his divorce (without a rights warning) and ordered him to produce his divorce decree. He produced a false one. The CAAF held that the questioning was unlawful—but that the fake divorce decree was admissible under the required records exception.[87] In doing so, the court established a three-part test for the exception:

> (1) The requirement that [the records] be kept "must be essentially regulatory"; (2) the records must be the "kind which the regulated party has customarily kept"; and (3) the records themselves must be either public documents or "have assumed 'public aspects' which render them at least analogous to public documents."[88]

The court found that Swift's alleged "divorce decree" fit the test because regulations required such documents "to establish and update military records supporting spousal eligibility for government benefits," and indeed he had presented it to the personnel office for this purpose; also, the document was public and of a kind typically kept by the Air Force.[89]

1. Application to the Revised Order

The Revised Order, by contrast, fails the first element of the test. It contains language obviously designed to bring it within the exception, stating that its purpose is to "monitor and maintain the personnel readiness, welfare, safety, and deployability of the force."[90] But this

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[86] United States v. Serianne, 68 M.J. 580, 584 (N-M. Ct. Crim. App. 2009) (citing United States v. Oxfort, 44 M.J. 337, 340–41 (C.A.A.F. 1996), California v. Byers, 402 U.S. 424, 427–28 (1971)). According to the *Serianne* court, the term "required records exception" is used when the disclosures are in the form of documents, and the term "regulatory exception" is used otherwise. *Serianne*, 68 M.J. at 584.

[87] The fake decree was additionally admissible because the accused had voluntarily produced it (and presented it at the installation personnel office) *before* his first sergeant ordered him to bring it. United States v. Swift, 53 M.J. 439, 453 (C.A.A.F. 2000).

[88] *Id.* (citing Grosso v. United States, 390 U.S. 62, 67–68 (1968)).

[89] *Id.* at 453–54.

[90] OPNAVINST 3120.32D, *supra* note 74, ¶ 5.1.6.

language is simply a more developed version of the "military exigencies" argument that failed to persuade the NMCCA in *Serianne*.[91] It does not change the nature of the reporting requirement, or the consequences of reporting.

In *United States v. Williams*,[92] the COMA set forth the standard for determining whether a regulation is "primarily regulatory" (and thus whether it meets the first part of the test for the required records exception established in *Swift*):

> First, we must consider whether the reporting requirement occurs in an area "permeated with criminal statutes" or in an area "essentially noncriminal and regulatory." Second, we must consider whether the reporting requirement focuses on a "highly selective group inherently suspect of criminal activity" or on the public in general. Finally, we must determine whether compliance would force an individual to provide information that "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt." Upon considering these factors, a court may conclude that the particular disclosures required under a regulatory or statutory scheme are inevitably self-incriminating. Stated otherwise, we must determine whether the disclosure requirement . . . requires an "inherently risky" disclosure of an "inherently illegal activity."[93]

The Revised Order fails all three parts of this standard. The NMCCA concluded that the Serianne Instruction was "decidedly punitive" because it "promotes the traditional aims of punishment—retribution and deterrence."[94] In expanding the order beyond alcohol-related offenses to include all criminal offenses, the Revised Order promotes the same aims and is decidedly more punitive than the one it replaced. An order to report only alcohol-related arrests could arguably be justified as providing the Navy with information it needed to rehabilitate Sailors

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[91] *Serianne*, 68 M.J. at 585. "We are likewise not persuaded by the Government's argument that 'military exigencies' exist to uphold the otherwise unconstitutional disclosure requirement of [the Serianne Instruction]."
[92] 29 M.J. 112 (C.M.A. 1989).
[93] *Id.* at 115–16 (quoting United States v. Williams, 27 M.J. 710, 717 (A.C.M.R. 1988)) (internal citations omitted).
[94] *Serianne*, 68 M.J. at 584.

with alcohol problems (and might even have had that effect if the reporting Sailors had been immunized from UCMJ action). An order to report *all* arrests, without immunization, is about punishment, not rehabilitation.

The fact that a Sailor could be tried at court-martial for the underlying offenses places the Revised Order squarely within the punitive ambit, irrespective of other measures the government may have at its disposal. It is insufficient for the government merely to state a regulatory purpose. The gravamen is potential UCMJ charges. And the revised order compels servicemembers to report arrests by authorizing prosecution for *failing* to do so, while subjecting them to possible prosecution for *having* done so.[95]

Having found the Serianne Instruction punitive, the NMCCA did not consider the second part of the standard described in *Williams*. If it had, the court could not have found a more "highly selective group inherently suspect of criminal activity" than a class of persons recently arrested by other sovereigns. While the Revised Order may apply equally to all Sailors, the key distinction is that the duty to report is imposed solely on

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[95] The revised order contains supplemental guidance on disciplinary action, which instructs commanders to impose disciplinary action for the reported offense only if based "on evidence derived independently of the self-report." OPNAVINST 3120.32D ¶ 5.1.6, *supra* note 74. Opponents to this article's thesis could read this guidance to create a de facto testimonial immunity, prohibiting any subsequent use of the disclosure, however remote. If these critics are right, then the disclosure ceases to be incriminating and thus the Fifth Amendment is not violated.

A few considerations refute this argument. First, the independently derived language is contained in supplemental guidance, not in the order itself, so its weight is unclear (and untested in the military courts). Second, and more important, the language of the actual order belies such a reading. The order prohibits investigators from questioning self-reporting servicemembers "unless they first advise the person of their rights under UCMJ article 31(b)." Yet that subsequent interrogation would undoubtedly derive *directly from* the disclosure. And third, the implications of such a reading are simply unconscionable. According to this reading, a Sailor may very well preclude his own prosecution under the military justice system—no matter how heinous the allegation—so long as the Sailor is the first to notify his commander of his arrest. In such a scenario, the commander would be left to hope—barred from so little as making a phone call—that investigators, military or civilian, "independently" notify him of potential misconduct.

In any event, this is the debate that proves the point. Both the NMCCA and the CAAF, per Supreme Court guidance, measure incrimination on the "reasonable belief [that the disclosure] could be used in a criminal prosecution or could lead to evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444–45 (1972). If practitioners can debate whether supplemental guidance contained in an order amounts to immunity, it is reasonable for a self-reporting servicemember to believe that it does not.

a class of persons who have been arrested or criminally charged. By definition, this group is "inherently suspect of criminal activity"—if they were not suspected, they would not have been arrested or charged.

As to the third part, the NMCCA did consider whether the required information would provide a significant "link in the chain" to establish the suspect's guilt. It held that "it was reasonable for [Chief Serianne] to believe that the reporting of his own arrest would lead to further disclosure of incriminating evidence…and would not only provide a link in the chain of an investigation but more probably cause the initiation of a criminal investigation by the Navy into his conduct."[96] The Revised Order fails this consideration in much the same way. Stated most simply, the duty to report exists precisely because arrests are not automatically reported to military authorities. If they were, the duty would be an unnecessary formality. Reporting an arrest allows a command to obtain police reports, witness statements, and all other evidence gathered by the arresting authority. For obvious reasons, this evidence cannot be obtained without knowledge of the arrest. The compelled report provides the command with the first link in the chain that leads to a finding of guilty.

2. Additional Language

As noted above, the Revised Order includes new language to try to squeeze it into the regulatory exception: "No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure of the arrest is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force."[97] Despite this language, nothing in the substance of the Revised Order renders it a better fit for the exception. Calling the revised order "regulatory" does not make it so. The Revised Order expands the duty to report arrests and allows commanders to impose the same consequences for failing to comply.

By its terms, the Revised Order requires Sailors to disclose only their arrests, not underlying facts. But this, too, is a distinction without a difference. The Serianne Instruction did not require the disclosure of underlying facts either. The NMCCA did not consider underlying facts in

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[96] *Serianne*, 68 M.J. at 583 (citing Marchetti v. United States, 390 U.S. 39, 48 (1968)).
[97] OPNAVINST 3120.32D, *supra* note 74, ¶ 5.1.6.

invalidating that Instruction. It based its holding on the fact that, in reporting his arrest, Chief Serianne would cause the Navy to initiate an investigation into the conduct that led to his arrest, which in turn could lead to his conviction. The same is true of the Revised Order. In short, if the Serianne Instruction did not qualify for the regulatory exception, nothing about the Revised Order qualifies it.[98]

3. Earlier Examples

It is instructive to compare the Revised Order with those that have been found to qualify for the regulatory exception. In *United States v. Oxfort*, the CAAF upheld a federal statute that required unauthorized possessors of classified material to surrender the material to specified officials,[99] even if such surrender suggested they had committed a crime by wrongfully obtaining the material. In doing so, the court noted that classified records are documents that must, by their nature, be handled in a certain manner. Such documents rightly belong to the government, which can dictate the terms of their possession and use. The court analogized the requirement to that of bankrupt companies forced to surrender their accountants' books by subpoena—even though these books might contain incriminating information. "The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself . . . but of compelling him to yield possession of property he is no longer entitled to keep."[100]

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[98] The operative thesis of this article is that the Revised Order is unconstitutional because the NMCCA's holding is still good law and because the Revised Order does not qualify for the regulatory exception. Beyond the scope of this article but still worthy of consideration is whether the CNO has, in fact, eliminated the regulatory conflict relied upon by the CAAF. Navy Regulation 1137 still excepts Sailors from self-reporting orders "when such person are themselves already criminally involved in such offenses at the time such offenses first come under their observation." Absent removal of this language, it is difficult to argue that 1137 does not excuse servicemembers from reporting arrests as required by the Revised Order, especially in light of the fact that both the NMCCA and the CAAF said it did in *Serianne*. Therefore, the Revised Order, instead of eliminating the conflicting regulations, may have merely shifted the conflict to a different location.

[99] 44 M.J. 337, 343 (C.A.A.F. 1996). The statute at issue in *Oxfort* was 18 U.S.C. § 793(e) (2012), which provides that anyone in unauthorized possession of a classified document or information who willfully fails to deliver it to an official entitled to receive it is guilty of an offense.

[100] *Oxfort*, 44 M.J. at 340–41 (quoting *In re* Harris, 221 U.S. 274, 279 (1911)).

The court also found that the simple act of handing over classified documents was not "testimonial" because the statute did not require the individual to relate a factual assertion or disclose information of an incriminating kind.[101] The person turning over information might have acquired it lawfully or unlawfully, but the requirement to turn it in did not by its nature require him to reveal anything incriminating.

The *Oxfort* rationale does not apply to the Revised Order, which requires the suspect to provide information that he is perfectly entitled to keep to himself, that is always testimonial, and always incriminating—since it always links him to a real or suspected crime.

In *United States v. Williams*,[102] the COMA upheld a U.S. Forces-Korea regulation, which covered possession of high-value items such as videocassette recorders and television sets, against a constitutional challenge. The regulation required, in part, the following:

> Upon request of the unit commander, military law enforcement personnel, or responsible officer, [personnel will] present valid and bona fide information or documentation showing the continued possession or lawful disposition . . . of any controlled item . . . regardless of where or how acquired, brought into the [Republic of Korea] duty-free or acquired in the [Republic of Korea] without payment of duty or tax.[103]

The regulation was admittedly aimed at suppressing unlawful activity—black marketing. The court nonetheless found the regulation constitutional. It was regulatory in nature: it required servicemembers to keep records to prove their compliance with an overall scheme to regulate *lawful* transactions, and on certain occasions to surrender those records. It did not focus solely on criminal suspects, but rather on all persons who took advantage of the opportunity to acquire duty-free items in Korea. "Merely engaging in the transactions subject to the disclosure requirement will not necessarily result in a criminal prosecution because the [Status of Forces Agreement] explicitly permits the tax-free transfer of goods between persons qualifying for the exemption. . . ." Furthermore, since the act of buying and transferring items duty-free was

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[101] *Id.* at 340.
[102] 29 M.J. 112 (C.M.A. 1989).
[103] *Id.* at 114.

not inherently criminal, the required disclosures would not "in the usual circumstance provide the government with a significant link in a chain of evidence tending to establish guilt." Even a failure to disclose, for example, while violating the regulation, might indicate a lost record as opposed to a black market transaction.[104]

But even this regulation was ruled unconstitutional as applied in *United States v. Lee*.[105] In that case, the Military Police learned that the accused had purchased a number of high-value items, and (per their standard procedures) sent a letter asking his commander to require him to produce proof that he had the items or had transferred them lawfully. The commander, who did not suspect the accused of wrongdoing, complied. The accused did not produce the proof, and he was charged with failing to do so.[106] The COMA held that, since the Military Police suspected him of a crime ("regardless of the euphemisms employed at trial to mollify this reality"), they could not evade the requirements of the Fifth Amendment and Article 31, UCMJ, by using the regulation and a non-suspicious commander to question the suspect with no rights warning.[107] The regulation on its face did not violate the servicemember's privilege against self-incrimination, but the "targeted" use of it did.

The Revised Order, by contrast, is unconstitutional with respect to everyone. It does not regulate a lawful activity, but requires disclosures of suspected unlawful activity. It is focused solely on criminal suspects. It is targeted by its very nature on persons suspected of crimes. And the "euphemisms" employed in the Order cannot withstand this reality.

V. Conclusion

The right not to accuse oneself was recognized at common law, under most state constitutions, and even at court-martial, before the drafting of the federal Constitution. This early exaltation, admittedly, does little to clarify the contemporary construction of the self-incrimination clause. It does, however, demonstrate that the clause

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[104] *Id.* at 116 (quoting *with approval* United States v. Williams, 27 M.J. 710, 717–18 (A.C.M.R. 1988)).
[105] 25 M.J. 457 (C.M.A. 1988). *Lee* was decided before *Williams* but did not reach the facial constitutionality of the regulation.
[106] *Id.* at 458–59.
[107] *Id.* at 460–61.

occupies a rooted place in American jurisprudence that ought to be treated with solemnity.

The Supreme Court did no less when it decided *Miranda v. Arizona*. In deciding that case, the Court recognized its duty to combat against too "narrow and restrictive construction[s]," for if it failed to do so, constitutional rights "would have little value and be converted by precedent into impotent and lifeless formulas."[108] The Court traced the history of the self-incrimination clause, from its analogue in the biblical era,[109] to its use as a rule of evidence in the English common law,[110] to its "impregnability of a constitutional amendment" in this country.[111] With this evolution in mind, the Court issued its own order and implemented perhaps the most renowned warning label in American legal history.

The Supreme Court in *Miranda* explicitly ordered only courts below it, but its opinion has served ever since as guidance to every police officer in the United States, whether city, county, state, federal, or military—all of whom are executive officers like the CNO. The CNO should be similarly instructed by the NMCCA's *Serianne* opinion on the unconstitutionality of orders like the Serianne Instruction. The CAAF's affirmation of *Serianne* on other grounds does not vitiate the NMCCA's constitutional holding, but leaves it intact as the law. Under that law, the CNO's Revised Order suffers from the same deficiencies as the one it replaced. It ought to be rescinded.

The authors of this article are mindful of the CNO's primary duty to maintain readiness of the fleet. Reporting requirements can certainly be linked to this duty. But the CNO has many administrative tools and commanders may mete punishment or use administrative actions to ensure readiness without depriving Sailors of their right against self-incrimination. The Fifth Amendment protects the criminally accused. With the Revised Order, the CNO extended that protection to all Sailors who, like Nately and Serianne, choose not to report their own arrests.

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[108] Miranda v. Arizona, 384 U.S. 436, 442 (1966) (quoting Weems v. United States, 217 U.S. at 373 (1910)).
[109] *Id*. at 458. More accurately, the earliest known recognition of a right or privilege against self-incrimination is the Talmud, a compilation of ancient oral teachings based on the five books of Moses. *See* LEVY, *supra* note 45, at 433.
[110] *Miranda*, 384 U.S. at 458.
[111] *Id*. at 442 (quoting Brown v. Walker, 217 U.S. 591, 597 (1896)).

Two years after the Supreme Court issued its order in *Miranda*, constitutional scholar Leonard W. Levy published *Origins of the Fifth Amendment*, an exhaustive history of the right against self-incrimination for which he was later awarded the Pulitzer Prize. He concluded that "[a]bove all, the Fifth Amendment reflected [the Founders'] judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty."[112] Stated differently, whether guilty or not, no Sailor should be subject to a Catch-92. Certainly not after Chief Serianne was.

[112] LEVY, *supra* note 45, at 432.

WAR CRIMES IN THE AMERICAN REVOLUTION: EXAMINING THE CONDUCT OF LT. COL. BANASTRE TARLETON AND THE BRITISH LEGION DURING THE SOUTHERN CAMPAIGNS OF 1780–1781

MAJOR JOHN LORAN KIEL, JR.*

I have promised the young men who chose to assist me in this expedition the plunder of the leaders of the faction. If warfare allows me, I shall give these disturbers of the peace no quarter. If humanity obliges me to spare their lives, I shall convey them close prisoners to Camden. For confiscation must take place in their effects. I must discriminate with severity.[1]

I. Introduction

While Lieutenant Colonel Banastre Tarleton may have enjoyed a reputation as one of Great Britain's most tactically proficient commanders during the Revolutionary War, his reputation for brutality during the Carolina Campaigns also renders him one of its most notorious. Banastre Tarleton is best known by the monikers historians have developed for him over the years such as "Bloody Ban," "Ban the Butcher," and "Bloody Tarleton" because of his practice of refusing to spare the lives of surrendering enemy rebels, which the Americans sarcastically referred to as granting "Tarleton's Quarter."[2] Banastre

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[1] Letter from Lt. Col. Banastre Tarleton to Lord Cornwallis (Aug. 5, 1780) (Leneu's Ferry, Cornwallis Papers, Public Record Office, Kew, 30/11/63, ff. 19–21). *See also* ROBERT D. BASS, THE GREEN DRAGOON: THE LIVES OF BANASTRE TARLETON AND MARY ROBINSON 91 (Sandlapper Publishing Co. 1973).

[2] JOHN HAIRR, GUILFORD COURTHOUSE: NATHANAEL GREENE'S VICTORY IN DEFEAT, MARCH 15, 1781, at 58 (Da Capo Press 2002). The battle cry of "Tarleton's Quarter"

Tarleton's notoriety even made its way onto the big screen in Mel Gibson's movie *The Patriot* in 2000.[3] In *The Patriot*, the main protagonist, a British dragoon commander named Colonel William Tavington, murders Gibson's young son, torches a plantation housing a young widow and her children, rounds up an entire town, locks them in a church, and burns the church to the ground, among other dastardly deeds. Although in real life, Banastre Tarleton never committed most of the acts depicted in the movie, his reputation for ruthlessness nevertheless lends itself to the type of creative license portrayed in movies, literature, and in history books that still shocks and angers Americans to this day.

The genesis for this article comes from a blog titled the *National American History Examiner* in which a historian recently wrote of Banastre Tarleton: "Although a skilled cavalryman, he occasionally acted in a manner unbecoming an officer. In other words, he butchered soldiers and treated civilians cruelly. In another century, Bansatre Tarleton would have been a war criminal."[4] The purpose of this article is to examine whether this supposition is true in light of the British and American Articles of War in effect at the time of the Revolutionary War and customary law that had developed prior to the late 18th Century.

The next section of the article will briefly examine Banastre Tarleton's meteoric rise to power through the ranks of the British Army as a young cavalry officer. Section III will discuss some of the more infamous incidents that contributed to his brutal reputation. Section IV will examine the law in effect at the time of the American Revolution and will conclude that under both the British and American Articles of War and under customary "Law of Nations," Banastre Tarleton personally committed war crimes and was culpable under the principle of command responsibility for some of the war crimes his dragoons committed while serving under his command.

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came about as a result of the Battle of Waxhaws where Americans accused Tarleton of slaughtering surrendering rebels. *See also* BASS, *supra* note 1, at 81.

[3] THE PATRIOT (Columbia Pictures 2000).

[4] Don Keko, *Tarleton's Quarter*, EXAMINER.COM, September 16, 2010, http://www.examiner.com/american-history-in-national/tarleton-s-quarter.

II. Banastre Tarleton—A Short History

Banastre Tarleton was born in Liverpool, England, on August 21, 1754, to John and Jane Parker Tarleton and was the third of seven children. John Tarleton was a highly successful shipping merchant, owned plantations throughout the West Indies, and even became the Mayor of Liverpool in 1764. John Tarleton's wealth permitted Banastre to attend the best preparatory schools and afforded him ample time for sports and other leisure activities. He was described as uncommonly strong, a gifted athlete, and fond of speaking and acting. Banastre possessed extraordinary oratory skills, so his father encouraged him to become a lawyer.[5] Banastre spent most of his time boxing, riding, swimming, and playing cricket and ended up dropping out of law school at the University College at Oxford after his father died in 1773. John Tarleton left Banastre a 5000 pound inheritance which he quickly exhausted, drinking and gambling the time away. With few job prospects, Banastre focused his attention on the military for employment and a chance to make a name for himself. Fortunately for him, in 1775, a young man named John Trotter purchased a commission as a Lieutenant in the British 2nd Regiment of Dragoon Guards, which caused him to sell his previous commission as a Cornet in the 1st Regiment of Dragoon Guards.[6] Banastre purchased the commission on April 20, 1775, and thus began his career as a commissioned officer in the British Army.[7]

On December 26, 1775, Cornet Tarleton sailed to America under the command of Earl Cornwallis. Shortly after arriving in New York, Cornet Tarleton volunteered to serve with the Sixteenth Queen's Light Dragoons, one of two regular British cavalry regiments in America.[8] Cornet Tarleton quickly gained experience in the Northeast where he participated in the New York campaigns, including the Battle of White Plains, and was present during the capture of Fort Washington and Fort Lee in November of 1776. One month later, Cornet Tarleton participated in another event that would solidify the reputation he already enjoyed among his superiors as an ambitious, energetic, young cavalry officer. On December 13, 1776, Tarleton's unit stumbled upon White's Tavern in

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[5] BASS, *supra* note 1, at 12.
[6] *Id*. at 14. Both Banastre Tarleton's purchase of John Trotter's commission in the 1st Dragoon Guards and John Trotter's purchase of another man's commission in the 2nd Dragoon Guards are noted in *Preferments*, 37 THE SCOTS MAGAZINE 287–88 (May 1775).
[7] BASS, *supra* note 1, at 14.
[8] ANTHONY J. SCOTTI, JR., BRUTAL VIRTUE: THE MYTH AND REALITY OF BANASTRE TARLETON 15 (2002).

Basking Ridge, New Jersey, the makeshift headquarters of American General Charles Lee. Once Tarleton and his men discovered that General Lee was inside the tavern, they carried out a nighttime raid up to the establishment, quickly surrounded it, and captured General Lee while receiving fire.[9] After reflecting on the fact that he had just taken part in the capture of George Washington's most flamboyant and talented general, Tarleton wrote to his mother that "this is a most miraculous event, it appears like a dream."[10] Historians mark the capture of General Lee, early in Tarleton's career, as the beginning of his remarkable rise through the ranks of the British Army.[11]

Tarleton later saw action at Princeton and Trenton in 1777, accompanied Vice Admiral Richard Howe on his expedition to the Delaware and Chesapeake, and then participated in the battles of Brandywine, Germantown, and Monmouth Courthouse.[12] In a relatively short amount of time, Tarleton had seen significant action in battle and continued to impress his superiors. One superior in particular, Sir Henry Clinton, became a mentor of sorts and helped Tarleton secure a regular commission in the British Army and later had him conferred with the rank by which he is best known—Lieutenant Colonel of the British Legion.[13] The British Legion was a relatively small command comprised of American Loyalist dragoons and light infantry.[14] The combination of cavalry and infantry made the unit extremely mobile and versatile. During the war, the British Legion was renowned for its speed and endurance as Tarleton relentlessly drove it to pursue its Rebel enemies.[15] The Legion also became infamous for killing captured American rebels and innocent civilians, and for indiscriminately destroying their property.[16]

The British Legion cemented its reputation for ruthlessness during the Battle of Waxhaws on May 29, 1780, when they killed nearly 200 Virginia Continentals who attempted to surrender under a white flag of

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[9] *Id*. at 16.
[10] *Id*. (providing an excerpt from a letter from Banastre Tarleton to his mother written on December 18, 1776).
[11] *Id*.
[12] *Id*. at 16–17.
[13] *Id*. at 19.
[14] *Id*. at 33.
[15] *Id*. at 35.
[16] *Id*. at 31.

truce.[17] The significance of this battle will be examined in detail in the next section of the article. Shortly after the Waxhaws battle, Lieutenant Colonel Tarleton and the British Legion were decisively defeated by Brigadier General Daniel Morgan at the Battle of Cowpens.[18] Tarleton was later shot through the hand while fighting Major General Nathaniel Greene's forces at the Battle of Guilford Courthouse, which resulted in half of his hand being amputated.[19] Wounded, defeated, and demoralized, Banastre Tarleton saw his last action at the Battle of Yorktown, where he and the rest of General Cornwallis's troops surrendered to General George Washington on October 19, 1781.[20]

By the end of the war, Banastre Tarleton was keenly aware of how badly the Americans hated him, so immediately upon his surrender he appealed to the French for personal protection.[21] The Comte de Rochambeau agreed to Tarleton's request but not before offering the following critique: "Colonel Tarleton has no merit as an officer—only that bravery that every Grenadier has—but is a butcher and a barbarian."[22] Shortly after General Cornwallis and his principal officers were paroled, General Washington and de Rochambeau invited their British counterparts to dine with them, excepting only Tarleton. Tarleton was humiliated by the snub and asked Lieutenant Colonel John Laurens, Washington's aide-de-camp, whether there had been some sort of awkward misunderstanding.[23] Laurens curtly replied "No, Colonel Tarleton, no accident at all; intentional, I can assure you, and meant as a reproof for certain cruelties practiced by the troops under your command in the campaigns in the Carolinas."[24] Tarleton indignantly replied "and is it for severities inseparable from war, which you are pleased to term cruelties, that I am to be disgraced before junior officers? Is it, sir, for a faithful discharge of my duty to my king and my country, that I am thus

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[17] *Id*. at 137–38.
[18] BASS, *supra* note 1, at 158. Interestingly enough, Colonel Buford and his men were fully aware of the British Legion's actions at the Waxhaws and the meaning of "Tarleton's quarter," yet Buford had no bloodlust after defeating Tarleton at the Cowpens and immediately offered the defeated Dragoons quarter, in keeping with the customs of war.
[19] SCOTTI, *supra* note 8, at 136.
[20] BASS, *supra* note 1, at 4.
[21] *Id*.
[22] *Id*. at 4 (citing GEORGE WASHINGTON PARKE CUSTIS, RECOLLECTIONS AND PRIVATE MEMORIES OF WASHINGTON (1861); Sallie DuPuy Harper, *Colonial Men and Times, Containing the Journals of Colonel Daniel Trabue*, WM. & MARY C. Q. (1948)).
[23] *Id.* at 5.
[24] *Id*.

humiliated in the eyes of three armies?" to which Laurens retorted "There are modes, sir, of discharging a soldier's duty, and where mercy has a share in the mode, it renders the duty more acceptable to both friends and foes."[25]

III. Controversial Events Surrounding the British Legion

This section of the article will examine why the Americans and French came to view Banastre Tarleton and the British Legion as butchers and barbarians. A number of inflammatory and exaggerated accounts have been given of Banastre Tarleton and his men over time. Not all these accounts are trustworthy and, to the best of the author's ability, the exaggerated tales have been omitted from this discussion. This includes some of the post-war witness recollections and correspondence, whose inflammatory accounts are impossible to substantiate. The author has, as much as possible, relied upon Banastre Tarleton's own recollections and admissions as he conveyed them in his account of the campaigns and through his personal correspondence, though, naturally, those accounts are likely biased in his favor. The incidents discussed in the next two sections of this article transpired while Lieutenant Colonel Banastre Tarleton was in command of the British Legion and are generally credited with contributing to his reputation for brutality.

A. The Battle of Waxhaws—May 29, 1780

News that the British had captured the city of Charleston on May 12, 1780, reached Colonel Abraham Buford and his detachment of 350 Virginia Continentals when they arrived at Lenud's Ferry, South Carolina, on their way to relieve the city from siege. After Charleston fell, Colonel Buford and his men were ordered to retreat to North Carolina to wait for reinforcements from General Washington's northern army, who were also headed south. General Cornwallis found out from British Loyalists that South Carolina Governor John Rutledge had escaped into North Carolina with Colonel Buford. Cornwallis quickly dispatched Lieutenant Colonel Tarleton to pursue Buford's detachment

[25] *Id.*

in hopes of capturing Governor Rutledge.[26] Tarleton rode at the head of his cavalry and mounted infantry for nearly fifty-four hours, covered over 105 miles of unsteady terrain, and killed off a number of his horses in the pursuit.[27] Tarleton finally caught Buford and his detachment near a settlement on the border of North and South Carolina called the Waxhaws. Banastre Tarleton quickly sent forth a surrender demand exaggerating the strength of his own detachment in order to bluff Buford into capitulating.[28] Tarleton threatened Buford about failing to accept the surrender terms, warning him, "If you are rash enough to reject them, the blood be upon your head."[29] Colonel Buford, not knowing the true size of Tarleton's force and suspecting a ruse, refused Tarleton's terms and continued on his march.[30] On the afternoon of May 29, Lieutenant Colonel Tarleton attacked Colonel Buford's rear guard, where he quickly decimated it, and then proceeded to attack the main body of the Virginia Continental detachment.[31]

Lieutenant Colonel Tarleton ordered Major Cochrane to dismount and attack Buford's flank and then ordered the 17th Dragoons and part of the Legion to attack Colonel Buford's center. Tarleton also had a sizeable reserve comprised of mounted infantry and the remainder of his dragoons.[32] For the main attack, Tarleton assembled thirty of his select horsemen and some dismounted infantry and attacked the Americans' right flank, which enabled him to break the main American line and permitted him to observe the effects of the other attacks.[33] When the British Legion finally charged, Tarleton immediately swung around to his right and saw a young American standard bearer, a fourteen year old boy named Ensign Cruit, attempting to raise the white flag.[34] Lieutenant Colonel Tarleton quickly raced toward the young Ensign, cut him down with his saber and left him for dead.[35]

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[26] HUGH F. RANKIN, FRANCIS MARION: THE SWAMP FOX 47 (Thomas Y. Crowell Co. 1973).
[27] SCOTTI, *supra* note 8, at 173.
[28] *Id*.
[29] BASS, *supra* note 1, at 80 (Letter from Lt. Col. Banastre Tarleton to Col. Abraham Buford (May 29, 1780) [hereinafter Buford Letter]).
[30] RANKIN, *supra* note 26, at 48.
[31] BANASTRE TARLETON, A HISTORY OF THE CAMPAIGNS OF 1780 AND 1781 IN THE SOUTHERN PROVINCES OF NORTH AMERICA 29 (London, T. Cadell 1787).
[32] *Id*.
[33] *Id*. at 29–30.
[34] BASS, *supra* note 1, at 81.
[35] *Id*.

While Colonel Buford's detachment attempted to surrender, a Continental soldier fired at Banastre Tarleton, missing Tarleton but killing his horse underneath him.[36] Although Tarleton was trapped under his horse and uninjured, his men presumed he was dead and exacted revenge among the wounded and dying Continentals.[37] In a letter to General Cornwallis recounting the affair, Tarleton wrote, "[A]nd slaughter was commenced before Lieutenant-Colonel Tarleton could remount another horse, the one with which he led his dragoons being overturned by the volley."[38] After Banastre Tarleton's horse was shot and he was presumed dead, Tarleton's men proceeded to indiscriminately saber the unarmed and wounded Americans until they had all grounded their arms.[39]

One historian provides the account of a Captain John Stokes, who while lying wounded on the battlefield attempted to protect his head from the saber of one dragoon only to have his right hand sliced off by another.[40] Stokes switched his sword to his left hand trying to protect himself when he was struck again, the blow this time splitting his left arm from the wrist to the shoulder. Stokes was then sabered in the head, which was split open from the length of his crown to his eyebrows. A British infantryman then mockingly asked, "Do you ask quarter?" Stokes replied "I do not; finish me as soon as possible." Twice the infantryman drove his bayonet into Stokes's body. Another British infantryman came along and asked the same question and upon receiving the same answer, he too drove his bayonet twice into the helpless American. Finally a British sergeant stepped in and protected Stokes. A British lieutenant later ordered the Legion surgeon to treat Stokes for his wounds, from which he ultimately recovered, as did the young standard bearer, Ensign Cruit.[41]

Banastre Tarleton attempted to explain the lopsidedness of his victory at Waxhaws in a letter to General Cornwallis, asserting that the "loss of officers and men was great on the part of the Americans, owing to the dragoons so effectually breaking the cavalry, that they had lost their commanding officer, which stimulated the soldiers to a vindictive

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[36] *Id*.
[37] SCOTTI, *supra* note 8, at 176–77.
[38] TARLETON, *supra* note 31, at 30.
[39] BASS, *supra* note 1, at 81.
[40] *Id*.
[41] *Id*.

asperity not easily restrained."[42] When the Battle of Waxhaws was over, the British had suffered eighteen casualties (five killed and thirteen wounded) compared to the Virginia Continentals, of whom Tarleton bragged, "I have cut 170 Off'rs and Men to pieces."[43]

B. Battle of Fishing Creek—August 17, 1780

While Banastre Tarleton suffered a disdainful reputation among the Americans after the Waxhaws massacre, his British superiors continued to view him in a favorable light, especially after the Battle of Fishing Creek where Tarleton surprised and annihilated Colonel Thomas Sumter's rebel militia detachment.[44] Immediately after the British victory at Camden, General Cornwallis discovered the whereabouts of Colonel Thomas Sumter, the "Carolina Gamecock" as he was known, and sent Banastre Tarleton to pursue him.[45] On the morning of August 17, 1780, Tarleton began his painful pursuit.[46] After discovering Sumter's position on the west side of the Wateree River, Tarleton paddled his cannon and infantry across the river in boats while he and his dragoons swam their horses across.[47] After fording the river, Tarleton and his men pursued Sumter over sandy terrain in the ruthless August heat.[48] By the time Tarleton finally reached Sumter, the majority of his men were so exhausted that he decided to leave them behind to rest.[49] Lieutenant Colonel Tarleton and 100 of his dragoons and 60 mounted foot soldiers took off after Sumter.[50]

Tarleton pursued Sumter for about five miles when the Legion's advance guard briefly clashed with two vedettes of Sumter's rear guard, killing them instantly.[51] Tarleton then rode up to a hill, peered over it and saw all of Sumter's camp in disarray with their arms completely stacked.[52] Sumter's detachment consisted of approximately 100

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[42] TARLETON, *supra* note 31, at 30–31.
[43] BASS, *supra* note 1, at 81–82 (Letter from Lt. Col. Banastre Tarleton to Gen. Cornwallis (May 29, 1780)).
[44] *Id.* at 101–03.
[45] *Id*. at 101.
[46] *Id*.
[47] TARLETON, *supra* note 31, at 112.
[48] BASS, *supra* note 1, at 101.
[49] TARLETON, *supra* note 31, at 113.
[50] *Id*.
[51] *Id*.
[52] BASS, *supra* note 1, at 101.

Continentals, 700 militia, and two cannon.[53] Hoping to take advantage of his good fortune, Banastre Tarleton quickly formed his cavalry and infantry in one line and gave the command to charge.[54] The British dragoons cut the Americans off from their arms and then began swinging their sabers, causing great carnage among Sumter's detachment.[55] Tarleton later referred to the engagement as a slaughter, stating that "the numbers, and extensive encampment of the enemy, occasioned several conflicts before the action was decided."[56] Writing about himself in the third person, he added, "At length, the release of the regulars and the loyal militia, who were confined in the rear of the Americans, enabled Lieutenant Colonel Tarleton to stop the slaughter, and place guards over the prisoners."[57]

Colonel Sumter was asleep when the initial charge began but was immediately awakened when the battle started.[58] The Carolina Gamecock quickly mounted a horse and rode bareback as far and as fast as he could until he reached Major William Davie's camp two days later.[59] During the Battle of Fishing Creek, Tarleton captured 300 American prisoners, freed 100 British troops the Americans had taken prisoner, and took possession of forty-four wagons of recaptured stores.[60] Elated at the outcome, General Cornwallis dashed off a letter to Lord Germaine, bragging, "This action was too brilliant to need any comment of mine, and will, I have no doubt, highly recommend Lieutenant-Colonel Tarleton to his Majesty's favour."[61] Lord Germaine did in fact show King George III Cornwallis's letter and ultimately published Cornwallis's official report in the *London Gazette*.[62]

Because of his smashing success at Fishing Creek, where he defeated a force nearly eight times the size of his own, Banastre Tarleton became a darling of his superiors and a hero to the British public.[63] Unfortunately, Tarleton's increasingly brutal reputation among the

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[53] TARLETON, *supra* note 31, at 112.
[54] *Id*. at 114.
[55] BASS, *supra* note 1, at 101.
[56] TARLETON, *supra* note 31, at 114
[57] *Id.*
[58] BASS, *supra* note 1, at 101.
[59] *Id*. at 101–02.
[60] *Id*. at 102.
[61] *Id.* at 103 (Letter from Gen. Cornwallis to Lord Germaine (Nov. 9, 1780)).
[62] *Id.*
[63] *Id*.

Americans led them to view Fishing Creek as yet another example of his penchant for cutting down defenseless rebels.[64] Upon hearing Colonel Sumter's explanation of the events that decimated his detachment, Major Davie noted that while Tarleton may have secured a victory through good fortune and audacity, the victory at Fishing Creek was "stained by the unfeeling barbarity of the legion who continued to hack and maim the militia long after they had surrendered. . . ."[65] He further lamented that Tarleton "must have suffered severely for this boyish Temerity; the conflict was nothing, the fighting was entirely on one side, and the slaughter among the defenceless."[66]

C. The Widow Richardson's Plantation—Early November, 1780

In addition to contending with the Carolina Gamecock, Banastre Tarleton fought with Colonel Francis Marion and his band of rebels, who would famously ambush the British and then quickly blend back into the swamp, earning Marion the nickname "Swamp Fox." On one occasion, Tarleton chased Colonel Marion through the swamps for over seven hours without coming close enough to even catch a glimpse of him. Frustrated by Marion's repeated escapes, Tarleton punished the local inhabitants by burning down the homes and grain of some thirty plantation owners, creating a swath of destruction from Jack's Creek to the High Hills.[67] On November 11, 1780, Tarleton issued a proclamation offering pardon to the rebel "delinquents" warning them, "It is not the Wish of Britons to be cruel or to destroy, but it is now obvious to all Carolina that Treachery Perfidy & Perjury will be punished with Instant Fire & Sword."[68] Days before issuing the proclamation, Lieutenant Colonel Tarleton had already discovered and burnt down Colonel Sumter's mills and then headed off in search of the plantation of widow Richardson, the wife of a recently deceased rebel General.[69]

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[64] WILLIAM R. DAVIE, THE REVOLUTIONARY WAR SKETCHES OF WILLIAM R. DAVIE 18 (Blackwell Robinson ed., Raleigh, N.C., Dep't of Cultural Resources, Div. of Archives and History, 1976), *available at* http://www.battleofcamden.org/davie.htm (last visited Apr. 3, 2012) (providing extracts).
[65] *Id*.
[66] *Id*.
[67] RANKIN, *supra* note 26, at 114.
[68] *Id*. at 114 (Letter from Lt. Col. Banastre Tarleton to Lt. Col. George Turnbull near Singletons (Nov. 5, 1780)).
[69] BASS, *supra* note 1, at 111.

By the time Banastre Tarleton arrived at General Richardson's plantation, he was already furious over the capture and hanging of his friend Major John André, whom the Americans had tried and executed for being a spy. Motivated out of spite for André's death, Tarleton located the grave of General Richardson and had it exhumed and ripped open so that he could "look upon the face of such a brave man," as he sarcastically noted.[70] Banastre Tarleton and his men plundered the house, forced the Richardsons' servants to feed them dinner, and then gathered and locked all the livestock in a barn.[71] Tarleton then set the plantation and the barns ablaze, leaving the Richardson family destitute for the impending winter.[72] Before he left, Tarleton allegedly flogged widow Richardson in hopes of forcing her to reveal Colonel Marion's whereabouts.[73] Upon hearing of Tarleton's conduct, an outraged Governor Rutledge wrote a letter on December 8, 1780, to the South Carolina delegates in the Continental Congress fuming that "Tarleton, at the house of the widow of General Richardson, exceeded his usual barbarity; for having dined in her house, he not only burned it after plundering it of everything it contained, but having driven into the barns a number of cattle, hogs, and poultry, he consumed them, together with the barn and the corn in it, in one general blaze."[74]

A few days later, Francis Marion learned of the destruction of Richardson's plantation and personally bore witness to the swaths of devastation the British Legion left in its wake. Colonel Marion wrote a letter to General Horatio Gates complaining that the Legion had "burnt all of the houses and destroyed all the corn" from Camden all the way to Nelson's Ferry.[75] Of Tarleton in particular, Colonel Marion lamented, "It is distressing to see women and children sitting in the open air around a fire, without a blanket, or any clothing but what they had on, and women of family, and that had ample fortunes; for he spares neither Whig nor Tory."[76]

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[70] *Id*.
[71] SCOTTI, *supra* note 8, at 169.
[72] *Id*.
[73] RANKIN, *supra* note 26, at 115.
[74] BASS, *supra* note 1, at 111 (Letter from Gov. John Rutledge to members of the South Carolina delegates to the Continental Congress).
[75] SCOTTI, *supra* note 8, at 108 (Letter from Lt. Col. Francis Marion to Gen. Horatio Gates near Benbow's Ferry, Black River (Nov. 26, 1780)).
[76] *Id.* at 93 (Letter from Lt. Col. Francis Marion to Gen. Horatio Gates near Benbow's Ferry, Black River (Nov. 9, 1780)).

D. Killing and Raping Civilians

In addition to the burning and plundering, which Banastre Tarleton bragged about bringing by "Fire & Sword," some of Tarleton's dragoons also murdered innocent civilians. At the beginning of his book *Brutal Virtue: The Myth and Reality of Banastre Tarleton*, historian Anthony Scotti provides the account of Moses Hall. Hall had witnessed a group of Loyalist prisoners being hacked to death by their American captors after one of the captors exhorted the rest to "remember Buford." The next morning, Hall and his North Carolina militia detachment made camp in an abandoned campsite used by the British Legion. Hall stumbled upon what looked to be a sixteen-year-old boy who was bleeding from a mortal wound. Still able to speak, the boy told Hall that he came out to sneak a peek at the notorious Banastre Tarleton when a few of the Legionnaires unexpectedly ran him through with a bayonet and left him to die.[77] Although disgusted by the killing of the Loyalist prisoners he had witnessed the night before, Moses Hall wrote, "The sight of this unoffending boy, butchered rather than be encumbered . . . on the march, I assume relieved me of my distressful feelings for the slaughter of the Tories, and I desired nothing so much as the opportunity of participating in their destruction."[78]

Professor Scotti relates in his book another incident involving the killing of a fourteen-year-old bugler in General Charles Lee's Legion. On the morning of February 13, 1781, James Gilles, the boy bugler, and a few of his friends crossed paths with some Legion dragoons near the Guilford Courthouse.[79] After an exchange of words and a brief skirmish, Gilles fled on his horse to escape but was no match for Tarleton's trained dragoons. The Legionnaires easily tracked Gilles down and sabered him to death. General Lee's men later discovered that the dragoons who killed Gilles had been drunk at the time they killed him.[80]

Tarleton recounts in his book, *A History of the Campaigns of 1780-1781 in Southern America*, an incident at Tarrant's Tavern in North Carolina that occurred right after his defeat at the Cowpens.[81] Some of the Legionnaires, after being chided by Tarleton to "Remember the

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[77] *Id*. at 1.
[78] *Id.*(citing THE REVOLUTION REMEMBERED: EYEWITNESS ACCOUNTS OF THE WAR OF INDEPENDENCE 201–03 (John C. Dann ed., 1980)).
[79] *Id.* at 172–73.
[80] *Id*. at 173.
[81] TARLETON, *supra* note 31, at 225–26.

Cowpens," charged down the road toward the tavern and encountered a group of civilians and soldiers crowding the tavern and the road outside.[82] Chaos ensued when someone yelled out "Tarleton is coming."[83] The roads were clogged with wagons and there were people everywhere when Tarleton and his dragoons rode up to the tavern.[84] Tarleton admitted that "a furious onset ensued: They broke through the center with irresistible velocity, killed near fifty on the spot, wounded many in the pursuit, and dispersed above five hundred of the enemy."[85] Professor Scotti surmised in his book that the Legionnaires undoubtedly sabered to death several innocent civilians who could not get out of the way quickly enough due to the panic and confusion.[86]

In addition to killing innocent bystanders, members of the British Legion also raped them on occasion. Banastre Tarleton himself bragged of "having butchered more men and lain with more women than anybody else in the army."[87] One of Tarleton's preparatory school classmates exclaimed upon hearing of Tarleton's boast "Lain with! What a weak expression! He should have said ravished. Rapes are the relaxation of murderers."[88] Although there are no alleged instances of Banastre Tarleton having personally committed rape, there are at least two recorded instances where members of his Legion did. The first took place after a particularly grueling engagement with American rebels in April 1780, when three of Tarleton's dragoons broke into the plantation of Sir John Colleton, a distinguished Loyalist.[89] Several women from surrounding plantations had routinely taken refuge at Colleton's plantation when fighting broke out. On this occasion, Tarleton's dragoons singled out three of the most attractive women from the group and raped them.[90] The women fled from the plantation after enduring the assaults and sought the protection of British officers, one of whom was Patrick Ferguson, generally thought to be one of the British Army's most chivalrous commanders. The three rapists were quickly identified, arrested, and tried by a general court-martial panel seated in Charleston,

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[82] *Id*. at 226.
[83] SCOTTI, *supra* note 8, at 171.
[84] *Id*.
[85] TARLETON, *supra* note 31, at 226.
[86] SCOTTI, *supra* note 8, at 171.
[87] BASS, *supra* note 1, at 9.
[88] *Id*. at 10.
[89] *Id*. at 74–75.
[90] *Id*. at 74.

South Carolina, where they were found guilty of rape and sentenced to be flogged without mercy.[91]

Another reported rape occurred in the spring of 1781 a few days before Lieutenant Colonel Tarleton received an unexpected visit from his commander, General Cornwallis. After having tracked down the Legion, Cornwallis halted his column and ordered Tarleton to dismount and line up his dragoons along the side of the road. General Cornwallis, accompanied by a small group of local citizens, dismounted his horse and proceeded to inspect the assembled dragoons until he came to two in particular, one a sergeant, the other a lieutenant. The visibly nervous civilians identified the sergeant and the lieutenant as the assailants who committed a robbery and rape the night before. The two dragoons were quickly taken into custody and tried by a general court-martial in Halifax, North Carolina, where they were found guilty of robbery and rape and condemned to death.[92]

While the events discussed so far in this section are accepted by historians as having taken place because they can be corroborated through legitimate sources,[93] many more allegations of brutality against Banastre Tarleton exist. Some of these are outright myths, and others are untrustworthy because witness accounts are completely contradictory, the accounts were recorded too long after the war when memories were no longer fresh, or the witnesses themselves are simply not credible. These incredible accounts, while certainly interesting, will not be discussed in this article in the interest of fairness. Instead, the remainder of the article will examine which, if any, of the incidents discussed thus far would be considered war crimes under the British and American Articles of War and the customary Law of Nations in effect during the American Revolution.

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[91] *Id*. at 75.

[92] TARLETON, *supra* note 31, at 290.

[93] By legitimate sources, the author means accounts that are corroborated through letters and journals of actual participants in the events discussed and generally not dismissed by the historians whose works have been cited throughout this article. The author has to the extent possible relied upon Banastre Tarleton's own recollections of these events as reflected in his book and personal correspondence, though these naturally tend to be biased in his favor.

IV. War Crimes

This section will formulate a working understanding of "war crimes" and will then discuss the incidents thus far examined in the light of the following classifications: Crimes against Combatants, Crimes Against Civilians, and Crimes Against Civilian Property. This section will also briefly addresses command responsibility and how it applied during the American Revolution in determining whether a commander could be held culpable for war crimes committed by soldiers under his charge.

Department of the Army Field Manual (FM) 27-10, titled *The Law of Land Warfare*, succinctly articulates three fundamental purposes of the Law of War: to protect combatants and noncombatants from unnecessary suffering, to safeguard certain fundamental rights of those who fall into enemy hands, and to quickly facilitate the restoration of peace.[94] Field Manual 27-10 notes that one of the basic principles of the law of war "requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry."[95]

There are two principal sources that comprise the law of war—lawmaking treaties and customary law. Lawmaking treaties that govern the Law of War today, like the Geneva and Hague Conventions, postdate the American Revolution, so that it would not be fair to use them as a standard to judge Banastre Tarleton's acts. Instead, this article will rely on customary international law[96] as reflected in the British Articles of War of 1765 and the American Articles of War of 1775, passed respectively by the British Parliament and the American Continental Congress prior to the outbreak of hostilities. Only then, after carefully examining the law under which Banastre Tarleton operated at the time, can we begin to objectively determine whether he was in a fact a war criminal.

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[94] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) (C1, 15 July 1976) [hereinafter FM 27-10].
[95] *Id*. at 3.
[96] Army Field Manual 27-10 loosely defines customary international law as unwritten or customary law which has not been incorporated in any treaty or convention but has been firmly established by the custom of nations and well defined by recognized authorities on international law. *Id*. at 4.

A. Crimes Against Combatants

One of the chief complaints lodged by General Washington and members of the Continental Congress during the war dealt with the British practice of refusing quarter to surrendering enemy soldiers.[97] British refusals to accept surrender are not easily understood because established international law in effect at the time required that "once an enemy had ceased to offer resistance, he could not rightfully be killed, and that quarter was to be given to those surrendering."[98] The idea of accepting quarter and offering terms of exchange for prisoners, particularly officers, had become a commonly accepted practice both before and during the Revolutionary War.[99] In fact, throughout the war, British commanders gave explicit instructions to their troops to properly treat persons offering to surrender.[100]

In 1620, Hugo Grotius, a prominent Dutch jurist, wrote that persons wishing to surrender, whose surrender was not accepted, could be lawfully killed, as could those who surrendered unconditionally.[101] However, he also wrote that "moral justice" imposed a stricter duty than the Law of Nations, and required combatants to spare the lives of those who surrendered, whether they surrendered on condition that their lives be spared, or even unconditionally.[102] In 1758, the Swiss jurist Emerich de Vattel, one of the founders of modern international law, wrote that enemies who submitted and laid down their arms could not be refused quarter under the Law of Nations,[103] unless the enemy had committed an

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[97] EDWIN G. BURROWS, FORGOTTEN PATRIOTS 37, 82–83 (Basic Books 2008).
[98] Captain George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 182 (1978).
[99] Major Gary Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 203–04 (1998).
[100] Coil, *supra* note 98, at 186.
[101] HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. 3, ch. 4, §§ XI–XII (Francis W. Kelsey trans., Carnegie Endowment ed., Clarendon Press 1925) (1625), *available at* http://www.lonang.com/exlibris/grotius/.
[102] *Id.*, bk. 3, ch. 11, §§ XIV–XV.
[103] EMERICH DE VATTEL, THE LAW OF NATIONS, ch. 3, § 140 (Joseph Chitty, trans., 1883) (1758), *available at* http://www.constitution.org/vattel/vattel.htm. An anonymous translation of Vattel's book was published in England in 1760, and the work was increasingly popular with American leaders through the Revolution, so that it was being used as a textbook in American universities by 1780. Albert de Lapradelle, *Introduction to* 3 EMERICH DE VATTEL, LE DROIT DES GENS, at xxix–-iii (Charles G. Fenwick, trans., Carnegie Institution of Washington, 1916) (1758), *available at* books.google.com (search for Vattel & "droit des gens" & "volume 3") (free e-book from Google Books). Before the Revolutionary War, American scholars were apparently unfamiliar with Vattel,

"enormous" breach of the Law of Nations, in which case surrender could be refused as punishment.[104]

In ancient warfare, the concept of protecting or pardoning prisoners of war was highly uncommon, as defeated enemy combatants were typically enslaved or put to death.[105] As early as 250 B.C., however, the Carthaginians paroled prisoners in exchange for their promise to no longer take up arms against Carthage.[106] Throughout medieval times, the concept of ransoming captured enemy prisoners became a lucrative practice for their captors and an incentive to protect them.[107] The question of when and whether prisoners could be killed was not always clear, as can be shown by the controversy over Henry V's order that his troops kill their prisoners at Agincourt in 1415.[108]

During the 16th and 17th centuries, European armies became smaller and more professionalized and as result, European states began to place

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though they studied Grotius. *Id.* at xxix. A recent writer argues that the American Founders were indeed familiar with Vattel and quoted him as an authority, but not as the sole definitive authority, on the Law of Nations, and gave great weight to Grotius as well. Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 548 (2012). Nonetheless, on the point of how prisoners of war should be treated, the widespread use of parole, the trouble both sides took to keep large numbers of prisoners, and the complaints raised by Americans when American captives were mistreated suggest that Vattel properly reflected the prevailing customary norm at the time of the Revolution.

[104] VATTEL, *supra* note 103, at § 141. Although Vattel admitted the permissibility of refusing to accept surrender as a form of punishment, he thought such severe measures were morally wrong, and recommended "other methods of chastising the sovereign—such as depriving him of some of his rights, taking from him towns and provinces." *Id.*

[105] Brown, *supra* note 99, at 201.

[106] *Id*. at 202.

[107] *Id*. at 201 & n.12.

[108] Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 34–39 (1992). Meron concludes that Henry did not violate "contemporary standards" by issuing this order, because it was given during an "emergency" while the battle was still taking place, and in those circumstances was "not unprecedented" in the era of chivalry, and because it was not criticized even by French writers at the time. *Id.* at 39. Interestingly, Shakespeare's patriotic account—which would surely have been familiar to British and American officers in the eighteenth century—justifies the order on the grounds of both emergency (Henry's fear that the French will counterattack and the prisoners will rejoin them) and reprisal (Henry's anger over a French attack on the "boys" attending the English luggage), *see id.* at 34–36, but subtly criticizes it by having a character ironically refer to the order as the "worthy" act of a "gallant" king, and by having another compare Henry to Alexander the Great, who killed his friend Cleitus in a drunken rage. *See* WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 7.

emphasis on exercising greater restraint on the battlefield.[109] Starting from the beginning of the 17th century, prisoner exchange between opponents slowly became common practice, greatly increasing the chances of survival for soldiers taken captive.[110] By the time the American Revolution was underway, there was virtually no excuse for continuing to execute surrendering enemy Soldiers as it had become common custom to either exchange them, parole them, or convince them to switch sides.[111] Indeed, during the American Revolution itself, many prisoners were exchanged and paroled by both sides.[112]

Grotius wrote that prisoners of war were slaves under the Law of Nations, and as such could be killed with impunity,[113] but that moral justice forbade the killing of an innocent prisoner.[114] Vattel later wrote that prisoners of war could not to be put to death under the Law of Nations, except for their own individual offenses,[115] or in reprisal for enemy atrocities.[116] He allowed an exception if there were too many

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[109] Sibylle Scheipers, *Prisoners and Detainees in War*, EGO: EUROPEAN HISTORY ONLINE, Nov. 15, 2011, http://www.ieg-ego.eu/en/threads/alliances-and-wars/war-as-an-agent-of-transfer/sibylle-scheipers-prisoners-and-detainees-in-war. Scheipers describes this as only the "beginning of a development" with a "trajectory that was non-linear and characterized by numerous setbacks."

[110] *Id*. Scheipers notes that the fate of prisoners in this period ranged from execution and enslavement through impressment into the captor's forces to release for ransom or exchange, but that exchange became common from the beginning of the seventeenth century. This made sense since common professional soldiers, unlike the landed knights of the previous era, had little economic value for their captors. In addition, during this period, it became common for captive officers to be paroled, allowed to return home or take residence in designated "parole towns," provided they agreed not to take further part in the hostilities. *Id.* This practice continued through, and was common during, the American Revolution. *See* Coil, *supra* note 98, at 185.

[111] *See* Scheipers, *supra* note 109.

[112] Betsy Knight, *Prisoner Exchange and Parole in the American Revolution*, 48 WM. & MARY Q. 201 and *passim* (1991). The two sides in the war failed to reach a general agreement, or "cartel," on prisoner exchange as was common in European wars, but commanders in the southern theater managed to negotiate three independent cartels and exchange many prisoners under their terms. *Id.* at 202.

[113] GROTIUS, *supra* note 101, bk. 3, ch. 7, §§ I.1 to III.1.

[114] *Id.* bk. 3, ch. 14, § III.

[115] VATTEL, *supra* note 103, ch. 3, § 149.

[116] VATTEL, *supra* note 103, § 142. While admitting the permissibility of reprisals, Vattel admonishes princes and generals that it is better to "check" opponents who violate the laws of war by other means than the execution of innocent prisoners. *Id.* On one occasion, General Washington threatened to hang a British officer in retaliation for the murder of an American prisoner of war by Loyalist militia, unless the murderer was delivered to him unconditionally. Coil, *supra* note 98, at 191–92. The British tried and acquitted the officer themselves, on the basis that the killing had been done on orders

prisoners to feed or keep safely, but even then only if the prisoners had not been promised their lives as a term of surrender, and the captors' safety depended on it. Even so, he reported that the European custom was to parole prisoners who could not be conveniently kept instead of executing them.[117] An American congressional commission, chaired by the Continental Commissioner for Prisoners and assigned to investigate maltreatment of American prisoners of war, reconfirmed that it was "contrary to the usage and custom of civilized nations, thus deliberately to murder their captives in cold blood."[118]

B. Crimes Against Civilians

Closely related to the prohibition of killing surrendering enemy combatants is the well established custom which forbade the killing and raping of innocent civilians.[119] Grotius wrote that the Law of Nations allowed combatants to injure "those who are truly subjects of the enemy," including women and children.[120] He admitted that some nations held that rape of the enemy's women was allowed, but that the "better" nations forbade the practice.[121] Vattel, closer in time to the Revolutionary War, conceded that all subjects of an enemy state were "enemies" or "things belonging to the enemy" regardless of age or sex, but that there were limits to how they could be treated.[122] In particular, he wrote that the custom had changed with respect to "the people, the peasants, the citizens," because wars were being fought by professional troops instead of levies, so that civilians in occupied territory could live safely as long as they did not take part in hostilities.[123] This was especially true of women and children and persons of unmilitary occupation (such as

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from superior authority; but they also dissolved the militia that had carried out the execution and issued further orders to prevent repeat occurrences. *Id.* at 192.

[117] VATTEL, *supra* note 103, § 151. Vattel excuses the execution ordered by Henry V at Agincourt, *see* note 108 *supra*, on the grounds that Henry believed the prisoners were about to join a French counterattack, so that the safety of his troops depended on it.

[118] BURROWS, *supra* note 97, at 84–85, 177.

[119] "Kill the [boys] and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery, mark you now, as can be offer't. . . ." WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 7.

[120] GROTIUS, *supra* note 101, bk. 3, ch. 4, § IX. Foreigners who knew about the war but entered the enemy's territory anyway could likewise lawfully be injured or killed. *Id.* § VI.

[121] *Id*. bk. 3, ch. 4, § XIX.1.

[122] VATTEL, *supra* note 103, ch. 3, §§ 70, 72, 145.

[123] *Id.* § 147.

clergy), as long as they did not offer resistance.[124] As Vattel reported the custom, officers tried to stop their men from raping women, even if they were subjects of the enemy, and punished the offense when they could.[125]

In keeping with Vattel's formulation of prevailing custom, American and British Articles of War provided some protection to civilians, especially women. The Articles of War of James II, promulgated in 1688, stated that "whoever shall force a Woman to abuse her (whether she belong to the Enemy, or not) and the fact be sufficiently proved, shall suffer Death for it."[126] The same section punished violence against civilians bringing provision to the camp, or to the hosts with whom troops were quartered.

The Articles of War of 1765, which were in effect during the American Revolution, required British commanders to appoint general courts-martial "who are to try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes . . . and all other Capital Crimes, or other offenses, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve."[127] In fact, murder, rape, and robbery were three of the top five major crimes prosecuted by the British at General Courts-Martial during the war.[128] The American Articles of War of 1775 required officers to redress and punish wrongs, such as "beating, or otherwise ill-treating any person, or . . . committing any kind of riot, to the disquieting of the inhabitants of this continent."[129] The Articles of War of 1776 contained the same provision and also provided that

> [w]henever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or the property of the good people of any of the United American States, such

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[124] *Id.* §§ 145–46.

[125] *Id.* § 145. As an example, Article 85 of Gustavus Adolphus's Articles of War of 1621 provided, "Hee that forceth any woman to abuse her, and the matter bee proved, hee shall die for it." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 912 (2d ed. 1920), *available at* www.loc.gov/rr/frd/Military_Law/ML_precedents.html. Article 97 also protected churchmen, "aged people, men or women, maides or children, unless they first take arms. . . ." *Id.* at 913.

[126] WINTHROP, *supra* note 125, at 924. The Articles of War of Richard II, three hundred years earlier, likewise prescribed death for taking any woman prisoner unless she was bearing arms, or for "forcing" any woman. *Id.* at 904.

[127] *Id.* at 946.

[128] SCOTTI, *supra* note 8, at 156. Mutiny and desertion were the other two.

[129] WINTHROP, *supra* note 125, at 954.

> as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required . . . to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate. . . .[130]

In keeping with the custom described by Vattel, neither side allowed rape and both punished murder.

C. Crimes Against Civilian Property

Grotius and Vattel both allowed a belligerent sovereign a broad, but not unlimited, right to destroy civilian property. According to Grotius, just as enemy civilians were themselves enemies who could be slaughtered, their property could also be lawfully plundered or destroyed.[131] Vattel likewise laid down the general rule that a belligerent gained rights over "things belonging to the enemy"[132]—a category that included civilian property.[133] However, according to Vattel, the "voluntary law of nations" limited this right to actions which increased the strength of the belligerent party, weakened the enemy, or punished the enemy for "egregious offenses against the law of nations."[134] Also, the right of plunder extended to the sovereign alone, and it was up to each sovereign to decide when and whether individual soldiers could take or destroy any civilian property.[135]

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[130] *Id*. at 964.

[131] GROTIUS, *supra* note 101, bk. 3, ch. 5, § I. This extended even to "sacred" or "consecrated" property, unless it was sacred to the attackers' own religion. *Id.* §§ II–III. However, Grotius made one clear exception: "the bodies of the dead may not be mistreated, because that is contrary to the law of burials. . . ."

[132] VATTEL, *supra* note 103, ch. 3, § 160.

[133] *Id.* § 73. This included property belonging "to the state, to the sovereign, to the subjects, of whatever age or sex." *Id.*

[134] *Id.* § 173. Vattel approvingly cited the then-recent custom of "contributions," by which a civilian population could be forced to support an invading army, but the supplies required were "proportion[ed] . . . to the abilities of those on whom they [were] imposed." He cited the wars of Louis XIV, who at the commencement of hostilities regularly made agreements with his enemies to regulate the amounts that each belligerent might take from the other's civilian populations.

[135] *Id.* § 164. "[The sovereign's] soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name, and for him . . . But the sovereign may grant the troops what share of the booty he pleases. . . ."

The British and American Articles of War exercised that authority by forbidding soldiers to do any such thing, in virtually identical language:

> All Officers and Soldiers are to behave themselves orderly in Quarters, and on their March; and whosoever shall commit any Waste or Spoil, either in Walks of Trees, Parks, Warrens, Fish-ponds, Houses, or Gardens, Cornfields, Enclosures, or Meadows, or shall maliciously destroy any Property whatsoever belonging to any of our subjects, unless by Order of the then Commander in Chief of Our Forces to annoy Rebels, or other Enemies in Arms against Us, he or they that shall be found guilty of offending herein, shall (besides such Penalties as they are liable to by Law) be punished according to the Nature and Degree of the Offence, by the Judgment of a Regimental or General Court-martial.[136]

This was in keeping with a longstanding English tradition of forbidding soldiers to despoil the civilian population.[137]

D. Command Responsibility

An early notion of command responsibility present in both the British and American Articles of War contemplated holding commanders individually liable for bad acts committed by their subordinates.

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[136] *Id.* at 940 (Article XVI, Section XIV, of the British Articles of War of 1865); *see also id.* at 967 (Article 16, Section XIII, of the American Articles of War of 1776) (the American version refers to "the good people of the United States" instead of "our subjects" and "against said states" instead of "against us").

[137] Thus, Richard II in his 1385 Articles of War required "that no one be so hardy as to rob or pillage another of money, victuals, provisions, forage, or any other thing, on pain of losing his head. . . ." WINTHROP, *supra* note 125, at 904. The penalty extended to soldiers taking provisions "brought for the refreshment of the army" for their own use. Henry V, during the Agincourt campaign in France, famously forbade looting the inhabitants and had a soldier hanged for stealing from a church. Meron, *supra* note 108, at 31-33. James II likewise forbade soldiers to commit "Waste, or spoil . . . without Leave from their Superior Officer," and also from burning "any House, Barn, Stack of Corn . . . Ship . . . or carriage, or anything which may serve for the Provision of the Army, without Order from the Commander in Chief. . . ." WINTHROP, *supra* note 125, at 922–23.

Grotius held that a sovereign could be held responsible for the acts of his subordinates, under the principle that "those who order a wicked act, or who grant it the necessary consent . . . [or] do not forbid such an act although bound by law properly so called to forbid it…[or] do not dissuade when they ought to dissuade . . . deserve punishment."[138] He wrote further that, in an unjust war, not only the sovereign, but soldiers and generals were individually responsible for the harm they had done and required to make restitution.[139] Vattel admitted that the sovereign could be held personally responsible for unjust war, but denied Grotius's contention that soldiers or generals could be required to make restitution for "the injuries which they have done, not of their own will, but as instruments in the hands of the sovereign."[140]

For centuries before the Revolutionary War, sovereigns had been holding their subordinates responsible for war crimes. Thus, in 1439, Charles VII of France ordered "that each Captain or lieutenant be held responsible for the abuses, ills, and offenses committed by members of his company, and that "[i]f he fails to do so or covers up the misdeed or delays taking action . . . the Captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished. . . ."[141] A tribunal of the Holy Roman Empire made use of the concept in 1474 when it tried and convicted Peter von Hagenbach of murders and rapes committed by his men, because as a knight he was held to have a duty to prevent such crimes by his subordinates.[142] Gustavus Adolphus of Sweden incorporated the same idea in his Articles of War in 1621, proclaiming that "[n]o Colonell or Captaine shall command his souldiers to doe any unlawful thing; which who so does, shall be punished according to the discretion of the Judges."[143] This included officers whose men burned down towns or villages without proper authority, especially if the act proved prejudicial to the king and advantageous to the enemy.[144]

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[138] GROTIUS, *supra* note 101, bk. 2, ch. 21, §§ I.2 and II.
[139] *Id.* bk. 3, ch. 10, § IV.
[140] VATTEL, *supra* note 103, ch. 3, §§ 185, 187.
[141] Victor Hansen, *What's Good for the Goose is Good for the Gander: Lessons from Abu Ghraib*, 42 GONZAGA L. REV. 335, 349–50 (2007) (citing THEODORE MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS 149 n.40 (1993)).
[142] Major William S. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 4–5 (1973).
[143] WINTHROP, *supra* note 125, at 910.
[144] *Id.* at 912.

The 1765 British Articles of War included the same concept:

> Every officer commanding in Quarters, Garrisons, or on a March, shall keep good order, and to the utmost of his Power, redress such abuses or disorders which may be committed by any Officer or Soldier under his command; if, upon Complaint made to him of Officers or Soldiers beating or otherwise ill-treating of their Landlords, or of extorting more from them than they are obliged to furnish by Law; of disturbing Fairs or Markets, or of committing any Kind of Riots, to the disquieting of Our People; he the said Commander who shall refuse or omit to see Justice done, and Reparation made to the Party or Parties injured, as far as Part of the Offender's Pay shall enable him or them, shall, upon Proof thereof, be punished by a General Court-Martial, as if he himself had committed the Crimes or Disorders complained of.[145]

American authorities enacted the same principle in virtually identical language, in the 1775 Massachusetts Articles of War, the 1775 American Articles of War, and the 1776 American Articles of War.[146] Also, during the Carolina campaigns, British General Alexander Leslie was concerned with some of the "excesses" British troops had been committing against the Americans. In order to reinforce discipline within his ranks, General Leslie issued an order on February 6, 1781, declaring that "Any officer who looks on with Indifference & does not do his Utmost to prevent the Shameful Marauding Which has of late prevailed in the Army Will be Considered in a more Criminal light than the persons who Commit those Scandalous Crimes, which must bring disgrace & Ruin on his Majesty's Arms."[147]

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[145] *Id.* at 937.

[146] *Id.* at 948–49, 953, 964. In 1779, the Americans captured British Lieutenant Governor Henry Hamilton, and he was indicted under Virginia law for atrocities committed by his Indian allies, though these were contrary to his explicit orders. Hamilton was ultimately paroled and exchanged without being tried, in part because General Washington doubted the propriety of treating him as a criminal after his surrender. Coil, *supra* note 98, at 193–97.

[147] SCOTTI, *supra* note 8, at 163. *See also* A.R. Newsome, *A British Orderly Book, 1780–1781*, 9 N.C. HIST. REV. 165, 289–90, 296–97 (1932).

V. Legal Application

A. Battle of Waxhaws

Under British, American, and customary law in effect at the time of the American Revolution, it is clear that Banastre Tarleton and the British Legion committed war crimes. The most infamous of these occurred at the Battle of Waxhaws, discussed in Part III.A. above, where Tarleton himself attacked an ensign attempting to raise a white flag, and after believing Tarleton to be dead, his men continued to kill Americans who had laid down their arms until all had surrendered. As discussed in Part IV.A., by the time of the American Revolution, it had become established custom to give quarter to surrendering enemy combatants.

Tarleton and his men had no excuse for executing surrendering American soldiers. The British had already established an elaborate system for housing American prisoners of war, and Tarleton could have sent prisoners to Charleston for internment. Even were it not so, the prevailing custom would have been to parole prisoners rather than execute them. Per the rule laid down by Vattel, executing prisoners who could not be kept was only permissible if sparing their lives would endanger the captors.

Historian Anthony Scotti suggests that since Colonel Buford rejected Tarleton's original terms of surrender before attacking him, Tarleton was technically absolved from any obligation to offer Buford's men quarter.[148] However, between Grotius's treatise in 1620 and Vattel's in 1748, the requirement to give quarter to surrendering troops had grown from a requirement of "moral justice" to an established custom of international law. Even though Buford had refused Tarleton's terms to surrender his whole detachment, individuals who surrendered during the fight were surrendering unconditionally, and as such were entitled to quarter. Technically, the white flag being raised by Ensign Cruit was a request to parley, which Tarleton could have refused,[149] but under the circumstances it was an obvious effort to surrender by someone who was no longer taking part in the fight. At the very least, Tarleton should have

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[148] SCOTTI, *supra* note 8, at 178.

[149] GROTIUS, *supra* note 101, bk. 3, ch. 24, § V ("At the present time white flags are the implied sign of request for a parley."). The obligation not to hurt the other party extended only to those who requested and those who were granted parleys. *Id.* § III.

offered quarter to Ensign Cruit himself, if not the entire detachment, at that point.

Professor Scotti also attempts to excuse Tarleton's conduct at the Waxhaws in his book on the grounds that the Americans had committed similar atrocities.[150] Reprisals were permissible under the Law of Nations at that time,[151] though killing prisoners in reprisal was disfavored by the major authorities in international law on moral grounds.[152] In some instances, General Washington or his British counterparts threatened (but did not carry out) reprisals to stop ungentlemanly and unlawful acts committed by the other side, but the British have never claimed the Battle of Waxhaws as a reprisal for some alleged atrocity committed by the Americans. Even if it had been, Tarleton would not have been able to take matters into his own hands, as typically reprisals were handled between the highest levels of command in the British and American Armies, as when the Continental Congress threatened retaliation against the British for mistreatment of American prisoners.[153]

Professor Scotti also suggests that Banastre Tarleton was not responsible for war crimes at the Battle of Waxhaws because he was not aware of what was going around him. However, this suggestion is flawed. As discussed in Part III.A., Banastre Tarleton wrote to Lord Cornwallis in full awareness of what had happened when Colonel Buford's detachment attempted to surrender. Lieutenant Colonel Tarleton, as the Legion's commander, would have naturally positioned himself somewhere near the center of the battlefield in order to command a better view of the action. Long after the war was over, Tarleton claimed in his book for the first time that his horse had been shot from underneath him as Colonel Buford's men were attempting to surrender.[154] Tarleton claims that he was trapped under his horse while his dragoons hacked Buford's men to pieces as they unsuccessfully

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[150] SCOTTI, *supra* note 8, at 137–38.

[151] Reprisals are acts of retaliation to specific customs of war or law of war violations committed by an adversary which are intended to induce future compliance. Reprisals are intended for use only after other less extreme measures have been exhausted and only as an unavoidable act of last resort. *See* FM 27-10, *supra* note 94, ch. 8, para. 497a–d. Modern law prohibits reprisals against prisoners of war. *Id.* para. 497c.

[152] GROTIUS, *supra* note 101, bk. 3, ch. 11, §§ XIV–XV; VATTEL, *supra* note 103, § 141.

[153] BURROWS, *supra* note 97, at 78, 191–93. Traditionally reprisals can only be ordered by the highest-ranking military authority available. *See* FM 27-10, *supra* note 128, ch. 8, para. 497d. In Tarleton's case, that would have been General Cornwallis, commander of the British Army in the South.

[154] TARLETON, *supra* note 31, at 30.

begged Tarleton for quarter.[155] Professor Scotti concedes in his book that even though Tarleton may have been dazed by the fall after his horse was shot, that in itself fails to excuse the fact that "he could have tried to take charge before the situation devolved into complete mayhem."[156]

According to Tarleton, it was only after much exertion on his own behalf that he was he able to stop his dragoons from cutting down what was left of the Virginia Continental detachment.[157] But if such was the case, why did he not mention it in his letter to Cornwallis, instead of waiting years to mention it in his own book? Furthermore, his own actions in attacking Ensign Cruit as he attempted to raise a flag of truce, after having warned the Continentals that "the blood would be on their heads" if they did not surrender without a fight, too clearly showed his men what he wanted them to do. Thus, even if Tarleton's self-serving story was true, he would have been responsible as commander under the British Articles of War. Killing surrendering troops was the opposite of the "good order" each commander was charged to keep, and an "abuse or disorder" of the kind he was required to redress.

As commander of the British Legion, Tarleton was responsible for his unit's utter lack of self-discipline in murdering Buford's troops as they attempted to lay down their arms and surrender. By all accounts, Banastre Tarleton was considered a perfectionist when it came to drilling his dragoons.[158] Regardless of where he was physically located on the battlefield, his dragoons should have been disciplined enough to abide by the customs of war regardless of the circumstances in which they found themselves. Although Lieutenant Colonel Tarleton instilled tactics and discipline into his dragoons, he was also unfortunately indifferent toward and even outright encouraged their "excesses" at times.[159] Tarleton admits in his book, *A History of the Campaigns of 1780–1781 in Southern America*, that General Cornwallis had to warn him about tempering his conduct, admonishing Tarleton that "I must recommend it to you in the strongest manner to use your utmost endeavours to prevent the troops under your command from committing irregularities."[160] General Cornwallis noticed early on in the Southern campaigns, as the Americans did, that Banastre Tarleton's prisoners of war "by all accounts

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[155] *Id*.
[156] SCOTTI, *supra* note 8, at 177–78.
[157] *Id.* at 30–31.
[158] *Id.* at 46–47.
[159] *Id*. at 167.
[160] TARLETON, *supra* note 31, at 38.

have been most cruelly treated."[161] His reputed indifference to the well-being of prisoners after they were captured is in keeping with his apparent indifference to letting them surrender in the first place.

B. Battle of Fishing Creek

While the Battle of Waxhaws was a slaughter among the defenseless, the Battle of Fishing Creek was another matter altogether. As previously discussed in Part III.B., Banastre Tarleton caught Colonel Sumter's camp completely unaware and in a state of disarray while they camped alongside Fishing Creek. Sumter's men had stacked all of their arms together while they cooked, slept, and generally passed the time away.[162] Lieutenant Colonel Tarleton rightly seized the initiative and attacked Sumter's detachment despite the fact that it was nearly eight times the size of his own.[163] Tarleton completely surprised Sumter's troops and quickly cut them off from their arms and from one another and methodically cut them down until the remaining 300 or so survivors were taken prisoner.[164] Colonel Sumter was asleep when the attack began. When he awoke, he frantically mounted his horse bareback and fled to Major Davie's camp.[165]

Though Major Davie considered the Battle of Fishing Creek a "slaughter among the defenseless" after hearing Sumter's account, Tarleton had simply used the element of surprise to rout an unsuspecting enemy. Then and now, this was both allowable and desirable.[166] Davie asserted that the Legion "continued to hack and maim the militia long after they had surrendered," but there is no evidence that this was so. Tarleton therefore, cannot be held guilty of a war crime for his actions at the Battle of Fishing Creek.

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[161] SCOTTI, *supra* note 8, at 93.
[162] *See supra* text accompanying note 73.
[163] TARLETON, *supra* note 31, at 112–13.
[164] *Id.* at 115.
[165] *See supra* text accompanying notes 78–79.
[166] U.S. DEP'T OF ARMY, FIELD MANUAL 3.0, OPERATIONS para. 4-47 (14 June 2001) (classifying surprise as one of the nine principles of war (objective, offensive, mass, economy of force, maneuver, unity of command, security, and simplicity being the others). Surprise results from taking actions which the enemy is unprepared to respond to. Factors contributing to surprise include speed, information superiority, and asymmetry.

C. The Widow Richardson's Plantation

On top of the war crimes the British Legion committed at the Battle of Waxhaws, Tarleton and his dragoons committed more war crimes when they plundered and burned the Widow Richardson's plantation and other civilian property. As discussed in Part III.C., Tarleton admitted to having destroyed "by Fire & Sword" great swaths of property in the Carolinas. Francis Marion noted that Tarleton burned down plantations, homes, and other property all the way from Jacks Creek to the High Hills.[167] Marion was deeply distressed to see women and children left homeless and without food or clothing, huddled around makeshift fires in midwinter.[168] Tarleton's actions at the Richardson plantation were in keeping with his actions throughout the South. He not only desecrated the grave of Mrs. Richardson's husband and burned down her home, but locked all the family livestock in a barn and burned that to the ground too.[169]

Under the "voluntary law of nations" as described by Vattel, hostile sovereigns could only destroy civilian property if doing so gained some military advantage, by strengthening the hostile power, weakening the enemy, or punishing the enemy for an egregious violation of the Law of Nations. None of these applied to Tarleton's destruction of the Widow Richardson's plantation or the exhuming of her husband's body. Furthermore, the British Articles of War of 1765 forbade officers and enlisted men to "commit any Waste or Spoil" or to "maliciously destroy any property" of their own accord. Only the commander in chief could authorize such acts and only when it worked to the king's benefit.

There is no evidence that Lord Cornwallis authorized Tarleton's actions at the plantation or that these actions were an effort to secure some advantage to the Crown. Mrs. Richardson was a widow living at home with her children minding her own business when Tarleton dug up her husband's grave and destroyed everything she and her children owned. Tarleton's apparent motive was revenge for the hanging of his friend, alleged spy Major John André. And his decision to desecrate the grave of General Richardson violated even the earlier, more permissive Law of Nations recognized by Grotius. Tarleton's actions at the plantation were war crimes.

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[167] *See supra* text accompanying notes 67–68.
[168] *See supra* text accompanying note 76.
[169] *See supra* text accompanying note 74–75.

D. Rape and Killing of Civilians

Rape and murder also violated the law of war during the American Revolution. Customary international law, as set forth by Vattel, forbade soldiers to harm "the people, the peasants, the citizens," and especially women and children who did not take up arms or offer resistance. The British Articles of War required commanders to appoint courts-martial "to try all Persons guilty of Wilful Murder . . . Rapes . . . and all other Capital Crimes," and to "redress such abuses or disorders which may be committed by any Officer or Soldier under [their] command." Some of Banastre Tarleton's defenders argue that murders and rapes like the ones described in Part III.D. were isolated events and that it was impossible for Tarleton to know about and prevent them all.[170]

With respect to the killings described in Part III.D., Lee's bugler, despite his youth, was a soldier fleeing the legion after a skirmish. As such he was not an "innocent" civilian, and could lawfully be killed under the Law of Nations as articulated by Grotius and Vattel. Grotius, as noted above, held that all children belonging to the enemy could be killed or enslaved under the Law of Nations; Vattel held that women and children were in general protected because they could not bear arms, but a bugler who participated in the war effort was not "innocent" in the way Vattel used that term and could lawfully be killed. The dying boy met by Moses Hall may have been mistaken for an American scout or spy. His ill-considered mission to sneak a peek at the notorious Banastre Tarleton would have rendered him indistinguishable from such a combatant, and so may have made him a lawful target.[171] Even the killing of innocent civilians at Tarrant's tavern may not show a war crime by Tarleton. The civilians were mixed in with a crowd of American soldiers, and on the information available it is not possible to say whether they resisted the Legion themselves (as would make them likely targets under Vattel's formulation) or whether it was reasonably possible for Tarleton's dragoons to attack the American soldiers without striking these civilians, let alone whether Tarleton himself knew or condoned an unlawful civilian killing on this occasion. Neither then nor now could soldiers

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[170] SCOTTI, *supra* note 8, at 165.

[171] The Law of Nations as formulated by Vattel focused on the concept of "innocence," and protected such persons as were too young, too old, too female, or otherwise too far removed from the war effort to constitute credible threats; only later was the concept of "innocent" changed for the broader, modern concept of "civilian." *See* Meron, *supra* note 108, at 25. This individual, as a sixteen-year-old male, was able to handle weapons and serve in either side's armed forces.

render themselves immune from attack simply by crowding together with civilians.

However, with regard to the rapes at Sir John Colleton's plantation, Tarleton's dragoons carried out those heinous acts in the open after rounding up all of the women and singling out the three most attractive to debase, without even a hint of trying to disguise their evil intentions from the witnesses present. This suggests that they knew such acts were tolerated in their command, The fact that General Cornwallis had to personally intervene in an unrelated second rape incident suggests something about the command environment Banastre Tarleton fostered in the British Legion. Either Tarleton had no idea that the rapes had taken place or he did know about them and chose to look the other way. Neither possibility speaks well of Lieutenant Colonel Tarleton as a commander. As noted above, the concept of command responsibility had been recognized in Europe for several centuries before the Revolutionary War. The British and American Articles of War required officers to "keep good order" and redress "abuses and disorders" by their troops, and if they failed to do so they could be punished as though they had committed those same acts themselves.[172] The evidence does not conclusively prove that Tarleton violated these standards, and so committed war crimes, but it does suggest it.

VI. Modern Legal Application

Under established customary international law today, Lieutenant Colonel Banastre Tarleton would without doubt be considered a war criminal.

The Waxhaws massacre would certainly qualify as a war crime today. The Hague Convention of 1907 [hereinafter Hague IV] expressly forbids killing or wounding "an enemy who, having laid down his arms . . . has surrendered at discretion" (i.e., unconditionally).[173] Assuming the war was treated as "not of an international character"—i.e., that the American rebels were considered as British subjects—Common Article 3 to the Four Geneva Conventions of 1949 would explicitly protect "[p]ersons taking no active part in the hostilities, including members of

[172] *See supra* text accompanying note 218.
[173] Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 23, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

armed forces who have laid down their arms." It provides that such persons must "in all circumstances be treated humanely," with a specific prohibition on "violence to life and person." This is reaffirmed in Article 4 of Additional Protocol II to the Conventions, which explicitly forbids violence against all persons "who have ceased to take part in hostilities." If the conflict was international, then it would be goverened by Article 41 of Additional Protocol I (AP I) to the Conventions, which requires that any person who is *hors de combat* by reason of expressing an intention to surrender shall be spared from further attack.[174]

Article 23 of Hague IV and Article 40 of AP I make it a crime to refuse to offer quarter to such soldiers or even to *threaten* to refuse quarter to a defeated adversary. Tarleton's threat to Buford after proposing surrender terms—"if you are rash enough to reject them, the blood be upon your head"—was ambiguous in this regard; but his actions and his troops' in the battle suggest that he intended, and they understood, that he meant for them to refuse quarter and kill surrendering Americans in reprisal if they failed to surrender at once. If that was the case then under modern standards he was guilty of a war crime before the battle even began. As noted above, eighteenth-century international law permitted a side to execute prisoners or refuse quarter in reprisal for enemy violations of the law of war (though there is no evidence that Tarleton intended this at Waxhaws). Modern international law does not permit even this—Common Article 3, AP I, and AP II admit of no such exceptions.

The principle of command responsibility, which had already received some recognition in the writings of Grotius and Vattel and in both sides' Articles of War in the Revolutionary War, is now an explicit and robust part of customary international law. Article 86 of AP I provides that

> [t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary

[174] Additional Protocol to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 40–41, Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter AP I] (providing that "[i]t is prohibited to order that there shall be no survivors, [or] to threaten an adversary therewith," that "[a] person is who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack," and that a person is hors de combat if "he clearly expresses an intention to surrender . . . provided that . . . he abstains from any hostile act and does not attempt to escape").

> responsibility . . . if they knew, or had information which should have enabled them to conclude . . . that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach. . . .

Article 87 goes further, and imposes on commanders a duty to prevent, suppress, and report breaches to their superiors, and to "ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol." The United States Supreme Court recognized, in *Yamashita v. Styer*, that under international law a commander has "an affirmative duty to take such measures as [are] within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[175] And the International Criminal Tribunal for the Former Yugoslavia reaffirmed this principle in *Prosecutor v. Delalic*, stating that "[a] person in a position of superior authority should . . . be held individualy responsible for giving the unlawful order to commit a crime. . . . But he should also be held responsible for failure to prevent a crime or to deter the unlawful behavior of his subordinates."[176] Thus, Tarleton's failure to *prevent*, as much as his failure to stop, the killing of surrendering Continentals would render him liable under the modern law of war. Even by failing to train his dragoons on the importance of accepting an enemy's surrender, Tarleton would be guilty of a war crime under this standard.

Part III.D. discussed two incidents where Tarleton's dragoons raped local civilian women. The first took place at Sir John Colleton's plantation where a group of local women had gathered to take refuge from the war, and the second took place in the Spring of 1781, when General Cornwallis made an unannounced visit to the British Legion. Cornwallis was summoned by a group of local townsfolk who informed him of the rapes and later identified the two offenders who were under Tarleton's command. As noted above, the offenders were ultimately court-martialed and punished.[177] Under the Geneva Convention, and in

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[175] Yamashita v. Styer, 321 U.S. 1, 16 (1946). *See also* COURTNEY WHITNEY, YAMASHITA V. STYER: A MEMORANDUM 46–58 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/Yamashita_case.html (discussing the international law of command responsibility as it stood in 1946, including examples of commanders being held responsible for failing to act to prevent serious law of war violations).

[176] Prosecutor v. Zejnil Delalic, Case No. IT-96-21-T, Judgment ¶¶ 333–34 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (citing AP I, *supra* note 174, art. 87).

[177] *See supra* text accompanying notes 122, 126.

particular Article 76 of AP I, women are to be treated as objects of "special respect" and are to be protected from indecent assault, forced prostitution, and rape.[178] Though Banastre Tarleton did not personally commit the rapes discussed in the article, under Article 87 he might still be held responsible under the doctrine of command responsibility for failing in his obligation as a commander to prevent the rapes from happening and for failing to immediately report them to his superiors once they did, if he knew or should have known they were likely to occur.[179]

Lastly, modern international law would surely condemn the wanton destruction of property which Banastre Tarleton threatened to bring about "with Instant Fire & Sword,"[180] including his destruction of the Widow Richardson's barn and livestock. In the eighteenth century, such destruction was allowable if it met the test of military necessity—that is, if it strengthened the attacking force or weakened or punished the enemy—and, in the case of plunder, if the sovereign allowed it. British and American articles of war allowed plunder and destruction only with permission from the respective commanders-in-chief. But the modern law of war forbids outright the deliberate (as opposed to the incidental) destruction of civilian property.[181] Article 52 of AP I states that civilian objects are protected against attack unless they forfeit their protected status and become valid military objectives.[182] Thus, Tarleton's "Fire & Sword" policy, his destruction of civilian plantations, would be unlawful in our own day even if his commander-in-chief had expressly ordered it. His desecration of General Richardson's grave would be quite as unlawful in our day as it was in his own.[183]

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[178] *See supra* note 277.

[179] AP I, *supra* note 174, arts. 86–87; *see also* Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Jun. 30, 2003) (noting that Milosevic, while not charged with committing rape himself, would be defending charges that he failed to take the necessary measures to prevent or punish rape).

[180] *See supra* text accompanying notes 90–91.

[181] FM 27-10, *supra* note 94, para. 40c ("Pursuant to the provisions of Article 25 [of Hague IV] . . . cities, towns, villages, dwellings which may be classified as military objectives, but which are undefended . . . are not permissible objects of attack.").

[182] AP I, *supra* note 174, arts. 51–52.

[183] FM 27-10, *supra* note 94, paras. 218 ("Parties to the conflict . . . shall further ensure that the dead are honorably interred . . . [and] that their graves are respected. . . ."), 504c. (listing "maltreatment of dead bodies" as a war crime).

VII. Conclusion

In conclusion, the notion that Banastre Tarleton was not a war criminal despite the fact that he "butchered surrendering soldiers and treated civilians cruelly" is patently false. Lieutenant Colonel Tarleton and his dragoons violated established customary law and very explicit provisions of the British Articles of War prohibiting murder, rape, destruction of civilian property, and the killing of enemy prisoners. Had General Washington decided to court-martial Banastre Tarleton for war crimes after his surrender at Yorktown, the law would have supported his conviction. Had General Cornwallis decided to court-martial Banastre Tarleton for war crimes after repeatedly warning him about committing "irregularities" and "cruelly treating" the Americans, the law would have supported his conviction. The fact that neither side did so does not detract from the fact that Banastre Tarleton was a war criminal—certainly by today's standards and even in his own day.

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]

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[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, 203).

[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

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[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

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[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,

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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 Gadafhi 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 Minster 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

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[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

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[23] Alfred Stephan, 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

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[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,

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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

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[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:

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[45] Thomas E. Ricks, *A Challenge for COINhata 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

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[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

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> 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 11years . . . 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:

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[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

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[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

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[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]

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[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 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

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[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,

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> 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

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[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]

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[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

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[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

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[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

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[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 conductive 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:

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[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

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[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

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[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.

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[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

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[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

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[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

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[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

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[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.

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[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

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[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

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[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,

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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 Contractors Officers "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

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[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

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[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-intense 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

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[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.nwsource.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 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

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[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

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[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

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[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

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[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

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[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:

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[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

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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

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[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

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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

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[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

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[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

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[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/INRALBANIA/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

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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 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

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[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]

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[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 administers 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

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[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.

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

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[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

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[233] *Id.*:

> ARTICLE 29: RECOVERING THE COSTS OF THE PROCEDURE
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> (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

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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

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[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

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[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.

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[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.

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[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]

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[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)	**This section is prepared by the requiring activity to briefly describes the following:** • **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	**This is a unit level (requiring activity) function primarily through S2/S9 channels that does the following:** • **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	**This is a unit level (requiring activity) function that leverages S2/S9 resources to determine the following:** • **Formally determine if pursing this requirement will have any adverse impact on the local market place 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	**This is a unit level (requiring activity) function that leverages S2 resources to determine the following:** • **Formally determine the pool of potential contractors likely to benefit from this requirement.** • **Formally determine whether or not any of these potential contractors pose 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 annotate that as a potential risk.*
Contractor Risk Assessment	**This is a unit level (requiring activity) function that leverages S2 resources to determine the following:** • **Formally determine if pursing 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 or it poses high risk because this contractor is tied to XXX.*
Commander's Overall Risk Assessment/Mitigation Plan	• **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)	**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:** • **Date XX – Coordination with Central Govt.** • **Date XX – PWS/SOW Development** • **Date XX – Solicitation for proposals.** • **Date XX – Award Date.**
Requirement Coordination with Central Government	**Prepared by HN Official and/or Higher HQ to ensure adequate coordination with the central government to determine the following:** • **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	**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:** • **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	**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.**

THE USE OF LAW IN COUNTERINSURGENCY

THOMAS B. NACHBAR*

I. Introduction

Almost no aspect of the current conflict has received as much attention as the "rule of law".[1] The "rule of law" has had its presence felt from the legal contests over detention that started almost immediately after the invasion of Afghanistan and the opening of the detention facility at Guantanamo Bay,[2] to the breakdown of law and order in the lost "golden hour" following the invasion of Iraq in 2003,[3] to the debates over the legality of interrogation techniques practiced by the United States,[4] to the blood and treasure expended rebuilding the Iraqi justice system and building the Afghan justice system.[5] There have been

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[1] In U.S. military doctrine, "Rule of Law" is defined as "a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles." U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1-24 (2008) [hereinafter FM 3-07].

[2] The first detainees were transferred to Guantanamo Bay in January of 2002; the first petition for habeas corpus arising out of a Guantanamo Bay detention was filed on January 20, 2002. *See* Gherebi v. Bush, 374 F.3d 727, 728–29 (9th Cir. 2004).

[3] *See* William B. Caldwell IV & Steven M. Leonard, *Field Manual 3-07, Stability Operations: Upshifting the Engine of Change*, MIL. REV., June 2008, at 56.

[4] Barack Obama, Protecting Our Security and Our Values, Address at the National Archives (May 21, 2009) ("I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. What's more, they undermine the rule of law.").

[5] On the relationship between "rule of law" as a set of development efforts and "rule of law" as an imperative for U.S. military operations, see Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2d 303, 318 (2009) ("[T]he definition of the rule of law that drives the development effort may not be as important as the one that defines the approach that U.S. forces take to their own operations. Successfully establishing the rule of law has less to do with one's definition of the rule of law than it has to do with one's commitment to the rule of law.").

countless rule of law advisors, multiple rule of law handbooks,[6] "rule of law green zones,"[7] rule of law coordination cells,[8] and most recently in Afghanistan, both a rule of law ambassador[9] and a one-star command—the NATO Rule of Law Field Support Mission / Rule of Law Field Force-Afghanistan[10]—dedicated to the rule of law.

Whether the rise of law's role in this conflict is a good thing is the subject of considerable debate. Many have derided the use of law by our adversaries as underhanded and claimed that legal constraints weaken the United States' ability to conduct war, a view held not only by commentators but by the executive branch itself.[11] Over the last ten years, law has become so heavily intertwined with warfare as to spawn not only a new term—"lawfare"—but entire conferences debating the significance of the term.[12] Moreover, efforts to establish the rule of law

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[6] CENTER FOR LAW AND MILITARY OPERATIONS, THE RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2011 ed.) [hereinafter RULE OF LAW HANDBOOK]; UNITED STATES JOINT FORCES COMMAND, HANDBOOK FOR MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM I (2011) [hereinafter JFCOM HANDBOOK].

[7] *See, e.g.*, Robert Chesney, *General Martins on Rule of Law Green Zones, Afghan Criminal Prosecution, and Other Updates from the ROLFF in Afghanistan*, LAWFARE (Feb. 10, 2011), http://www.lawfareblog.com/2011/02/general-martins-on-rule-of-law-green-zones-afghan-criminal-prosecution-and-other-updates-from-the-rolff-in-afghanistan/ (discussing rule of law Green Zones in Afghanistan); Michael R. Gordon, *Justice From Behind the Barricades in Baghdad*, N.Y. TIMES, July 30, 2007, at A1 (discussing rule of law Green Zones in Iraq).

[8] *See* Colonel Richard Pregent, *Reconciling Security and Rule of Law While Coordinating US Military and Civilian Efforts*, *in* RULE OF LAW HANDBOOK, *supra* note 6, at 274–85 (discussing the "Interagency Rule of Law Coordination Cell" in the U.S. Embassy, Iraq).

[9] *Coordinating Director of Rule of Law and Law Enforcement*, EMBASSY OF THE U.S., KABUL, AFGHANISTAN http://kabul.usembassy.gov/klemm.html (last visited Dec. 4, 2012).

[10] *See* Mark Martins, *Rule of Law in Iraq and Afghanistan?*, ARMY LAW., Nov. 2011, at 21, 24.

[11] *See, e.g.*, NATIONAL DEFENSE STRATEGY OF THE UNITED STATES 6 (Mar. 2005) ("Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."); David B Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J., Feb. 26, 2007, at 15.

[12] The term is generally attributed to Charles Dunlap, one-time Deputy Judge Advocate General of the Air Force. *See* Charles J. Dunlap, *Does Lawfare Need an Apologia?*, 43 CASE W. RES. J. INT'L L. 121 (2010) (providing an overview of the term and its lifecycle. Gen. Dunlap originally defined "lawfare" simply as "the use of law as a weapon of war" but his definition has evolved over time to a "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective"). *Id.* at 1. *See, e.g.*, Michael P. Scharf & Shannon Pagano, *Lawfare!: Are America's Enemies Using Law Against Us as a Weapon of War?*, 43 CASE W. RES. J. INT'L L. 1 (2010) (providing information from conferences on the term).

in Iraq and Afghanistan have been painted with the brush of "nation building"—a red-headed stepchild of military operations since the days of Vietnam.[13]

The confluence of law as a constraint on war and law as a means of war over the last decade is largely due to the United States' choice of strategies in the current conflict. The United States has alternatively relied on counterterrorism and counterinsurgency strategies, both of which are closely tied to law—counterinsurgency doubly so. Unlike conventionally understood forms of war, counterinsurgency is not a contest to control territory or destroy an enemy's ability and will to fight but rather is a competition between two opposing groups to be recognized by a particular population as their legitimate government.[14] Thus, law has a dual use in counterinsurgency, both as a tool for defeating criminal insurgents themselves (by imprisoning them) and as a means for governments to build legitimacy. As a tool for counterinsurgents, though, law is poorly understood, leaving a serious gap in counterinsurgency theory and practice. Although "rule of law" is frequently invoked in the context of counterinsurgency (as exemplified by the phrase's many appearances in the *Counterinsurgency Field Manual*),[15] counterinsurgency doctrine lacks a comprehensive description of how law figures in counterinsurgency. At the same time, the use of law as a means of counterinsurgency warfare has raised concerns over a separate problem of legitimacy: whether such uses undermine the authority of the law itself.

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[13] Both Presidents in office during the conflict have derided "nation building" while simultaneously committing extensive resources to building host nation institutions as part of a counterinsurgency strategy, alternatively in Iraq and Afghanistan. *See* David Morgan, *Gibbs on Afghanistan: Not Nation-Building*, CBS NEWS, (Dec. 1, 2009), http://www.cbsnews.com/8301-503544_162-5848072-503544/gibbs-on-afghanistan-not-nation-building/ ("This can't be nation-building," Gibbs said. "It can't be an open-ended, forever commitment, and I think that's what the president will outline.") (quoting Robert Gibbs, White House Press Secretary). *October 3, 2000 Transcript*, COMM'N ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=october-3-2000-transcript (George W. Bush, as a candidate, said, "The vice president and I have a disagreement about the use of troops. He believes in nation building. I would be very careful about using our troops as nation builders. I believe the role of the military is to fight and win war and therefore prevent war from happening in the first place.").

[14] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-3 (2006) [hereinafter FM 3-24] ("Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate").

[15] *See id.* at 1-4, 1-119, 1-143, 1-150, 5-6, 5-38, 5-44, 5-46, 5-52, 5-74, 5-87, 6-21, 6-29, 6-90, 6-97, 6-102, 8-42, 8-48, D-15, and D-38 to 39.

I have elsewhere written on the nature of legitimacy in counterinsurgency and the ways that law can be used to build legitimacy.[16] In this article, I examine the question from the other side—from the perspective of law. Although counterinsurgency doctrine is consumed with building both legitimacy and the rule of law, it lacks a clear understanding of how law contributes to legitimacy. Moreover, law is useful to counterinsurgents in a variety of ways. Although law can be used to build legitimacy, not all uses of law necessarily do so. The question remains, then, whether the ways counterinsurgents actually use law contribute to legitimacy. Even more disturbing is the possibility that the use of law as a means to conducting counterinsurgency is not only counterproductive to building legitimacy but may actually undermine the authority of the law itself. Recognizing the complex relationship between law and legitimacy requires counterinsurgents to temper their rush to law as a means of war with consideration of the second- and third-order effects generated by introducing a complex and morally contingent concept like law as a means to obtaining operational advantage in armed conflict.

The article proceeds by first describing the relationship between law and legitimacy as suggested by U.S. counterinsurgency doctrine. The rule of law and legitimacy are not the same thing, though, and so the second part of the article addresses how the "rule of law" can actually build legitimacy. Because building legitimacy is not the only way law is used in counterinsurgency, a complete answer to the law/legitimacy question requires an understanding of how law is actually used in counterinsurgency. That question is addressed in the third part of the article, describing the four ways law is used in counterinsurgency and how those various uses relate to legitimacy and thereby to the authority of the law. A complete understanding of how law is used by counterinsurgents reveals that the many uses of law in counterinsurgency fall along a continuum of legitimacy. Keeping that continuum in mind has implications for practice, which are covered in the fourth part of the article, followed by a brief conclusion.

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[16] Thomas B. Nachbar, *Counterinsurgency, Legitimacy and the Rule of Law*, PARAMETERS, Spring 2012, at 27.

II. Law and Legitimacy in Counterinsurgency

The United States Department of Defense defines counterinsurgency negatively as "[c]omprehensive civilian and military efforts taken to defeat an insurgency and to address any core grievances."[17] Consequently, in order to know what counterinsurgency is, it helps to know what insurgency is. The DoD defines insurgency as "[t]he organized use of subversion and violence by a group or movement that seeks to overthrow or force change of a governing authority."[18] In essence, then, an insurgency/counterinsurgency[19] is a struggle outside of normal political channels (such as elections) between a government and an insurgent group for control of the state. The nature of insurgencies distinguishes them from "traditional" war (if there truly is such a thing) in several important ways.

First, as the use of different words ("insurgency" and "counterinsurgency") for two sides of the same conflict suggests, insurgency is asymmetric. Although both sides of an insurgency are party to the same conflict, the conflict is viewed completely differently by those two sides. Insurgents usually lack the economic, commercial, military, or political infrastructure that counterinsurgents have by virtue of being the established government. Counterinsurgents, on the other hand, have to not only fight insurgents, they have to do so while simultaneously operating and defending the large economic, commercial, military, or political infrastructure on which they depend for support. The support that counterinsurgents receive from their infrastructure may be outweighed by the cost of defending it; the lack of an infrastructure frequently allows insurgents to choose the time and place of engagements. "The trouble [in counterinsurgency] is that the enemy holds no territory and refuses to fight for it. He is everywhere and nowhere."[20]

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[17] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 84 (as amended through July 15, 2011).
[18] *Id.* at 174.
[19] The author generally uses the term "counterinsurgency" when describing the conflict from the perspective of the established government of the host nation and "insurgency" when describing it from the perspective of insurgents. When describing the conflict in abstraction, rather than rely on the ungainly "insurgency/counterinsurgency," the author simply uses one of the two alternative terms.
[20] DAVID GALULA, COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE 50 (2006 ed.).

Second, the objective in an insurgency is not to defeat an opposing force or to militarily control a specific territory; it is a struggle to govern. What the winner in an insurgency gets is the right to govern, and so the ultimate question is not who is better able to marshal military force but rather who can make the better case for being the legitimate government, a contest more susceptible to political acumen than military supremacy.[21]

These two characteristics of insurgency combine in important ways to upend many traditional intuitions about how one fights wars. A simple example is that counterinsurgents cannot rely on static cost-benefit analysis to determine whether they choose to maintain and defend infrastructure. Unlike the insurgent, the incumbent regime is expected to simultaneously govern and fight the insurgency, making any success the insurgency enjoys two-fold: insurgent victories not only harm the regime's ability to fight, but demonstrate the regime's weakness, undermining its claim to govern. "In an asymmetric conflict, the weaker insurgent gains from having a large, cumbersome and vulnerable target to attack, with each successful assault augmenting the insurgent's credibility and following."[22] Receiving support from other nations can actually put a government fighting a counterinsurgency at a disadvantage because the need for external support demonstrates the government's weakness. On the other hand, when insurgents receive foreign support from societies with which the local population feels political or cultural affiliation, the fact of support can bolster the insurgent's cause as much as the support itself. The effects of external support can be asymmetric partly because the local population will not expect the insurgents to operate as independently as would the formal government.[23]

Perhaps nothing better exemplifies the strange nature of counterinsurgency than the centrality of law's role in the theory underlying such conflicts. The *Counterinsurgency Field Manual* mentions "rule of law" thirty times, including an entire section on "Establishing the Rule of Law."[24] Rule of law features in counterinsurgency doctrine in two distinct but related ways. First,

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[21] FM 3-24, *supra* note 14, at 1-1 (2006) ("Political power is the central issue in insurgencies and counterinsurgencies").

[22] Paul Cornish, *The United States and Counterinsurgency: "Political First, Political Last, Political Always,"* 85 INT'L AFF. 61, 77 (2009).

[23] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-2.2, TACTICS IN COUNTERINSURGENCY 2-54 (2009) ("Accepting external support can affect the legitimacy of both insurgents and counterinsurgents. The act of acceptance implies the inability to sustain oneself."

[24] FM 3-24, *supra* note 14, at D-38 to D-39.

developing the rule of law is an element of building the government's ability to operate effectively:

> The primary tasks to accomplish during clear-hold-build are—
>
> Provide continuous security for the local populace.
> Eliminate insurgent presence.
> Reinforce political primacy.
> Enforce the rule of law.
> Rebuild local [host nation] institutions.[25]

In this sense, establishing the rule of law is primarily achieved through building the capacity of host-nation institutions, and as the list above suggests, much of that work has little to do with lawyers. Indeed, even the rebuilding of legal institutions is likely to rely as heavily on skills related to development as on skills related to law. The rule of law is also relevant to building the host nation government in ways not directly related to legal institutions. For instance, the rule of law can improve the effectiveness of government generally, and not just legal institutions, by limiting corruption.[26] United States military doctrine recognizes the value of the rule of law for bringing stability and security to a civilian population as part of U.S. operations, even beyond the specific case of counterinsurgency.[27]

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[25] *Id.* at 5-52. *See also id.* at Foreword.

> Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law.

[26] *See id.* at 5-45 and tbl.5-5 (listing considerations for developing governance generally, including creating means for citizens to petition the government for redress of government wrongs).

[27] *See* FM 3-07, *supra* note 1, at 1-17 ("Failure to ensure continuity of rule of law through [the] transition [from military occupation to local civilian control] threatens the safety and security of the local populace, erodes the legitimacy of the host nation, and serves as an obstacle to long-term development and achieving the desired end state."), and 2-11 ("Long-term development aims to institutionalize a rule of law culture within the government and society").

United States doctrine also claims that counterinsurgents improve their positions by following the law in their prosecution of the counterinsurgency itself. Put quite simply:

> Efforts to build a legitimate government though illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. Moreover, participation in COIN operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation] laws. . . . Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.[28]

In this sense, compliance with the law in conducting counterinsurgency operations is itself is a tool to winning the counterinsurgency.[29] Again, the operational benefits of compliance with established norms are hardly limited to counterinsurgency; the operational benefit of complying with established norms has long been recognized in a wide range of conflicts.[30]

Given its importance in current operations, it is no surprise that the rule of law has received much attention from both the military and the U.S. government civilian development community. As defined by the Army's field manual on stability operations,

> Rule of law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law,

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[28] FM 3-24, *supra* note 14, at 1-132.
[29] Nachbar, *supra* note 5, at 315.
[30] *See, e.g.*, WILLIAM SHAKESPEARE, HENRY V act 3, sc. 6 ("When lenity and cruelty play for a kingdom, the gentler gamester is the soonest winner."); SUN TZU, THE ART OF WAR, ch. 2 (Lionel Giles trans. 1910) (ca. 500 B.C.) ("The captured soldiers should be kindly treated and kept. This is called using the conquered foe to augment one's own strength").

> equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.[31]

For those who favor bulleted lists, the same manual clarifies:

> In general terms, rule of law exists when:
>
> - The state monopolizes the use of force in the resolution of disputes.
> - Individuals are secure in their persons and property.
> - The state is bound by law and does not act arbitrarily.
> - The law can be readily determined and is stable enough to allow individuals to plan their affairs.
> - Individuals have meaningful access to an effective and impartial justice system.
> - The state protects basic human rights and fundamental freedoms.
> - Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.
>
> Effective rule of law establishes authority vested in the people, protects rights, exerts a check on all branches of government, and complements efforts to build security.[32]

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[31] FM 3-07, *supra* note 1, at 1-40. This definition follows one offered in the context of the United Nations. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* at 4, U.N. Doc. S/2004/616 (2004), and U.S. AGENCY FOR INT'L DEV., U.S. DEPT. OF STATE, U.S. DEPT. OF DEFENSE, SECURITY SECTOR REFORM 4 (Feb. 2009), *available at* http://www.state.gov/documents/organization/115810.pdf (interagency agreement within the U.S. executive branch uses a very similar definition).

[32] FM 3-07, *supra* note 1, at 1-41. *See also* THE RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 6 (Lieutenant Vasilios Tasikas, Captain Thomas B. Nachbar & Charles R. Oleszycki, eds., 2007 ed.); JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 76 (2006).

For a definition of "rule of law" adopted by a military force in the middle of a war, the Army's definition is rather ambitious. It assumes not only accountability but security institutions, complete with internal checks on those institutions. It is also decidedly substantive, insisting upon the presence of certain basic rights.[33] Given its development as a tool to be used in armed conflict, the U.S. national security establishment's conception of rule of law is unsurprisingly security-centric.[34] That is largely a consequence of the context in which it is being developed. The emphasis on security goes beyond simply providing security (referred throughout the nascent post-conflict rule-of-law development literature as the "three-Cs" of "courts, cops, and corrections").[35] Rule of law goes beyond physical manifestations of security and, as most clearly captured by the seventh element above, includes an internal commitment to the law rather than simply obedience to a set of rules.

Although the rule of law is certainly a laudable concept, to counterinsurgents, establishing and maintaining the rule of law is not an end in itself but rather is a means to an end, to be employed alongside other means such as building the host nation's ability to dispense non-legal services.[36]

Counterinsurgency is a not a contest for law but rather is a contest for "legitimacy". If the number of mentions is any measure, the *Counterinsurgency Field Manual*'s use of "rule of law" 30 times suggests attachment to the concept, but the 124 references to legitimacy (along with a section entitled "Legitimacy Is the Main Objective"[37]) suggest something closer to devotion. Like the rule of law, legitimacy both encourages acceptance of the government in its own right and

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[33] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 32, at 70–71 (on the substantive vs. formalist distinction). *See also* FM 3-24, *supra* note 14, at D-8 (describing three aspects of the rule of law as "A government that derives its powers from the governed," "Sustainable security institutions," and "Fundamental human rights".).

[34] *See, e.g.*, FM 3-07, *supra* note 1, at 1-17, 1-83 ("While military forces aim to establish a safe and secure environment, the rule of law requires much more: security of individuals and accountability for crimes committed against them."). Even in terms of expanding the rule of law beyond physical security, the doctrine anticipates a connection between the law and general security.

[35] *See infra* note 63.

[36] FM 3-24, *supra* note 14, at 6-1 (Success in counterinsurgency requires "the host nation to defeat insurgents or render them irrelevant, uphold the rule of law, and provide a basic level of essential services and security for the populace.").

[37] *Id.* at 1-113 to 120.

increases the government's ability to provide services. By doing so, it also improves the government's ability to respond to the insurgency—to go beyond normal governmental functions to resolve the disputes that may have led to the insurgency in the first place.[38] Legitimacy is the bottom line of accepted counterinsurgency theory: "The primary objective of any COIN operation is to foster development of effective governance by a legitimate government."[39]

III. Law as a Means of Building Legitimacy

Although legitimacy is central to counterinsurgency, counterinsurgency theory lacks a comprehensive understanding of how law (or the "rule of law") affects legitimacy, although the *Counterinsurgency Field Manual* offers at least some traction:

> The presence of the rule of law is a major factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for preexisting and impersonal legal rules can provide the key to gaining it widespread, enduring societal support. Such government respect for rules—ideally ones recorded in a constitution and in laws adopted through a credible, democratic process—is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.[40]

The *Stability Operations Field Manual* provides a more detailed description of how the rule of law affects legitimacy:

> Rule of law enhances the legitimacy of the host-nation government by establishing principles that limit the power of the state and by setting rules and procedures that prohibit accumulating autocratic or oligarchic power. It dictates government conduct according to prescribed and publicly recognized regulations while

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[38] *Id.* at 6-1 ("Success in counterinsurgency (COIN) operations requires establishing a legitimate government supported by the people and able to address the fundamental causes that insurgents use to gain support.").

[39] *Id.* at 1-113. As is the case with many aspects of counterinsurgency, the role of legitimacy has general application as well.

[40] FM 3-24, *supra* note 14, at 1-119.

> protecting the rights of all members of society. It also provides a vehicle for resolving disputes nonviolently and in a manner integral to establishing enduring peace and stability.[41]

In combination, the two manuals suggest two very different ways in which the law affects legitimacy.

First, the rule of law represents government restrained by law, the government's own willingness to be restrained by law being the most convincing argument it can make to the people for why they should be willing to be restrained by (this government's) laws. There is considerable social science demonstrating this effect. The adoption and observance of legal procedures (or "procedural justice") substantially increases the population's perception of the government's legitimacy.[42] Although easily derided as "technicalities," most procedures are grounded in widely held notions of fairness, and the operation of the government through those procedures therefore builds an association between the government and those notions of fairness.[43] Moreover, procedural justice has particular value for building the *kind* of legitimacy valuable to counterinsurgents. The form of legitimacy most valuable to counterinsurgents presents itself as a form of discretion—or a "cushion of support"[44]—that allows the government to make decisions in tension with popular views about the content of the law.[45]

Second, the rule of law builds legitimacy by providing benefits to the population much in the same way as other government services—the rule of law as a useful tool for enhancing security and resolving disputes. Of course, the law's value goes beyond security and dispute resolution; law also allows individuals to order their affairs with each other, as through contract. As I have written elsewhere, providing benefits to the

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[41] FM 3-07, *supra* note 1, at 1-41.

[42] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 272 (2006 ed.) ("[T]he basis of legitimacy is the justice of the procedures use by legal authorities."); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 118–21 (1975).

[43] TYLER, *supra* note 42, at 109; THIBAUT & WALKER, *supra* note 42, at 115 (noting that experiment participants in France, Germany, and the U.S. had similar preferences regarding procedural rules).

[44] TYLER, *supra* note 42, at 107 ("The important role of procedural justice in mediating the political effects of experience means that fair procedures can act as a cushion of support when authorities are delivering unfavorable outcomes.").

[45] *Id*. at 275 ("Through legitimacy, procedural justice encourages deference."). *See generally* Nachbar, *supra* note 16.

population through the operation of a legal system is different from providing other benefits and may be more valuable for building legitimacy than other services the government might provide. Providing the service of "dispute resolution," for instance, is fundamentally different from providing the service of trash removal.[46] The authority to resolve disputes can necessarily be exercised by only one body (pursuant to the state's "monopoly on the use of force" that is the first element of the rule of law)—imagine the systemic breakdown that would result from two competing bodies claiming the power to resolve disputes. Thus, when the government provides dispute resolution services it is both providing a beneficial service and simultaneously claiming the authority to resolve disputes. If the population accepts that claim by using the government's dispute resolution services, their perception of the government is likely enhanced by the value of the service and the government's legitimacy is simultaneously enhanced as against all rivals.[47]

These two mechanisms for building legitimacy through law operate quite differently, although they are easily conflated because they are frequently present in the same case. Thus, a government that imprisons criminals—such as insurgents—according to established law and procedure doubly enhances its legitimacy, both by setting an example of abiding by legal constraints (as opposed to punishment without due process) and by increasing security by incapacitating the imprisoned criminal. Nevertheless, it is important to keep the two effects distinct, because the way they operate has important implications for the ways that law is used in counterinsurgency.

Although legitimacy is the watchword of counterinsurgency, not all uses of law in counterinsurgency build legitimacy (just as not all offensive operations contribute to legitimacy). That raises an important question for governments undergoing insurgencies (and potential interveners like the United States): Can law be used instrumentally as a tool to fight insurgencies without undermining its ability to build legitimacy, or are attempts to use law in counterinsurgency counterproductive? If the population's commitment to the law is somehow tied to the law's fairness, will attempts to use the law as an instrument of counterinsurgency strain the law's perceived fairness in

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[46] *See* FM 3-24, *supra* note 14, at 5-70 (listing trash removal as one of the tasks government can undertake to increase legitimacy).
[47] Nachbar, *supra* note 16.

such a way as to undermine its authority? If so, then employing law as a means to fighting counterinsurgency could not only reduce its ability to lend legitimacy to the government but also could diminish its power to constrain behavior and order social relationships. Do instrumental uses of law by the government to fight insurgents help the government or hurt the law?

IV. Law's Use in Counterinsurgency and a Continuum of Legitimacy

Drawing conclusions about law's role in counterinsurgency requires describing how law and legal institutions are used in counterinsurgency. In doing so, it is possible describe the ways law is used in counterinsurgency as falling along a continuum of legitimacy.

A. Four Uses of Law in Counterinsurgency

Law and legal institutions are used in counterinsurgency in four distinct ways:

First, counterinsurgents use the criminal law, with all of its normal retributive, deterrent, and incapacitory effects, as a weapon against insurgents. In this sense, the criminal justice system is essentially a substitute for lethal targeting as a means of affecting those who take part in the insurgency. This is a major distinction from conventional war, in which combatants are privileged, a distinction that explains much of the emphasis on law in counterinsurgency that is absent in conventional wars. Sometimes this will result in short-term victories for insurgents—what some might call the insurgents' "unfair" use of law to hinder military prosecution of the conflict.[48]

Second, counterinsurgents engage in capacity building of the host nation's criminal legal institutions because of those institutions' value in using the law against insurgents (described immediately above). This use is similar to the first use; the difference is in scale and method. Building legal institutions affects the insurgent movement as a whole, not just particular insurgents. Building the capacity of the local justice system provides a direct benefit to military commanders, shifting responsibility for things such as detention from the military to local civilian authorities

[48] *See, e.g.*, *supra* note 11 and accompanying text.

and freeing up military resources for other tasks. In this way, local civilian legal institutions are direct substitutes for military power, potentially a more efficient and almost always a less controversial one. Having institutions like detention facilities operated by the military (especially a foreign military) is normally considered a second-best to having them operated by local, civilian organizations.[49]

A more significant difference from the first use of law is at the practical level of method. Those who use law in the first sense are the normal participants in the legal system; lawyers rightly claim a central role in such uses. Building the capacity of legal institutions has less of a connection to the practice of law, though, and a closer connection to the skills necessary for international development generally. The overlap in skills between using legal systems and building their capacity has led to many disagreements over who should do it and how it should be done.[50]

Third, counterinsurgents build the capacity of criminal legal institutions because using those institutions to fight insurgency enhances the legitimacy—and therefore the strength—of the government's side in the insurgency (as opposed to the government itself). This can happen in at least three ways: First, using the criminal justice system can give the government the rhetorical advantage of labeling insurgents as criminals.[51] Second, as described in the previous section, relying on the legal system to punish insurgents is a form of compliance that actually increases the legitimacy and hence the effectiveness of the legal system itself.[52] Third, the population might view the procedures and rules of criminal justice as being more likely to lead to fair or accurate outcomes than the raw assertion of force that characterizes military action. That is, the population may have more faith in the accuracy in the outcomes of legal proceedings than they do in the accuracy of targeting decisions made by the executive alone. There is no shortage of criticism of the accuracy of legal proceedings, but in the context of an insurgency, the introduction of an impartial adjudicator in what is essentially a self-

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[49] *See* FM 3-24, *supra* note 14, at 1-154 ("It is just as important to consider who performs an operation as to assess how well it is done.").
[50] *Cf.* JFCOM HANDBOOK, *supra* note 6, at I.
[51] FM 3-24, *supra* note 14, at 1-131 ("When insurgents are seen as criminals, they lose public support.").
[52] *See id.* at D-15 (evidence collected against insurgents during operations and preserving it for use in criminal courts "will be used to process the insurgents into the legal system and thus hold them accountable for their crimes *while still promoting the rule of law*") (emphasis added).

interested conflict between the executive and insurgents may be enough. Even if the population does not have much faith in the accuracy of judicial proceedings, the procedure itself is likely to legitimize to the government's actions even if by calling upon general notions of fairness, whether or not it leads to better outcomes.

The fourth way counterinsurgents use the law is by relying on law for its value in enhancing the government's legitimacy rather than for any instrumental contribution to a particular outcome. These uses of law may have little to do with the insurgency or criminal law at all and instead capitalize on the ways that well-functioning legal systems generally increase political and social stability.[53] Anti-corruption efforts, even those having little direct effect on the insurgency,[54] are an instance of this use of law and legal institutions in counterinsurgency.

Perhaps the most meaningful indicators of the legitimacy of any state are the rules (and even more importantly the degree to which the state follows them) that govern its exertion of force, especially exertion of force against its own citizens. By announcing and demonstrating their commitment to these rules, counterinsurgents can enhance the government's legitimacy and weaken the insurgents. As Brigadier General Mark Martins, commander of an organization specifically formed to support "rule of law" operations in Afghanistan argues, "[c]ompliance with law is what legitimates the actions of our troops and separates their actions—sometimes necessarily violent and lethal—from what very bad people in criminal mobs do."[55] If General Martins is

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[53] *See* FM 3-07, *supra* note 1, at 1-43 (highlighting the rule of law as "a vehicle for resolving disputes nonviolently and in a manner integral to establishing enduring peace and stability").

[54] Of course, corruption is frequently a redirection of government resources to insurgents, providing them a direct benefit, and so anti-corruption efforts can also have a direct effect on insurgents themselves.

[55] Mark Martins, *Lawfare: So Are We Waging It?*, LAWFARE (Nov. 25, 2010), http://www.lawfareblog.com/2010/11/lawfare-so-are-we-waging-it/. *See also* FM 3-24, *supra* note 14, at 1-132:

> Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government though illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. * * * Any human rights abuses or legal violations committed by U.S. forces

correct that most people would rather live under a state that is governed by law rather than the will of men (and I think he is), this use of law may be the most powerful one in the conduct of a counterinsurgency—to again borrow General Martins' terminology, this is the way the government outflanks insurgents.[56]

In a sense, the first two uses are "direct" in that law and legal institutions are used directly on insurgents and the insurgency to weaken it. The second two uses are "indirect" in that the law is a means to build legitimacy, and it is the enhanced legitimacy of the government that the law produces, not application of the law itself, that harms the insurgency. The direct/indirect distinction is important for those who think about how law is used in warfare—those taking part in the "lawfare" debate. Defining lawfare as "the use of law as a weapon of war"[57] is inclusive but conflates the distinction between different types of uses of law. The operational and moral consequences of prosecuting insurgents and terrorists, for instance, are different from those implicated by building robust legal systems as a means to build stability in countries subject to insurgencies or whose instability has made them terrorist safe havens, as U.S. rule of law capacity building operations in Iraq and Afghanistan seek to do.

B. A Continuum of Legitimacy

Thus counterinsurgency doctrine's central place for legitimacy is doubly the case for uses of law in counterinsurgency because "legitimacy" is a necessary feature of not only the government but also of the law itself.[58] The legitimacy of the law arises from its connection to

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> quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.

[56] Mark Martins, *Reflections on "Lawfare" and Related Terms*, LAWFARE (Nov. 24, 2010), http://www.lawfareblog.com/2010/11/reflections-on-%e2%80%9clawfare%e2%80%9d-and-related-terms/.

[57] *See supra* note 12.

[58] What it takes for laws to have this legitimacy is the subject of nearly endless debate among jurisprudes and political scientists alike. Like the legitimacy that imbues a government, there is undoubtedly both a political and moral dimension to the legitimacy necessary for law. For instance, Lon Fuller famously debated the father of positivism, H.L.A. Hart, on whether fundamentally immoral laws should be regarded as "law." Even Hart, who would call such properly enacted rules "laws," conceded that they may be

the population's underlying normative commitments. Unlike other non-lethal tools of counterinsurgency (social welfare programs, infrastructure programs such as roads or electrification programs, or even most educational programs), the inextricable connection between this particular tool of counterinsurgency and the population's underlying normative commitments makes any attempt to use law without attention to its grounding in those commitments unwise and likely counterproductive, as the law can only achieve legitimacy if it is grounded in them:

> The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong; a second factor is the person's feeling of obligation to obey the law and allegiance to legal authorities. . . . [W]ithin the range of everyday laws studies, these two sources of commitments to law-abiding behavior reinforce each other.[59]

The uses described above fall along a continuum of legitimacy, ranging from using the law directly as a substitute for lethal, traditionally military means (which neither requires that law be legitimate nor necessarily enhances the legitimacy of the law) to using the law primarily to build legitimacy and then relying indirectly on that enhanced legitimacy to counter an insurgency (which depends entirely on the law's legitimacy to bring about the desired effects). While using the law directly on insurgents (especially those whose struggle has some political salience for the population) may undermine the law's legitimacy and hence its authority, uses of the law at the other end of the continuum that are both dependent upon and intended to enhance legitimacy are unlikely to do so.

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unworthy of obedience, which strains the concept of "law" practically beyond recognition. *See* H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 73 (1983) ("[I]f laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience."). *See also id.* at 77 ("[L]aws may be law but too evil to be obeyed.").

[59] TYLER, *supra* note 42, at 64. *See also* FM 3-07, *supra* note 1, at 6-90 ("[Security Sector Reform] planners do not impose their concepts of law, justice, and security on the host nation. The host nation's systems and values are central to its development of justice system reform").

Uses of the law consistent with the nation's underlying normative commitments—commitments to both substantive rules and to the fairness underlying many procedural rules—increase both the law's authority and the government's legitimacy, in a self-reinforcing cycle.[60] Law's legitimacy is recursive with the government's legitimacy.

V. Implications for Practice

Appeal to the rule of law as a source of operational advantage connects theoretical constructs like legitimacy with tangible effects[61] on the battlefield. A deeper understanding of how counterinsurgents can use the law has direct consequences for how we should use law in counterinsurgency.

A. The "Three C's" of Rule of Law

Rule of law programs have been viewed by counterinsurgents primarily as a way to improve security in areas undergoing active insurgency. As a result, the conception of the rule of law that has come to dominate military thinking has been limited to aspects of the criminal justice system, the so-called "courts, cops, and corrections" approach to the rule of law.[62] The focus on the "three Cs" is not limited to practitioners; a criminal-justice-dominated approach to the rule of law has found its way into doctrine as well.[63] Indeed, the military doctrine is so heavily focused on security and the criminal justice system that even

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[60] *See* FM 3-24, *supra* note 14, at 1-131 ("Using a legal system established in line with local culture and practices . . . enhances the [host nation] government's legitimacy").

[61] United States military doctrine has generally shifted toward an effects-based approach to conducting military operations in which all potential tools, kinetic and non-kinetic, are considered for their ability to produce the desired effect. The effort has been controversial. *See generally* General James N. Mattis, *USJFCOM Commander's Guidance for Effects-based Operation*, PARAMETERS, Autumn 2008, at 18 (discussing the effects-based concept and its limits).

[62] *See generally* Lieutenant Colonel Porter Harlow, *Publishing Doctrine on Stability Operations and the Rule of Law During Conflict*, ARMY LAW., June 2010, at 65, 69.

[63] *Id.* at 69. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-6 (Sept. 29, 2006).

when cautioning against inordinate emphasis on security, it does so by emphasizing . . . security and criminal accountability.[64]

Recognizing the dynamic connection between legal systems and legitimacy can inform both practice and doctrine by including aspects of security that a static approach to rule of law would neglect. Commanders faced with security threats have a strong incentive to adopt whatever means will quickly and efficiently neutralize that threat. Building the capacity of a local criminal justice system without an eye to how that system contributes to the overall legitimacy of the government—for example, by propping up judges and police who reliably support the counterinsurgency, but are corrupt—sacrifices the long-term for the short-term.[65] Legitimate institutions will not only provide better security; they are themselves the ultimate objective. Even if U.S. troops were able to provide the host nation's security without building legitimate local institutions, it would be a mistake to do so because the counterinsurgency will not end, since it's legitimacy, not security, that determines the outcome of an insurgency. And because building legitimacy takes longer than providing security, programs whose success is measured solely in terms of enhanced security are likely to operate on a timeline that is too short to provide any real benefit to legitimacy.

B. The Role of Traditional and Informal Justice in Counterinsurgency

The connection between law and legitimacy works the other way, as well—just as attempts to use the law in illegitimate ways to bolster stability will undermine the legitimacy of the regime, attempts to use law in ways viewed as legitimate by the population but that fail to contribute to the legitimacy *of the regime* are potentially problematic for counterinsurgents. Recent attention paid to "bottom-up" efforts in counterinsurgency[66] and (specifically for law) the potential value of

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[64] *See, e.g.*, FM 3-07, *supra* note 1, at 1-83 ("While military forces aim to establish a safe and secure environment, the rule of law requires much more: security of individuals and accountability for crimes committed against them.").

[65] Nachbar, *supra* note 5, at 316.

[66] *See, e.g.*, Peter Choharis & James Gavrilis, *Counterinsurgency 3.0*, PARAMETERS, Spring 2010, at 34, 42 ("Rather than thinking of COIN as a top-down approach to establish security for national government administrators and foreign aid workers to arrive and provide services and development aid to win the hearts and minds of poor and primitive people, COIN 3.0 would engage a broad spectrum of society with a bottom-up approach.").

traditional and informal justice systems in post-conflict environments[67] potentially falls prey to this error. In many areas, such customary justice (often dispensed by village elders or councils) is recognized as legitimate by the local population; the stability offered by resort to such systems is potentially very valuable to counterinsurgents hoping to improve the security situation in a country with a weak central government.[68] Some have gone so far as to take a "first do no harm" approach with regard to traditional justice—arguing that even a bad traditional justice system is better than no justice system.[69]

The more moderate view is that traditional and informal justice is best approached with caution. Many have recognized the potential substantive deficiencies of traditional justice, which tends to reinforce existing social norms that may be inconsistent with acceptable human rights standards.[70] The focus on the *substantive* deficiencies of traditional justice systems, though, ignores the real problem that such systems present to counterinsurgents, especially foreign intervenors: the effect of traditional justice systems of the national government.

While traditional justice systems can help to improve stability, and with it the legitimacy of the central government, if they are perceived as alternatives to the central government, they will provide stability at the expense of the central government's legitimacy. Unlike the institutional legitimacy that counterinsurgents seek to build, traditional justice systems tend to rely upon and improve the personal legitimacy of the

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[67] "Traditional justice" is a term used in a variety of contexts. I am using it here to describe traditional or informal systems for resolving normal disputes (sometimes civil, sometimes criminal) among civilians. Traditional justice systems (specifically ones emphasizing reparation and the restoration of the social order rather than retribution) have been advanced as a means for facilitating transitional justice as an alternative to formal mechanisms such as criminal trials before the International Criminal Court. *See generally* Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 439–40 (2011). Such extraordinary forms of justice are beyond the scope of my analysis.

[68] *See* FM 3-07, *supra* note 1, at 6-92 ("Traditional justice systems may enjoy high levels of legitimacy with host-nation populations and may possess unique advantages as a means of promoting [security sector reform] in a broader contest"); JFCOM HANDBOOK, *supra* note 6, at D-29 to D-34.

[69] JFCOM HANDBOOK, *supra* note 6, at D-34 ("Do not do anything that will disrupt or degrade the traditional or informal systems unless there is a functioning formal system capable of replacing it.").

[70] FM 3-07, *supra* note 1, at 6-92; JFCOM HANDBOOK, *supra* note 6, at D-33 to D-34.

local leader dispensing justice.[71] A key component of the "rule of law," and of the legitimacy of the government, is the government's monopoly on the coercive power to make rules and resolve disputes;[72] the threat presented by traditional justice systems is a threat to that power, not just to national or international substantive commitments or the risk that the local leaders dispensing justice might not be politically aligned with the central government.[73] The legitimacy enhanced by informal justice is both local and personal, not central and institutional, and therefore at least prima facie inconsistent with the objectives of counterinsurgents.[74] Traditional justice, even if legitimate in its own right, potentially exhibits exactly the same failure as illegitimate uses of law in the name of security—sacrificing long-term legitimacy in the name of short-term stability.

That is not to say that traditional, informal systems do not have a role or that counterinsurgents should not study them carefully. Traditional and informal systems generally reflect social norms (in substance and even procedure) and so provide a direct source of information[75] about how to align legal rules with popular morality, a key way to build legitimacy. It is only to say that the security benefits of traditional and informal justice must remain secondary to the ultimate goal of building the legitimacy of the central government. The legitimacy of the central government is enhanced by traditional or informal justice systems only if they operate under the auspices of that government. A direct way for the government to establish that relationship is by reserving the power to

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[71] JFCOM HANDBOOK, *supra* note 6, at D-32 ("What tends to make a customary system work is its decentralized, local character, and the personal legitimacy and authority of the traditional leaders who apply it").

[72] FM 3-07, *supra* note 1, at 1-41 ("The state monopolizes the use of force in the resolution of disputes."). *See also supra* text accompanying notes 46–47.

[73] *Cf.* JFCOM HANDBOOK, *supra* note 6, at D-33 to D-34 ("Traditional systems may follow customs that Westerners and others outside the community view as contrary to internationally accepted human rights standards. Traditional systems may fall under the control of warlords, insurgents, and other non-compliant actors.").

[74] *See* RULE OF LAW HANDBOOK, *supra* note 6, at 212 ("Further, non-governmental law enforcement challenges the state's monopoly on the use of force."). Nor is an account of the potential political relationship between local leaders and the national government adequate. *Cf.* JFCOM HANDBOOK, *supra* note 6, at D-34 ("Take into account whether the leaders that are empowered will support the long-term policy goals of the HN government and the US."). The point is not whether the individuals empowered through their role in traditional justice systems are political supporters of the central government, it's whether the system itself enhances the legitimacy of the central government.

[75] JFCOM HANDBOOK, *supra* note 6, at D-33 ("Traditional systems usually are very accessible, reflect the values of the community, and are trusted by the people.").

appoint local decisionmaking bodies (even if that appointment power is exercised to ratify local preferences, it ties the traditional system to the central government). Less directly, the central government can establish criteria for the enforcement of decisions made by traditional or informal bodies in the formal justice system.[76]

C. Law and Other Forms of Asymmetric Warfare—The Case of Counterterrorism

Keeping legitimacy in mind helps to preserve the law's authority when used as a tool in armed conflict. As discussed above, counterinsurgency presents little threat to the authority of the law because counterinsurgents seek both to use law and to increase its—and consequently the regime's—legitimacy. Conversely, limited strategies such as counterterrorism[77] (frequently abbreviated "CT"), which rely on law strictly as a means to fulfill the operational objective of incapacitating and deterring adversaries, are more likely to eventually undermine the authority of the law than a complete counterinsurgency strategy. While counterterrorism can use law, it need not. Counterterrorism seems to be the preferred U.S. strategy in places like Yemen and Pakistan precisely because the U.S. does not think it likely that long-term investments in building host nation legal institutions will pay off there.[78]

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[76] Conversely, an absolute prohibition on traditional or informal justice that is widely ignored by the population is likely to undermine the legitimacy of the government. On the relationship between alternative and formal systems, see generally Lisa Blomgren Bingham, *Reflections on Designing Governance to Produce the Rule of Law*, 2011 J. DISPUTE RESOLUTION 67, 74–78.

[77] Counterterrorism is "Actions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks." JP 1-02, *supra* note 17, at 86.

[78] *See* Michael J. Boyle, *Do Counterterrorism and Counterinsurgency Go Together?*, 86 INT'L AFFAIRS 333, 344 (2010).

> A strict CT approach to military force does not involve a state-building component and makes no assumption of the need for territorial control. Such operations are often conducted in regions in which the state has little capacity to maintain order (such as the recent strikes in ungoverned spaces in Yemen and Pakistan). Arguably, a resort to a CT model of warfare is premised on a lack of effective control over territory and of capacity for self-policing by the state.

Even if law does not feature centrally in counterterrorism strategy, nations engaged in counterterrorism are happy to use legal and political institutions when they can. Thus, even though the U.S. has adopted a "war" model for its struggle against terrorism, it still charges and tries terrorists (and pressures allies to as well). But if coalition forces view law only as a means to direct effects on opponents, the temptation will be to use the law selectively when it has the desired effect and to rely on other means when the law would point to a different outcome.

It is that selective use of law, not the use of law more generally, that animates critics of the use of law in war and potentially undermines the legitimacy of law itself.[79] A counterterrorism strategy, by so closely tying military and legal means with the limited goal of direct effects on individual terrorists or insurgents, presents a serious threat to the authority of law. The consequences for counterterrorism go beyond the threat to law; it is a strategy that harms the stability of already-unstable governments by calling upon them to undertake unpopular actions (such as strikes against terrorists who to the local government are insurgents[80] and frequently enjoy some local popularity) without building the legitimacy necessary to make those unpopular actions sustainable.[81] Counterinsurgency, by focusing on long-term legitimacy rather than incapacitating any particular insurgent or terrorist, minimizes the threat that the exigency of armed conflict presents to both the authority of the law and the legitimacy of the government.

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[79] Martins, *supra* note 56 (explaining that the possibility for undermining authority arises when law "merely becomes subordinated as a 'tool' or 'weapon' in the service of warfare").

[80] The Taliban, for instance, presents a terrorist threat to the United States but an insurgent threat to both Afghanistan and Pakistan.

[81] *See* Boyle, *supra* note 79, at 350:

> A central tenet of the modern thinking on counterinsurgency holds that success will require a strong and representative central state that can command the loyalties of the population. By contrast, counterterrorism depends on a state conducting, authorizing or at least tolerating potentially costly strikes against dangerous operatives on its territory. Both counterinsurgency and counterterrorism, then, depend on political capital, but in different ways. A counterinsurgency strategy is designed to build the political capital of the local government, while a counterterrorism strategy requires that government to use its political capital in authorizing costly or unpopular missions. Seen in this light, these missions work at cross-purposes, for one builds political capital while the other uses it.

VI. Conclusion

To say counterinsurgents can use law to fight insurgents is not to say that they should. Law is a complex and morally fraught tool for accomplishing any particular end, certainly for winning a war. Wise use of the law as a means of war—most recently and directly to build legitimacy as part of a counterinsurgency strategy—requires an understanding of how law (or the "rule of law") operates to build the legitimacy of a government fighting an insurgency. Recognizing the relationship between the uses of the law in war and the law's own authority has implications for both counterinsurgency and other forms of war. Because law operates in counterinsurgency by enhancing the regime's legitimacy, counterinsurgents should avoid using the law solely to improve security, for example by overrelying on traditional or informal legal systems that provide security without regard to how they affect the legitimacy of the central government. The use of law in forms of war in which legitimacy features less prominently, such as counterterrorism, presents a more serious threat to law's legitimacy.

Although we are over ten years into the current conflict, we are at the beginning of a new era in understanding how law relates to—and is used—in war. The rise of law's role in war is undoubtedly tied to strategies like counterinsurgency and counterterrorism. Tomorrow's conflicts may not resemble today's—war is ever-changing. Some things do not change, though. Both law and war have been around for as long as there have been governments, and the lessons we are learning in today's counterinsurgency and counterterrorism campaigns will likely play out for generations as, in each new conflict, law finds its place as both a constraint on war and a means of warfare.

THE TWENTY-SECOND MAJOR FRANK B. CREEKMORE, JR. LECTURE*

JAMES F. NAGLE†

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* This is an edited transcript of a lecture delivered by Mr. James F. Nagle, a partner at Oles Morrison Rinker & Baker Law Firm in Seattle, Washington to members of the staff and faculty, their distinguished guests, and members of the contract law community attending the Government Contract and Fiscal Law Seminar at The Judge Advocate General's School, Charlottesville, Virginia, on 18 November 2010. The Major Frank B. Creekmore Lecture was established on 11 January 1989. The lecture is designed to assist The Judge Advocate General's School in meeting the educational challenges presented in the field of government contract law.

Frank Creekmore graduated from Sue Bennett College, London, Kentucky, and from Berea College, Berea, Kentucky. He attended the University of Tennessee School of Law, graduating in 1933, where he received the Order of the Coif. After graduation, Mr. Creekmore entered the private practice of law in Knoxville, Tennessee. In 1942, he entered the Army Air Corps and was assigned to McChord Field in Tacoma, Washington. From there, he participated in the Aleutian Islands campaign and served as the Commanding Officer of the 369th Air Base Defense Group.

Captain Creekmore attended The Judge Advocate General's School at the University of Michigan in the winter of 1944. Upon graduation, he was assigned to Robins Army Air Depot in Wellston, Georgia, as contract termination officer for the southeastern United States. During this assignment, he was instrumental in the prosecution and conviction of the Lockheed Corporation and its president for a $10 million fraud related to World War II P-38 Fighter contracts. At the war's end, Captain Creekmore was promoted to the rank of major in recognition of his efforts.

After the war, Major Creekmore returned to Knoxville and the private practice of law. He entered the Air Force Reserve in 1947, returning to active duty in 1952 to successfully defend his original termination decision. Major Creekmore remained active as a reservist and retired with the rank of lieutenant colonel in 1969. He died in April 1970.

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Prior to his current position at Oles Morrison, Mr. Nagle's career has included service as Chief of the Logistics and Contract Law Branch of the Department of the Army Staff, Trial Team Chief in the Army's Contract Appeals Division, and Ethics Advisor with the Office of Chief of Staff of the United States Army. Mr. Nagle also served twenty years in the Judge Advocate General Corps.

Mr. Nagle's practice focuses primarily on government contracts. He is nationally renowned for his expertise in federal procurement and acquisitions, particularly in the area of construction law. Mr. Nagle's extensive experience includes working with supply, services, international, major systems, and construction contracts. He has litigated in numerous appellate and trial level federal courts, boards of contract appeals, the GAO, and the SBA. Mr. Nagle has mediated disputes between both the government and the prime, and the prime and its subcontractors. Mr. Nagle has represented owners, contractors, subcontractors, sureties, architects, engineers, and all parties in the contracting process. A prominent local and national reputation resulted in Mr. Nagle's

Thank you very much. Well, first off let me tell you how honored I am to be back here and to give this lecture, and it's nice to see so many old friends here. Now having said that, sit back, relax, put your pens down, absolutely nothing I say will have any practical value to you whatsoever **[laughter]**. I mean, I don't expect you to be able to work into your next brief what procurement practices were like during the French and Indian War **[laughter]**; but as we go through this stuff, as I talk about the themes that have developed in government contracting, you're just going to be stunned by my brilliance **[laughter]**. You're just going to sit back there and go, "My gosh, this guy, Nagle, has the brains of an Einstein. No one has ever thought of these things that, you know, that he's—that he's developed; the analytical skills of the man."

First, the government doesn't trust contractors. You know, what an insight. But that started early and it started at the top. George Washington called them "murderers of our cause," and I'll give you another quote from him later on. During the Civil War, Lincoln said, "Those contractors should have their devilish heads shot off."

By the way, before I go further, everyone today is worried about procurement fraud, how terrible it is. Whatever you have today pales before—with the way it was in the Revolution and the Civil War. Today when you look at procurement fraud, you always have this undercurrent: How can those people cheat their country that way? The problem in the Revolution and the Civil War was that very often it wasn't their country. They were Tories or Rebel sympathizers so they were very happy to cheat the Union Army or George Washington's Army, and if they could

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services being employed by both the government and contractors as a consultant, expert witness, and arbitrator/mediator.

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make some money at the same time, they were delighted with that, but however bare, however antithetical,—the animosity that was going on during the Revolution, the Civil War, or today, it pales to what it was in the 1930s. The 1930s, as we'll talk about later on, we'll look at the merchants of death theory, where their contractors were castigated not as cheats, not as frauds, not nearly as cheats and frauds but as murderers; people who had engineered our entry into World War I just to derive extra profits, so that's—we'll talk about that later on.

And I wanted to start with this because that's a theme that goes throughout the entire process. Now if you're sitting back there smug, thinking, "Yeah, we don't trust those guys. We don't trust those guys on the other side of the table." Well, the Government doesn't trust you either, okay **[laughter]**. And that has been a very recurring theme throughout government contracting. It doesn't trust your honesty, it doesn't trust your ability to avoid the appearance of evil, and it does not trust your ability to do the job right; that's how we get to this monstrosity. Basically, Ralph Nash always tell us the story: if an accounting officer up in Juneau, Alaska, makes a mistake, within a month or so we'll have a regulation prohibiting anyone else from ever making that mistake again, so that's how we get to something this big, and I'll come back to that in a moment.

As we go through this, I want to talk about how procurement statutes have evolved. Originally, there was nothing. There was no statute. There was no regulation. It was all individual people going, "Just what do we do? What do we do to get the best buy for the government in these circumstances?" Then it evolved into a few broad statutes that were rarely enforced. The Forfeiture of Claims Act was enacted in 1863. You would find a handful of cases until after World War II, so for basically eighty years it basically sat on the statute books in the library with really no enforcement, and then we get to where we are today, to numerous and ever increasing laws, and not only laws but also very, very specific laws.

Now, let's start out early on. French and Indian—I told you this was going to be an impractical talk—French and Indian War: This was the model that basically everyone used for the—rest of the time in government contracting, the British model. The commissary general, the quartermaster general, they would contract with noted local firms to have things done. Now, calling these contracts is almost insignificant. It doesn't do justice to them. That contractor was a fully functioning

member of the commanding general's staff. As broad as you think any contract was to KBR or any other companies in Iraq and Afghanistan is insignificant compared to what these were. There you would basically go to the contractor, "We're going to move the Army up to Quebec, you know, five thousand, eight thousand, twelve thousand men; feed and transport them there," period. That was it. That was the entire direction to the contractor. Everything else stemmed from that individual's discretion. "Do what has to be done" was basically the model. The discretion is total. The method of payment: cost plus a percentage of cost. We'll pay you all. Basically, we'll pay you your cost plus a reasonable amount of profit. Now if you think that's shocking, well it is, but it was also fair because that's how contracting officers were paid in the early days of the Republic. If a contracting officer bought a cannon for a hundred dollars, he got a certain percentage of that. If he bought the same cannon for two hundred dollars, he got a certain percentage of that **[laughter]**, so it worked out; it worked out.

I want to jump to the Revolution, and I'll tie all of this up eventually. Every problem we have today was present in the Revolution, okay. First, there was a shortage of supply and orders, and I should emphasize that to you because a lot of times people forget that. You impress people in the Army, great, fine, but who's going to build your cannon? Who's going to build your rifles, your muskets? So there's always been a tension between drafting people and basically leaving them home to do work that is essential to the war effort.

Cash flow problems: You worry about budgets now; insignificant compared to the problems they had then. They had no central taxing authority. Basically, the Continental Congress would have to go to the individual states and beg them for money. But the biggest problem was fraud. It was endemic.

"The people at home are destroying the Army by their conduct much faster than British Commander-in-Chief Howe and all his army can possibly do by fighting." It was that serious. It was that problematic; that was by an American general. Eventually, Washington had to resort to impressment. Well, we'll basically go in and then we'll take people's property, and he had a private navy that was designed to go out and basically steal from whoever was on the seas. Now, Washington, they don't talk like this anymore, but "The matter I allude to, is the exorbitant price exacted by merchants and venders of goods, for every necessary they dispose of. I am sensitive"—and he left out the word "to" —"the

trouble and risk in importing, give the adventurers a right to a generous price, and that such, from the motives of policy, should be paid"—got no problem with paying them a fair price— "but yet, I cannot conceive, that they, in direct violation of every principle of generosity, of reason and of justice, should be allowed, if it is possible to restrain 'em, to avail themselves of the difficulties of the times, and to amass fortunes upon the public ruin." How can these people live with themselves? Don't they know that we're fighting for their freedom and yet they take every opportunity to cheat us? So that was really the start of a problem that came up that still is with us today, that distrust of contractors that I mentioned.

The government for a while during the Revolution did away with the contracting system so there would be no general overview contractor. Basically, the commissary general or the quartermaster general would go out and buy—eliminate the middleman and buy the food themselves and then transport it themselves; that was an abject failure. Basically, the government rarely has ever been able—with all the grousing—has rarely been able to do it themselves as well as contractors could. So, basically, very shortly thereafter the government returned, about 1781, to the contract system; and then they brought in Robert Morris, the Superintendent of Finance. Robert Morris is really the father of government contracting. He was sort of an amazing character. There's a brand new biography of him just out. A well-known merchant; what he decided to do is we've got to get competitive bids. We've got to put our needs in a newspaper. We've got to publish them for about four to six weeks, and we've got to give a date that we want bids by. So the first RFP in government contracting: June 30th, 1781. Basically, he didn't use this phrase but it was best value procurement. He didn't go with the lowest price. He went with the higher price who was willing to wait longer to be paid. The government's cash flow problems were so problematic that, boy, if you can charge us a higher price but you give us six months to pay, we'll make the award to you; that was the model long before there was any statute, long before there was any regulation which permeated government contracting for about the first thirty or forty years before you started to get some statutes.

Now, I'm going to jump a little bit. The war is over. The young republic: First off, the Army demobilizes. Until the Korean War, as soon as the war ended all the troops went home; calling it a demobilization is not even giving it credit. It was a riot. "Bring the boys home" was the mantra after every war we've had. For that reason,

peacetime Army contracting is pretty insignificant. I mean, basically members of Congress were not terribly worried about Army contracting during peacetime because there wasn't enough of the Army to be terribly worried about. Some of the biggest contracts during this era were to Russell, Majors, and Waddell, a transport—the freighting company, as the Army—as the Army pushed West. Most of the big contracts were either to them or to road building contracts; the Army topographical engineers would have a lot of the road building contracts. Most of the statutes, most of the attention in peacetime throughout our history has not been military, Army or Navy, contracting. It's been Post Office contracting. That was something that really got the attention of the various members of Congress.

The first statute that required competition was a Post Office statute in 1792. Most of the original clauses came out of Post Office contracts. Tremendous gaps were overcome by that. The post office really was the right arm of civilization forcing the country West. The Pony Express, everybody—that was a ploy to win the government contract, you know. They knew, one lone rider on one pony is not going to be able to carry enough mail to be profitable. They just wanted to show Congress that we can get the mail through, so give us a contract so we can run stagecoaches through that area. The postal service contracting, by the way, was the first one to engage in what they call "socioeconomic requirements." In the 1790s they awarded a lot of contracts to the fledgling stagecoach industry just to get them started, give them a foothold. Then in the 1830s they gave mail contracts to the fledgling steamboat businesses to give them an ability. Then in the 1920s and '30s we'll talk about airmail contracts. Every airplane that you flew on, every airline that you flew on to get here got started on airmail contracts, and we'll talk more about that in a moment.

Let me mention the Purveyor of Public Supplies. Today, we think the Army, the Navy, the Air Force. In the early days, they didn't do the contracting. It was all centralized within the Treasury Department. Alexander Hamilton was the first Secretary of the Treasury. If you've read Ron Chernow's biography of him, when there was a major contract, he didn't sign it. He didn't have authority to sign it. He would go to wherever George Washington was and George Washington would have to sign those major contracts. After a while it got too much for the President and for the Secretary of the Treasury so they came up with the title, "The Purveyor of Public Supplies," a Treasury Department official,

and this is the person who would do a lot of the requirements for buying supplies for the Army, the Navy, as it was then.

Now, let me talk about this: the start of the arms industry. About 1798, there was a scare that we thought we were going to go to war with France, and it spurred the first mobilization of the Republic. Eli Whitney, the inventor of the cotton gin, was kind of down on his luck. He was getting into a lot of litigation over the cotton gin and he needed some money. So he wrote in a response to an RFP, "Let me build 10,000 muskets," and he got the contract. The problem was he had never built a musket before, didn't know anything about it, but he had an idea, and his idea was, his improvement was, up to this time all muskets were done individually, and if Elliott builds one type of musket and Craig builds another type of musket, basically they would not fit together, they could not be cannibalized; and, in fact, if Elliott built one last week and then he built one this week, they would not work together. Everything was done individually. He decided we're going to mass produce them. We're going to create them so that they are interchangeable. The barrels will fit on the stock. The firing mechanism—the firelock will fit along with any barrel.

He was late. He was taking a long time to get this done. They were going to terminate him for default. He said, "Please, I'm on to something here," so they arranged to have a presentation in January of 1801; went to Adams—John Adams was still President then. Thomas Jefferson was Vice President. In what has been called the most important weapons demonstration in American history until the Trinity test in 1945, he walked into the room. Adams was there. Jefferson was there. A bunch of cabinet officers and congressmen were there, and he unloaded a box of various barrels, stocks, firelocks, and said, "Assemble; assemble any weapon you want," okay. So they would each pick one apiece and worked and fit it together and it worked. He said, "That's why I'm doing this; that's why there's a delay; think of the benefits." Jefferson clicked on to this right away. "Don't terminate him for default. Yes, he's late. Yes, he's inexcusably late, but there's a real benefit to this."

He eventually delivered and then the Army—I say "the Army," the government—in really one of the best things government contracting has ever done, they said, "We've got to do more of this," so the Army Arsenal System, Springfield Armory, Harpers Ferry Armory, they really got involved in this. They imposed standardization throughout the

industry. John Hall, Simeon North, all the manufacturers of muskets and later rifles, they had imposed upon them rigid specifications and the government inspectors would test them with go/no-go gauges so that everything was standardized, all the parts were interchangeable. A leap forward. Before in Europe, only the best troops, the shock troops would have the best weapons. Now anybody in that regiment would have a great weapon.

There is a popular phrase, "Close enough for government work." Today, that's an excuse for shoddy work. Originally, in the 1820s, that was a boast. Companies would say, "Look at us. Our quality is so high, our tolerances are so tight that it's close enough for government work. The government has enough faith in us to buy from us; so should you." So I want to make sure everyone understands that, originally selling to the government, close enough for government work, was an imprimatur of quality, and it also had a tremendous impact on factory workers. Factory workers, even more so than in the Revolution, they were an indispensable part now of the mobilization process, which they had not been before.

Now, leaping ahead to the Civil War, and I need to talk about this. In every major war we've ever had, initially it is absolute chaos. The government is totally unprepared for the war. What they did, they bought a tremendous amount of weapons very quickly, low quality. You've all heard the scandals, things like that. Fraud was rampant, rampant. One classic case prior to the war, the Army had condemned about 5,000, 10,000 old muskets as unserviceable. They sold them for about a dollar to two dollars each. When the war started, some shrewd investors bought back those same things for three dollars each, then sold them to Major General Fremont, head of the Western Division – said, "We've got 5,000 carbines for you, perfect condition." The government's rushing now to—the government always rushes in a few weeks to try to make up for years of nonchalance, so they bought them. They were a disaster; better than twenty-two dollars apiece **[laughter]**. Disastrous, disastrous; people lost their thumbs when they would fire; the things would explode. Basically, the government refused to pay. The contractor sued. It went to a commission. The commission said, "Well, we'll give you half. We'll pay you about thirteen dollars." That was not good enough, so they went to virtually the brand new Court of Claims and the government said, "They didn't sell us—they're not in perfect condition," and this was a hundred years before the Truth in Negotiations Act, so the court goes, "Oh, the seller puffed up the quality. Gee, that's

never happened in history before **[laughter]**. You bought the stuff. You signed the contract; *caveat emptor*. Pay them the full amount." Remember, a hundred years before the Truth in Negotiations Act.

And I want to come to this next item, innovations in weapons, and I'll explain why I'm coming to this in a moment. Prior to the Civil War, innovations in weapons went with glacial slowness. If you took an infantryman in the Mexican War, 1845, gave him a Brown Bess musket from the Revolution, it might take them a few minutes then to figure out how to do it exactly, but within a few minutes, they'd know how to do it and their tactics were perfectly geared for that weapon.

The Civil War put everything on its head. I'll give you two examples. The repeating rifle. You've all seen those movies with the cavalry charge, sabers drawn on noble steeds they go out and on those hapless infantrymen. That worked fine when the hapless infantrymen had single shot, short range, relatively inaccurate muskets. It did not work well against long range, repeating rifles; what people in the Civil War called "that damn gun you load on Sunday and fire all week long." Basically, John Keegan in his book talks about one major, Major Keegan—excuse me not—Major Keenan, John Keegan talking about Major Keenan, basically led a cavalry charge at Chancellorsville against troops with repeating rifles. They found the major afterwards with thirteen bullets in him. His adjutant had nine, so all the tactics books that were designed for single shot muskets went out the window.

But the biggest example is the ironclads. Up to the Civil War, they'd all been purely wooden ships. Both sides, the North and the South, decided we've got to work on ironclads. The South took a U.S. ship, the *Merrimack*, and converted it to CSS *Virginia*. The North had a competition, had an RFP, made the award to John Ericsson, and he built what would later be called "the Monitor." He tested it up in, I think it was in the New York Harbor and there was no skunkworks at that time, so this was all in the open, and it didn't do too well in the testing. Front page articles in newspapers ridiculing Ericsson and the government, the Navy, for buying such a thing, Ericsson's folly. They started moving the *Monitor* down to the James River, Hampton Roads, Virginia.

On 8 March 1862, the *Merrimack*, the Confederate vessel, sails out to meet the Yankee fleet guarding the harbor: five ships, 240 guns, a formidable armada. The battle starts. Twenty-nine-gun *Cumberland* blasts away at the *Merrimack*. It bounces off. They fire several shots

into the *Cumberland*; then they ram it, sending it right to the bottom. While this is going on, the *Congress*, a 50-gun ship, blasting away with the *Merrimack*. They all bounce off. Fires—*Merrimack* fired a few rounds into it, starts a fire, hits the magazine, blown up. The flagship of the fleet, the *Minnesota*, panicking, firing everything they can and trying to get away runs aground. Basically, the *Merrimack* can't go after them because of their draft, but they decide, okay, we'll call it a day.

What a day it had been. In a few hours they had sunk two proud ships of the line and heavily damaged a third. No nation had ever done that before. No nation would do it again until 7 December 1941. For one day the Confederates had the strongest Navy in the world. The British government said, "From now on, anyone who goes to sea in a wooden ship is a fool, and the individual who sends them there is a scoundrel." The Secretary of the Confederate Navy, Stephen Mallory, said, "We will tow the Merrimack up the coast. We will take it into New York Harbor, and we will bombard the city and the Union into submission."

The Union was petrified. Lincoln is especially terribly worried. Gideon Welles said, "We've got the Monitor," and the Monitor went down March 9th, the next day; cheese box on a raft. The Yankee soldiers getting ready for whatever is coming see this strange contraption coming at them. "What the heck is that?" It's the *Monitor*. A few hours later the *Merrimack* gets there. They duke it out. People—Southerners always try to argue, "Well, it was a draw." No, it wasn't. The mission of the *Merrimack* that day was to sink the fleet. It didn't get a shot off at the fleet. The mission of the *Monitor* was to protect the fleet. The fleet was protected. So less than a month after newspapers had derided the project as Ericsson's folly, the *Monitor* saved the Union. The reason I bring that out now is up to that date generals, admirals, bureaucrats never had to think too much about contractors during peacetime. Now they did. Now they had a tremendous reason not only to see what is coming out of the factories, what is on the drawing boards, but they had to have a role in shaping that, so that really created a very symbiotic relationship not only during wartime but also during peacetime.

Now, going back to other aspects, Congress acts to reform the system. In writing my history book, I discovered one thing. Congress does two things well: nothing and overreact. **[laughter and applause]** Congress would be shocked, "My gosh, you're paying so much money for this low quality stuff. You must be inefficient. You know, general

counsel, you must be screwing things up or something like that," and they didn't realize we don't have time. We can't wait 30 days, put something out on the street. We need it now.

Montgomery Meigs, one of the unsung heroes, the quartermaster general of the Union Army, basically said, "A horse, a nag that will last thirty days is very often worth its weight in silver. After the debacle at Bull Run, we don't have time to hit the streets with a solicitation. We need horses now, we need rifles now, so don't battle with us and nitpick us after the fact. We had to do something at that time."

False Claims Act: Again, rampant fraud. The fraud, you know, was unbelievable. Abraham Lincoln Act, False Claims Act of 1863, imposing criminal and civil penalties. This was a long time before you had the Civil False Claims Act but the original act had both aspects to it. Stanton, by the way, sort of expanded—Edwin Stanton, the Secretary of War, wanted to expand on that, wanted to allow the Army to court-martial cheaters and their lawyers be subject to court-martial **[laughter]**, which is, of course, just a horrendous idea, but what they also did, they implemented the *qui tam* provision that had started falling into disrepair. Something like ten of the first thirteen acts passed by the first U.S. Congress in the 1790s had *qui tam* provisions.

Qui tam had started in the 13th century in Britain because there was no police department; same rationale here. The Justice Department in the 1860s was insignificant. You know, there was no FBI. They didn't have huge criminal investigation departments, so they basically decided we will set a rogue to catch a rogue. We will basically say, "If you participated in the illegality, if you bring it to our attention you will be able to participate and partake in any recovery." So that was really the first pillar of all the government's antifraud measures that we'll talk about later on.

The problem was—and this is a problem we have now, Meigs complained about it—the anti-contractor sentiment, antifraud sentiment was so great that Meigs complained, "Let any man propose a new provision of law slated to be intended to restrain contractors or officers"—remember what I said, the government doesn't trust you either, okay—and it goes through with little examination. Every once in a while, and we're in such a period now, Congress seems to just keep thinking, "Well, we can keep coming out with all these statutes and it won't cost us a dime. We'll just keep all these statutes in there." And

Meigs was very concerned about that because sometimes they were so concerned about constraining fraud, restraining contractors, that they were really harming the war effort. One of the requirements was that no contract could be let until it had been approved and signed off on by a local magistrate. Where are we going to find a local magistrate during the Battle of Chickamauga? So they were very concerned about some of these requirements.

Now, I'll just keep going on this. The war ends. Demobilization and the rise of consumerism: Every one of you that are here today in suits you can thank those suits to the Union Army. Prior to that time, if you wanted a suit of clothes, you would either do it yourself or you'd buy it from a tailor who would individually make it for you. The Union Army when they all at once had to outfit hundreds of thousands or millions of men, they came up with the concept of sizes: small, medium, large, and after the end of the war, they translated that to the civilian marketplace and a lot of the companies that had really gotten their start in selling to the Union Army, the Great Atlantic & Pacific Tea Company, the first chain store, A&P, got their start. Montgomery Ward also got their start.

During this period, building the fleet, let me explain a little bit about this. During the Civil War, the U.S. Government had the strongest navy in the world, and then, as I said, demobilized. They literally demobilized so by the 1880s Brazil bought a used cruiser from the British and Washington panicked. They estimated that one cruiser could defeat the entire U.S. Navy. So Chester A. Arthur, not a President known for his activism, decided we've really got to do something. We've got to—create the gray steel, blue water Navy, so they really started that.

I want to mention one problem there. They bought a lot of armor from Andrew Carnegie, and at one point, they decided that Carnegie was overcharging the government, so the Secretary of the Navy said, "We want to come in and we want to take a look at your books." Carnegie said, "Go to hell." **[laughter]** "We don't open our books to our competitors; we don't open them up to you. There is no statutory, regulatory, or contract clause requiring us to open our books to you." And there was none. At that time, the government had no visibility whatsoever into a contractor's books. Secretary of the Navy Whitney decided, "Well, we'll go to Europe and find out how much you're selling it to those people," so we put an investigator, probably the equivalent of a CID or something like that, on the steamship to go over to Europe. Carnegie found out about it and put his own person on that boat, and he

got off the boat first **[laughter]**, so he went to the British and French and said, "This guy's coming; don't give him anything," so the British and French did not, and we'll talk about that, how that comes about; how that changes things.

I do want to mention the Spanish-American War very briefly. Splendid little war, 1898. The battleship *Maine*, that had been a big dispute in government contracts, by the way, when they were building the fleet, blows up in Havana Harbor. We go to war and, boy, did we whup them Spaniards: beat them badly, beat them quickly, and as you go through the records at the time you can just feel the procurement system going, "Hey," **[laughter]** "we're good," and they really got very, very complacent about, you know, about how effective they were, how efficient they were, and that would come back to haunt them with terrible results in World War I that we'll talk about in a moment.

Now, Congress—excuse me, contracting enters the 20th century; contracting becomes centralized again. Remember earlier I had said the purveyor of public supplies, everything is funneled through the Treasury Department; then that went away and War Department, Navy Department, two entirely separate departments then, really got into it and Teddy Roosevelt decided, "You know, we've got too many people buying too many things. We're not getting the benefits of economic quantity discounts," things that we would require today. So there were two commissions, Dockery Commission and the Keep Commission; they came up with a board of award whereby this board of award would award schedules, you know, GSA hasn't been created yet but there would be schedule contracts that all the other agencies would order off of. It was designed to simplify the process, get the government better quality at lower prices, so the first start of what would later evolve into GSA.

Birth of aviation.. For the first time the government confronts an industry which is evolving faster than the procurement process can deal with it and that created problems for them. In 1908 the Army bought its first airplane from the Wright brothers. There were specifications which weren't too great because the Army didn't really have a great idea how to do this, but the contract itself was about two and one half pages and many of you have already seen it. It said basically three things: We want to buy an airplane; we want it to fly; if it flies more than forty miles an hour, we'll give you an extra twenty-five hundred dollars for each extra mile up to a cap of ten thousand dollars. The Antideficiency Act

was in place there, so they couldn't give them a blank check, and that was basically all it said, so that was the government's first venture into that. The same year, by the way, they bought the first airplane they also bought their first dirigible because they weren't sure where this technology was going, so the Army wanted to have both its bases covered, so that would be a main impact later on.

Navy versus the steel industry; big battles going on. The Navy decides at some point we're not going to buy any more armor plates from you; we're going to build our own plant. Disaster. They discovered it was not as easy to build this stuff as they anticipated; cost them a lot more so they abandoned it very quickly, but by the same token, the steel industry, which had always complained about what are these specifications, who are these inspectors that you have coming out driving us crazy, it took them a while but the Navy, steel industry, later decided that was a good thing. That forced us to focus on quality than we ever had before and that it really improved our ability to function.

Let me mention the Mexican Border Campaign, and I know I'm jumping around because I've got so much to cover. Pancho Villa crosses the border, has a raid, kills Americans. Everyone goes ballistic. President Wilson sends John J. Pershing down: "Teach them a lesson, capture them." The Mexican Border Campaign is important because of two developments. It was the first time the Army used its airplanes in combat, primarily for scouting, but they had bought a lot of Jennies from, I think, then, Glenn Curtis, later went to Lockheed Group, and they also used automobiles. One lieutenant described the first raid. They piled fifteen armed Soldiers into three Dodge touring cars, raced up to a bandit stronghold, shot it out with the bandits, killed their leaders and captured them all. The lieutenant wrote, "We could not have done this with horses. The automobile is the horse of the future." The lieutenant was George Patton, okay, so we just sort of love the idea that it was sort of a prelude to what would come later.

World War I: We entered the war in 1917. Europe had started fighting in 1914. We had a three-year head start. The allies were coming to buy weapons from us, so we were gearing up, already. In 1916, Enoch Crowder, former TJAG, made the most significant contribution any TJAG has ever done to the national interest. He was the principal drafter behind the National Defense Act of 1916. The War College had come out with some recommendations right after the *Lusitania* had been sunk. He implemented those and other

recommendations into this act. He said, "If we go to war, the President will decide priority." Why was that important? The Army and the Navy, totally separate cabinet departments. Anytime there was a war or a major effort, they would compete against each other, and then you had the Merchant Marine where they were competing, so they wanted a situation where the President or his delegees will decide: this steel, it's got to go to the Army; that steel, it can go to the Navy. The act also said, "And if any contractor refuses to take one of these orders in the appropriate priority, the President is authorized to take over that factory and to run it for the war effort." A similar act passed within a few days said, "Oh, and by the way, the President can seize any transportation element of this country to do that for the war effort," you know, the railroads, primarily, okay.

We get into the war in April 1917, and within about a week – well, actually, within two days but they didn't announce it until about a week later – the government did what it had always done at the start of a major war, "Oh, by the way, you know that big"—what we today call "sealed bidding"— "you know, formal advertising, well, scrap it. We don't have time for that. You know, we have to mobilize very quickly so you can go out and"—what we would today call "negotiate"— "you can buy in the open market." It was an amazing situation. The priority system went into effect; the setting prices. Contracting would eventually adapt to the war. They would come up with new contract types. Labor standards were implemented for the first time. There would be a prevailing wage. We had a contracting or an industrial czar, Bernard Baruch. General Motors, Ford, all the other—all the big automakers, they did not want to stop making their civilian cars, so they had—the government wanted them—"You got to keep building tanks and these other things," so they had a meeting in Baruch's office. William Durant, head of General Motors, said, "Oh, no, we're not going to do that."

"Oh, okay. Let me make a phone call." Baruch picked up the phone. "No more steel will be delivered to Detroit." Picked up the phone again. "No railroad deliveries will go to or out of Detroit." Picked up the phone a third time, Durant goes, "We give up. We will not make civilian cars for the duration." And the results were terrible. We failed. All that optimism, impressed with ourselves from the Spanish-American War, went to naught. When the 1st Division sailed for France, they sailed without helmets. When they arrived, they were basically put into the position of beggars and scavengers, trying to buy, borrow, steal things from the French and British. Pershing noted at the end, "Not a

single American-made tank fought at the front." Pershing: "It seemed strange that with American genius for manufacturing from iron and steel we should not ourselves after a year and a half of war almost completely without these—we find ourselves almost completely without these mechanical contrivances which had exercised such great influence." David Lloyd George, the British wartime prime minister, put it even more bluntly, "It is one of the inexplicable paradoxes of history that the greatest machine-producing nation on earth failed to turn out the mechanisms of war after eighteen months of sweating and toiling and hustling. There were no braver or more fearless men in any Army, but the organization at home and behind the lines was not worthy of the reputation which American businessmen have deservedly won for smartness, promptitude, and efficiency." That was a scary thing, because even with a three-year head start, from 1914 to '17, we couldn't get the job done; and for the first time modern planners realized we can mobilize personnel a lot quicker than we can mobilize material, and that would color the interwar period that I'll talk about in a moment.

Now, a lot of problems during the war as you anticipate. Right after the war, Congress enacted what today we call the False Statements Act, so by October 1918 the government had the two pillars of what is today its antifraud methods: False Claims Act, False Statements Act. They also prohibited "cost plus a percentage of cost" contracting. What had been the standard method for the first fifty years clearly of our national existence were done away with. Now, Congress again went back and had some hearings, very upset, "Boy, look at the prices you paid. This is outrageous. Couldn't you have gotten competition; couldn't you have gotten lower prices?"

Now today when that happens and generals and admirals are called—and SESs are called up to Capitol Hill, they're very, "Oh, we're sorry. We tried. It was terribly stressful circumstances. We'll do better this time." Charles Dawes was the head of the purchasing for General Pershing. "Sure we paid. We would have paid horse prices for sheep if sheep could have pulled artillery." **[laughter]** "It's all right now to say we bought too much vinegar or too many coal chisels, but we saved the civilization of the world. We weren't trying to keep a set of books. We were trying to win a war." I like that guy. Dawes, by the way, in 1921 Congress passed the Budget and Accounting Act of 1921, created the GAO, and created the Bureau of the Budget, today OMB, he was the first Director of the Bureau of the Budget; later won the Nobel Peace Prize for the work he did in helping Europe to recover and became the Vice

President of the United States. So somebody didn't hold it against him the fact that he went in there and said, "This is what we're going to do."

The interwar period: Airmail. As I said, all the airlines started there. There was a conference with the Post Office; they drove this. Post office basic—postmaster general said, "Okay, we're not going to have this debilitating competition for so long. I'm going to divvy up the routes this way," and out of that conference, called the "Spoils Conference," United Airlines arose, American Airlines arose, and eventually Delta arose, so airmail contracts were a big, big deal that was to survive, because nobody was going to be a passenger in these planes. This was a fairly dangerous activity in the '20s and '30s, so airmail was the lifeline.

The military between the wars: When you go back and you look at this, this is really kind of an amazing period. The military, you could just feel, they were frightened. They had seen what had happened in World War I, and they were—they were petrified. Douglas MacArthur was the Chief of Staff in the early '30s. He begged Congress, "Let us award" what they called "educational orders to industry just to educate them as to how to build tanks, how to build the latest artillery." Congress refused because of that merchants of death theory. They were so upset with industry, the profits they were making, that they refused—refused to give them any—any more audits, and I'll talk more about that in a moment. Vinson—by the way, remember, two entirely separate departments—Vinson-Trammel hearings only applied to the Navy; the Army hearing obviously applied to the War Department. For the first time, we really had statutory authorization for audits, so you can go in and take a look at the contractor's books, very limited but the door had been opened, and they also put a cap on profit.

Now, socioeconomic goals during the '30s. First of all, contracting for the CCC, the Civilian Conservation Corps, Roosevelt's program. The Secretary of War tasked the quartermaster general, "Supply all those youngsters in the CCC," primarily youngsters, "with food, equipment, clothing, shelter, and then transport them to wherever they need to be," really helped the government get their act together in that regard.

Hoover Dam, right outside Las Vegas. People today think of that as a New Deal program. It was not. It was started under Herbert Hoover, the Republican predecessor. Sort of an interesting contract. Department of the Interior and the Bureau of Reclamation had an interesting clause in there. "No Mongolians are to be hired during the performance of this

contract." No Asians, okay; didn't say anything about African-Americans, one way or the other, so they—out of the thousands of people that Six Companies, which was the name of the contractor hired, they only hired a handful of African-Americans, housed them separately in deplorable conditions, and gave them the worst jobs. When the Roosevelt Administration came in, they didn't like that, but there really wasn't anything they could do at the time.

Now later, in June of 1941, President Roosevelt issued an executive order, 8,802, prohibiting discrimination by government contractors. Congress went ballistic. "Who do you think you are, Mr. President, to do something like that? You have no authority to do that." His response was, "I'm doing it in my capacity as commander-in-chief. World War II has already broken out in Europe. I do not want, you know, the—our mobilization effort hampered by discrimination." So the Hoover Dam contract, if you ever get a chance take a look at it, that actually led to the Buy American Act of 1933. While the major contract was awarded to an American company, a lot of the other contracts were awarded to foreign countries, British, German, what have you. They didn't like that; the Great Depression. So basically Congress delayed opening of some other bids until they passed the Buy American Act. Herbert Hoover—it was the last act Herbert Hoover signed before he was replaced by Franklin Roosevelt, and it was a good thing that they did because when they finally did open the bids, the winning firms would have been German firms, so they excluded them and were able to award to the U.S. firms. Buy American Act, by the way, if not *the* first it's one of the first statutes that ever specifically calls for debarment for those who violate it, and I'll come back to that in a moment.

Wage laws: This is one of those areas where the government really put its money where its mouth was; where the government says, "Okay, we know that during the Depression that we can hire workers for pennies a day. We don't want to do that." So they came out with the Davis-Bacon Act, the Walsh-Healey Act, trying to make sure that people were paid a decent wage. The same thing with the Miller Act, 1935, 1936, basically saying, "If the prime—the general goes bankrupt and you have no privity, you cannot sue us, then basically, we will require and we will pay for a bond."

Now, I need to keep going quickly now. World War II: To say we had let our defenses down doesn't really give it justice. In 1939, the U.S. Army was the seventeenth largest in the world. When Hitler crushed

Poland in September of ’39, we rose to sixteenth. Romania had a bigger Army than the U.S. Army. Not only was it small, it was terribly ill-equipped. Recruits trained with broom handles, wooden machine guns. If you’ve seen film clips of the era, you’ll see an old truck moving around with a sign painted on it, “Tank,” so they could practice armored maneuvers. In 1940 and 1941, the Army had maneuvers in Louisiana and you saw the cavalry charging and the trucks with paint—tanks painted on them, and back then there was no television, but news reels at the movie houses showed this. And a few years earlier, everyone would have been impressed with this, but those same movie theater goers just a few months before had seen the German tanks on the blitzkrieg and one newspaper, major newspaper, really encapsulated it and I’m pretty much quoting, “We felt as if we were watching a bunch of Boy Scouts playing with BB guns.” It is obvious that the only thing for America to do now is to arm with all its might.”

So the rules started changing, and they changed—Congress changed them, not because they feared contractors any less, but they feared Hitler more, so when he crushed Poland a lot of the restrictions came off; when he went into France, more restrictions came off; and then, Pearl Harbor, everything was off. Absolute chaos. Again, we were unprepared but we got the act together fairly quickly. On 7 December 1941, Pearl Harbor was bombed. On 18 December 1941, Congress passed the first War Powers Act, saying in pertinent part, “For the duration of this conflict, the President is authorized to contract without regard to any provision of law.” Translation: Win the war; forget about all this legal foolishness. So they really got going.

Richard Neurater, a great political scientist, said, “Of all the Anglo-American freedoms, freedom of contract took the biggest beating during World War II.” You did what the government told you; you would do it at the price they told you, you would do it. It was a very, very structured economy. For the first time we really started seeing incentive contracts, new contract forms. Cost contracts not only proliferated but now the government said, “We need to take a look at your books,” so the audit clause is expanded. “Not only that, we’re going to come up with this new law of cost principles; we’re going to tell you right now what type of costs we think are appropriate for us to reimburse you,” and they came up with renegotiations to try to eliminate excess profits, okay. This worked successfully.

After the war, again, massive demobilization, but Congress realized there's a problem. We can't have any more of this interservice rivalry, and today we joke about it, but then it was really serious. I mean, in the Pacific, MacArthur and Nimitz basically fought two different wars, so they created the Defense Department. And then they came out with the Armed Services Procurement Act of 1947, unifying the procurement practices. Two years later, they came out with the Federal Property and Administrative Services Act, 1949.

Korean War: For the first time we do not totally demobilize after a war. The Cold War was going strong and we keep up the process. The Defense Production Act basically allows the government to act as a traffic cop. Here I need to spend some time on this. From 1953 to 1980, for the first time you have the rise of a real defense industry. For a long time contractors didn't want to sell to the government because it was so sporadic. You know, now they could realize, no, the government's in this for the long haul, so you have the rise of the aerospace industry; and for the first time, you have companies who are totally dependent on the U.S. Government. They are a monopsony. Everyone knows what a monopoly is, when there's only one seller. "Monopsony" is when there's only one buyer, so there's a tremendous impact for those companies to really, for lack of a better expression, be cozy with the government.

Antifraud measures come about. Truth in Negotiations Act, 1962. Remember that case I mentioned in the Civil War, *caveat emptor*. Truth in Negotiations Act basically guts caveat emptor. "You've got to disclose this to the government, and then with our expanded audit provisions, we will determine whether that is a fair and reasonable price." And the sole reason why Congress did that was that Congress said, "Government, you are now buying a lot of things that nobody else buys. You have no ability to determine if that is a fair and reasonable price by price comparison because there may not be any price comparison." What you had during this period – you had the culmination of everything we've talked about that allowed the government to have a really vibrant antifraud remedy. Let me explain that. The U.S. Government is not the brightest entity on the face of the earth **[laughter]**, but if at any point it decides people are trying to cheat it, things get very ugly very, very quickly. Criminal remedies: False Statements Act, False Claims Act; civil: Civil False Claims Act; contractual remedies; and then what we really got going during this time was debarment.

Okay, I need to explain that to you. Debarment has evolved over a period of time. Late 1920s, 1930s, the Army Air Corps discovered that what is now General Dynamics had been overcharging it on airplanes, about $300,000, a huge sum there. This is what the Army Air Corps did, and they didn't hide this, they bragged about it. Major General Mason Patrick, head of the Army Air Corps, Patrick Air Force Base in Florida is named for him, he calls in Reuben Fleet, the head of what is now General Dynamics, and says this: "You're going to build 50 more airplanes. You're going to sell them to us at a dollar apiece or you'll never again get a contract with the Army Air Corps." And there was none of this foolishness about due process **[laughter]**, because in 1930—today, if you had a dispute with J.C. Penney, you would not have to have a hearing to decide if you'll take your business elsewhere; that's the way the government perceived itself then. If we have a dispute with you, we'll just go elsewhere; and trust me, in 1930 if the Army Air Corps didn't buy your planes, you were out of business if you were a plane manufacturer, so they delivered—they delivered the planes.

By the 1960s, however, the philosophy was that while no one has a right to a government contract, everyone has a right to compete fairly for a government contract, so you have more due process remedies; however, the problem was the monopsony. Those contractors depended on the government; the government depended on those contractors. So let me make a statement and let me explain it. The debarment process is not a fair process. The reason why I say that: Boeing has been caught doing some things in the last decade that if a Mom and Pop machine shop did it, they would have been debarred in a heartbeat because you can find 500 more willing to take your place. The government's not going to debar Boeing. I gave a talk one time when there was an Air Force criminal investigator and he explained he had wanted to debar Boeing. He got a briefing with the Secretary of the Air Force. He went in there with all his charts, "This is what Boeing did. This is why we should debar the entire corporation," and at the end of the briefing, the Secretary of the Air Force said, "You obviously don't understand. Without Boeing, there is no Air Force. Get out." The situation had grown to such a level that those contractors were totally dependent on the government but the government was really dependent on those people, too.

Now, let me mention one other thing. You had the criminal, civil, contractual, and administrative. The other problem was the process had gotten so complicated. In the late '80s, the Government was prosecuting

Rockwell International for defective pricing, false statement, false claim. Rockwell pled guilty. The subcontract manager pled guilty. The material manager pled not guilty. I was brought in as the government's expert witness to explain to the judge and the jury in LA what government contracting was all about, what defective pricing was all about. So I was on the stand for direct examination for about a day and then I was cross-examined for about a day and it wasn't nasty cross-examination. It wasn't my case, I didn't care who won, but they put the long definition of cost or pricing data in front of the jury and walked me through it, and I said, "Well, yes, there are eleven cases that say that word means this; then there's another two or three that say it means that." Then in their summation to the jury, the defense counsel praised me to the hilt. "Ladies and gentlemen of the jury, we had a learned expert come in here, charming, witty, intelligent," **[laughter]** "just a wonderful fellow. Ladies and gentlemen, if the Government had to bring in an expert to try and explain these rules to you, try and make sense of these rules to you, how can you convict this poor man of violating them?" whereupon the government's case went into the toilet. The rules had gotten so complicated that it was very difficult—but remember, criminal, both beyond a reasonable doubt and to a matter of certainty, didn't do it in that case. Civil, a preponderance of the evidence, lower standard; contractual, whatever the accounting officer thinks is reasonable; and debarment, whatever the debarring official thinks is reasonable.

I'm going to talk a little bit about McNamara, Robert McNamara, Secretary of Defense under Kennedy and Johnson. You can thank Robert McNamara for this. Basically McNamara did not like Army supplements, Navy supplements, so he basically had his RIP, his Reduction in Implementation plan. He created the Defense Contract Administrative Services; took all of this stuff, put it into the FAR; tripled the size of the FAR, the ASPR at that time, in one year. He also did one other thing on profit. He started the weighted guidelines method for computing profit. You're probably all familiar with that. McNamara started it because he was worried that defense contractors were not making enough profit. He was worried that contracting officers were being so hard-nosed at the bargaining table they were forcing such low profit margins that industry would not be able to modernize and that was a big worry for him. He came out of World War II, where the arsenal of democracy had saved us, so he wanted to make sure of that.

Now, let me keep going on this. We know a sea of paperwork is a real problem. Remember in 1939, *Perkins versus Lukens Steel*, "a violation of a regulation." What does the Supreme Court say? Who cares? If a contracting officer violated a regulation, that's between the contracting officer and his or her supervisor. Contractor, you get no standing to challenge that; go home. That had turned. Now basically everyone's coming in and suing because this regulation has the force and effect of law by virtue of the *Paul* and *Christian* cases in 1963, so now you're not violating just some rinky-dink guidance, you're violating something of law. So the age of lawyers and litigation comes in.

Protests: I don't have to take a poll. Every one of you hates protests. Congress loved protests. Congress calls protestors, "private attorneys general out there policing the system," so the system had gone very non-agile.

In 1986, all of you are with the government. You are the beneficiary of 200 years of loophole closure **[laughter]**. Very often when the government litigates and loses a case they've got to decide, well, do we want to appeal or not? No. You know, we've got bad facts; that's why we lost at the trial level. We don't want to appeal and lose again under a broader presence. Let's go back and change the rules, and that's basically what they did. In 1986, Congress amended the Truth in Negotiations Act eliminating a lot of defenses. Well, the Contracting Officer, you should have known; I was in a superior bartering position. We negotiated not on line item but on bottom-line price and they never got a certification; wiped out. The other thing that Congress wiped out was a problem with that False Claims Act from 1863. Basically the original statute came out "knowingly submit a false claim." No definition of "knowingly," so it was actual knowledge. Congress discovered, however, that every contractor had someone like Mike Mueller. Every company should have someone like Mike Mueller. Mike will sign anything **[laughter]**. A leaf blows on his desk, he'll sign the leaf, and he would pass a polygraph, "I did not know that was false"; therefore, he and his company escaped liability. So Congress in '86 amended the statute, three definitions now of "knowledge": actual knowledge, deliberate ignorance—remember *Hogan's Heroes*, Sergeant Schultz. "I know *nothing*! I see *nothing*!"—or reckless disregard; if Mike does nothing to really check that out.

Now—all right I know I'm kind of moving quickly now. What was the result of all this? Contractors, not just crooked—a lot of good

contractors leave or don't get into the market. I retired from the JAG Corps in 1990. I was a typical government employee. For twenty years, every contractor I had dealt with was a government contractor or a wannabe government contractor. I assumed everybody wanted to be a government contractor. When I joined my law firm, they had a reception for me to meet some clients. I met a medical supplier. "Oh, you must sell a lot to the government."

"No, we don't sell to the government; too much trouble."

And a month or two later I met another contractor, medical supplier. "Oh, do you sell to the government?"

"Yeah, but we're getting out of that business."

"Why? I mean, the government spends so many billions of dollars."

"The government is three percent of my business and they're forty percent of the paperwork. I can find more profitable work elsewhere."

And that was a real problem at the time. Congress also had a study done at the same time that discovered anywhere from fifteen to fifty percent of a government contract had nothing to do with what makes these contraptions work. It was designed to accomplish a lot of other socioeconomic goals that added nothing to the value of that. So there was an impetus to try and resolve that. Some of you—you know, Elliott probably remembers this very well. The biggest deal was in Desert Storm. Basically, the Army had to buy 6,000 commercial radio receivers, what today we would call "cell phones." Motorola or Magnavox, I can't remember which one it was, **[cell phone rings]** was going to sell them—right on cue, okay **[laughter]**. My training aid, ladies and gentlemen—was going to sell them but the Government said, "We need this most favored customer, that this is the lowest price," and they couldn't waive that so the company refused to sell. They didn't want to wander in and make a mistake that would get them indicted. The Japanese government, as part of its contribution to Desert Storm, bought the radios and donated them to the Army; that was a major embarrassment. In fact, President Clinton when he signed FASA, the Federal Acquisition Streamlining Act, mentioned that.

I'm going to just try to leave one or two moments for questioning. I wanted to leave you with this about World War II. We failed in World

War I. World War II was our greatest success story. The arsenal of democracy really came through. DuPont was producing more explosives in one day than it had done in all four years of the Civil War. Liberty ships were coming off the line one a day. There was a joke that went around the country in 1944. A woman was invited to christen a ship. She comes to the Liberty shipyard. She was taken to an empty boat slip, given a bottle of champagne. "Well, where's the ship?"

"You just start swinging that bottle, lady, we'll have a ship there" **[laughter]**.

But the greatest testament, accolade to government contracting was on 30 November 1943. President Roosevelt and Prime Minister Churchill have gone to Tehran to meet with then Marshal Stalin. After dinner one night, Stalin stood up and he proposed a toast, and Stalin is not a man known for dropping praise, but he said, "To American production, without which this war would have been lost." So the next time someone finds out you're involved in government contracting and kid you, as they always do, about how many four-hundred-dollar hammers you bought or sold that day, ask them when was the last time their profession helped save the nation. We're in sort of a rough time now. We get criticism on both sides of the table; a lot of it justified, much more of it unjustified, but it will turn around. The nation has always been able to count on us, so I think I ended—I'm a beloved guest speaker, by the way, and it is not only because of the brilliance of my remarks, the comprehensiveness of my material, it is because I never, never go over my allotted time **[laughter and applause]**. I finished with four minutes to spare. Thank you very, very much.

THE TWENTY-EIGHTH ANNUAL GILBERT A. CUNEO LECTURE IN GOVERNMENT CONTRACT LAW[1]

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[*] This is an edited transcript of a lecture delivered by Professor Ralph C. Nash, Jr., to members of the staff and faculty, their distinguished guests, and officers attending the 60th Judge Advocate Officer Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia, on November 18, 2011.

Professor Emeritus of Law of The George Washington University, Washington, D.C., from which he retired in 1993. The lecturer founded the Government Contracts Program of the university's National Law Center in 1960, was the Director of the Program from 1960 to 1966 and from 1979 to 1984, and continues to be actively involved in the Program. He was Associate Dean for Graduate Studies, Research and Projects, of the Law Center from 1966 to 1972.

Professor Nash has specialized in the area of Government Procurement Law. He worked for the Navy Department as a contract negotiator from 1953 to 1959, and for the American Machines and Foundry Company as Assistant Manager of Contracts and Counsel during 1959 and 1960.

He graduated *magma cum laude* with an A.B. degree from Princeton University in 1953, and earned his Juris Doctor degree from the George Washington University Law School in 1957. He is a member of Phi Beta Kappa, Phi Alpha Delta, and the Order of the Coif.

Professor Nash is active as a consultant for government agencies, private corporations, and law firms on government contract matters. In recent years, he has served widely as neutral advisor or mediator and arbitrator in alternate dispute resolution proceedings. He is active in the Public Contracts Section of the American Bar Association, is a member of the Procurement Round Table, and is a Fellow and serves on the Board of Advisors of the National Contract Management Association.

During the 1990s, Professor Nash was active in the field of acquisition reform. He served on the "Section 800 Panel" that recommended revisions to all laws affecting Department of Defense procurement, the Defense Science Board Task Force on Defense Acquisition Reform, and the Blue Ribbon Panel of the Federal Aviation Administration.

He is the co-author of a casebook, *Federal Procurement Law* (3d ed. 1977 (Vol. I) and 1980 (Vol. II)) with John Cibinic, Jr. He and Professor Cibnic also co-authored five textbooks: *Formation of Government Contracts* (4th ed. 2011) (with Chris Yukins), *Administration of Government* (4th ed. 2006) (with James Nagle), *Cost Reimbursement Contracting* (3d ed. 2004), *Government Contract Claims* (1981) and *Competitive Negotiation: The Source Selection Process* (3d ed. 2011) (with Karen O'Brien-DeBakey), co-author with Leonard Rawicz of the textbook *Patents and Technical Data* (1983), the three volume compendium, *Intellectual Property in Government Contracts* (5th ed. 2011), and the two-volume, *Intellectual Property in Government Contracts* (6th ed. 2008); co-author with seven other authors of the textbook *Construction Contracting* (1991), co-author with Steven Feldman of *Government Contract Changes* (3d ed. 2007), and co-author with Steven L. Schooner, Karen O'Brien and Vernon Edwards of *The Government Contracts Reference Book* (3d ed. 2007). He has written several monographs for The George Washington University Government Contracts Program monograph series, and has published articles in various law reviews and journals. Since 1987 he has been co-author of a monthly analytical report on government contract issues, *The Nash & Cibinic Report*.

PROFESSOR RALPH C. NASH, JR.*

That's the third edition of formation. The fourth edition just came out. Steve is teaching using it this fall, and when he got his copy, the first thing he said to me was, my main issue in using your book this semester is to not drop it on my foot, because it's so fat.

Gil Cuneo was a fabulous guy. He actually, in my view, is the one who professionalized government contracting. When Gil came into the business out of the government, the practice of government contract law was there, but it was a pretty unsophisticated practice. This is a long time ago. And Gil began turning out really high quality documents; I think really the first person that did that.

When I set up the program in 1960 and began to give a—I started out with a two-week course in '61. I had five outsiders and, of course, Gil was one of those five. One of the great things that happened to me at the end of his life was that he and I were down here together. If he died in '76, it must've been '74 or 5, somewhere along in there. I don't know how many of you remember, but by that time, he was in a wheelchair. He was having a hard time getting around. But we did get a chance to go to dinner that night and it was a wonderful way—of course, I didn't know he was going to die in the next year or two—but it was a wonderful way

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[1] The Gilbert A. Cuneo Chair of Government Contract Law was dedicated on January 9, 1984. Gilbert A. Cuneo attended St. Vincent College, Latrobe, Pennsylvania, and Harvard Law School. He received an honorary LL.D. from St. Vincent College in 1973.

After graduating from Harvard Law School in 1937, he was engaged in the private practice of law in New York City until entering military service in October 1942. From August 1944 to March 1946, he was a member of the faculty of The Judge Advocate General's School, where he taught the legal and accounting phase of government contract negotiation, termination, and renegotiation, and wrote a substantial part of the text entitled *Government Contracts and Readjustment*, published by The Judge Advocate General's School.

Mr. Cuneo served as an administrative judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals, from 1946 to 1958, at which time he entered private practice in Washington, D.C.. He served as Chairman of the Section of Public Contract Law of the American Bar Association in 1968–1969. Mr. Cuneo was an Honorary Life Member of the National Board of Advisors, and a recipient of numerous MCMA awards and citations. A pioneer in his field, Mr. Cuneo wrote and lectured extensively on all aspects of government contract law for thirty years. As a commentator on developments in the field of government contract law and as a premier litigator, he shaped much of the present law of government contracts and was considered the "dean" of the Government Contract Bar until his death in April 1978.

for me to celebrate the life of a great person, a person who did an awful lot for our community.

I decided for my talk today to use the article -- the article that I wrote in the GW Law Review,[2] the origin of that article—I quit writing law review articles before most of you were born. You know, I did my four or five—I forget how many, when I was a young professor, and it occurred to me that nobody was reading them. So I decided not to write any more, and switched to books, which nobody reads, probably, either. But I was asked by the federal circuit bar people in their annual meeting, one-day meeting, to critique the government contracts decisions of the court. And they knew I was a critic, of course, they read the *Nash & Cibinic Report* and it was very kind of them to ask me, I guess.

Part of that job was to write a law review article, so that's what happened. So I took what I put together for the speech and turned out this article. And what it does, it compares the court—the current Federal Circuit to the Court of Claims which was the predecessor court. This—we're coming up on the 30th anniversary next year and 1982 was the transition.

We're coming up on the 30th anniversary of the killing of one of the great courts of the United States. It was killed by the patent bar. In retrospect, I probably have to be careful how I say that. You'll have to take it humorously: if everybody in the room went out and shot a patent lawyer, we'd be better off. [**Laughter**.] Don't take that literally.

I don't think we realized what had happened to us, but the patent bar was disturbed by the fact that of course patent litigation goes to District Court, private patent litigation goes through district courts and then appeals were going to all the various circuits, around the United States. And the Patent Bar was disturbed by the fact that they were getting a great diversity of decisions from the circuits, so they came up with this ingenious idea that maybe they could get all of the patent appeals from district courts to go to a single court. And they decided to take the Court of Customs and Patent Appeals, which heard agency appeals, but not district court appeals, and the Court of Claims, which heard government contracts patent cases and merge those two into a single circuit court called the Federal Circuit. And then take the Trial Division of the Court

[2] Ralph C. Nash, Jr., *The Government Contract Decisions of the Federal Circuit*, 78 GEO. WASH. L. REV. 586 (2010).

of Claims and make that an Article I Court called the Court of Federal Claims, and that's what they did.

They were successful in persuading Congress to do that. It didn't seem to us at the time that it made a whole lot of difference. We had the Court of Claims and we had the Trial Division and we had the Court. It was kind of an unwieldy operation. You sort of got an automatic appeal when you filed a case there, but what we saw happening was that they separated that into two different courts; didn't look like it was very significant. It turned out to be highly significant and that's—I started out the article by trying to describe what happened there. What happened was a change in attitude.

The Court of Claims was only a court of claims against the United States. Well, that was its function. It was set up in the late 1850s, turned into an Article III court under President Lincoln. And it basically was set up to get rid of congressional complaints because up to then, there'd been no waiver of sovereign immunity, so everything had to go through Congress. And they got sick of that, so they set up a court. The court perceived itself as being this sort of the guardian of the conscience of the nation. And I quote Marion Bennett who wrote a history of the court in the article where he talks about that and how important it is for the government to lose cases when government should be held accountable for the actions that it takes in order to persuade the citizenry that the government is a fair organization; treats people fairly.[3] And the Court of Claims really believed that.

It was fascinating to watch their decisions because they were fun to watch and we criticized them sometimes because they'd make a little new law or they'd bend some old law to arrive at what they perceived to be fair outcome. But I think they had that attitude because all they saw was claims against government. When that became the Federal Circuit, the Federal Circuit ended up with a huge amount of patent litigation. So if you look at their docket now, about a third of their caseload is private lawsuits: infringers against patent owners or patent owners against infringers. So they're no longer a court of claims against the United States Government. They perceive themselves as just another court.

And since we're, I think, 6 percent of their docket now, and patent

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[3] *Id.* at 587 & n.2, *quoting* MARION T. BENNETT ET AL., THE UNITED STATES COURT OF CLAIMS: A HISTORY, PART II, at 170 (1978).

is—I don't know—thirty-five percent, forty percent, something like that way over not only that, but the patent cases. After quite a long period of time, the Supreme Court didn't take any patent cases. But in the last five or six years, the Supreme Court has taken six or eight patent cases, and the Federal Circuit has been reversed on over half of their cases. And of course that gets the attention of the judges when they get reversed.

So they're really interested in patent law, and that means a couple of things. Number one, it means from the operation of the court that there are no judges on the Federal Circuit who have any background experience in government contracting. Zero. And they will openly tell you that.

Number two, they don't hire law clerks who have any experience in government contracting. So the court is basically devoid of any experience in our area. And we've had two judges at the Nash and Cibinic roundtable over the last three or four years. The first one was Judge Bryson, and he said you have to understand—because we were talking about cases that I'm going to talk about in a minute that didn't—I didn't think the outcome was exactly right. And he said you have to understand that we don't know anything about government contracts. And his perception was that the lawyers practicing in that court weren't helping the judges understand government contracts. What he said to our audience was when you submit a brief, what you're focusing in on the very narrow point in your case, but you're not giving us any context of why is this case important. How does it fit in the big picture? And we don't know, and so if we do decide the case on a narrow point, it's your fault, not ours. He didn't say it that way, but basically, that's what he was saying. I don't know if that's good advice or not. That was his perception. But the key thing is they don't have any experience.

Before this critique that I gave, I was asked by Judge Michel to come over and have lunch. And we chatted at lunch about why the government contracts bar was unhappy with their decisions. And we sort of concluded that, well, maybe it would help if we got somebody on the court, some judge with government contracts experience. And I thought that was kind of encouraging. At the conference afterwards, he was asked a question of what are your priorities for new judges. And his answer was first priority, I want a district judge who's handled patent cases. Second priority, I'd like another patent lawyer. Third priority, I forget what. And we were fourth on his priority list. Now, of course, he has no control over who Congress appoints, but I was a little taken

aback. Here I thought we made a point at lunch, and all of a sudden I end up at the bottom of the pile again, which seems to me to be appropriate.

I went over to that conference that day at nine in the morning and I listened to—I was one of the final panel. I listen to them talk about patent law for five hours and forty-eight minutes. I got the last twelve minutes. And that's where we stand, folks, in that court. That's their perception of our importance in life. It's a tough place to be.

Now, what I did in the article was to take seven issues that seemed to me were important where they had arrived at or had moved away from the old Court of Claims logic. The Federal Circuit, when they were formed, adopted a rule that they were bound by Court of Claims precedent, and the only way they could overturn precedent was by an en banc decision. Of course, there are very few en bancs. One of the suggestions that Judge Michel made a year or so ago—I forget whether it was at last year's roundtable or the year before—but he suggested we ought to ask for more en banc decisions when the panel issues a decision we don't think is a good one, which is a great idea, except they never grant en banc. You know, so you can try, but they're going to turn you down. But anyway, the rule is that they can only overturn Court of Claims precedent by en banc. But that doesn't keep panels from making different law. They just either don't mention the Court of Claims decisions, or they distinguish them on the facts. They rarely overturn one, hardly ever, but they come out with new results.

So let's just run through the seven areas, and I think you have the article, so I'm going to go through them fairly quickly so that you can see the details.

The one that I think is probably the most interesting in some ways is the contract interpretation issue. Some of you may remember, if you can remember first year contracts and if your professor talked about this, that there were two great professors of contract law; not government contracts, but contract law: Williston and Corbin. And they both wrote these huge treatises. They're still there, obviously not by the same professors. And they disagreed on a number of things. One of the things they disagreed on was contract interpretation. Williston was a sort of literalist. and he believed that the words of the contract were what really mattered. And Corbin argued that you also had to look at the context and that meant that you should look at extrinsic evidence of course of dealing or maybe up front of how they arrived at the words, and you should look

at all of those things when you're trying to figure out what a contract said. What do the words mean? And how they should be interpreted?

Corbin won that argument, at least in two places. He won it in the drafting of the Second Restatement of Contracts, which picked up his reasoning. I put some of that in the article. And he also won at the Court of Claims. He didn't everywhere because there's always been a dispute on that issue and actually that dispute has been around the English-speaking world. Apparently in England, the Williston view won. And there's a great article a couple of years ago by a New Zealand law professor describing the fact that Australian—New Zealand law adopted the Willistonian rule, and it wasn't getting—judges were not happy with it, and they seemed to be moving towards the Corbin view.

Meanwhile, we're going the other way. We're moving from Corbin to Williston and the Federal Circuit has taken the jump pretty far saying that the plain meaning rule is what is predominant in government contracting. The way I understand the court—and I'm not sure that this is the rule; though I cite an en banc decision,[4] which is the Coast Federal case, which happens to be a *Winstar* case, not a procurement contract. But they do recite very straightforwardly the plain meaning rule in *Winstar* cases.[5] So if I understand the rule structure that they're putting out, they're saying when you get into court, or presumably before the board, the first trick is to figure out what is the plain meaning of the language of the contract. If the judge sees a plain meaning from the words, that ends the case. If the judge sees ambiguous words, then you can look at extrinsic evidence to figure out if there is a single reasonable meaning, in which case there is no ambiguity. In other words, you can use extrinsic evidence to resolve an ambiguity and then if you can't resolve the ambiguity, after that, you go to what we call risk allocation rules, which is contra proferentem, the duty to seek clarification, and reliance. I put that in the article, but that's how I teach it. And that's how the books are written.

What they've done is they've taken the extrinsic evidence and they've moved it from the initial consideration of "what do the words mean?" back behind an ambiguity. So if you can't prove an ambiguity by the plain meaning, then you can't ever get the extrinsic evidence. You're not supposed look at it now. How the case actually gets tried is a

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[4] Coast Federal Bank, FSB v. United States, 323 F.3d 1035, 1040-41 (Fed. Cir. 2003).
[5] United States v. Winstar Corp., 518 U.S. 839, 911 (1996).

puzzlement to me, and I put that on the roundtable next month.

We're going to talk about that and see if we can figure out exactly what that means to the trial of these cases. But the way I analyze it in the article—what it does is it substitutes factual evidence in terms of determining what the meaning of the words is and says what we rather have is legal argument as to the meaning of the words. In other words, instead of bringing in the facts—and I can understand—it would be reluctance to hear some of the facts.

We mentioned the *McDonnell Douglas* case on A-12. If the facts are witness testimony about what happened twenty years ago—all you trial lawyers in the room prepare your witnesses and surprisingly they tend to remember your side of the case. I mean, nobody actually remembers what happened twenty years ago, so you're trying to resurrect memory, and I think we probably might all agree that that's a pretty tricky thing when you're looking back a long number of years. And so if I'm a judge on the court, I would be somewhat hesitant to base my decision on that kind of recollection. And I can understand that. But I don't understand why that means you should also throw out contemporaneous documents. I mean, one of the horrible things about trying cases is that you're stuck with documents and you're not allowed to throw them away. That's a no-no. So but for some reason, the court is throwing the whole thing out, and it's kind of interesting.

So now, if I understand what the court is saying, we say to the lawyers, you go to your dictionaries and your thesauruses and come up with a meaning of the words that supports your side. And so we substitute ingenious legal argument for facts or semi-facts which I think is a bad trade-off myself. The one thing that I've learned out of what's happened in the Federal Circuit is when I teach contract administration or government contracts, in general, I have to try and take these cases and turn them into advice for people at the working level. How did you respond to this case law?

And here, what I've been teaching is okay. Maybe the court thinks they're going to make better contracting people out of us. Okay.

Gil was one of the people, one of my first of my five people to help me teach it. Another one was a guy named EK Gubin. And EK was a sole practitioner, and he won almost every case. He had a big sign behind his desk that said, "When all else fails, read the contract."

In 1960, that was good advice. In 2011, that's bad advice. You better read the contract before you sign it. That's, I think, the message the court is giving us. And you have to read the contract from the point of view of somebody who doesn't know anything about government contract law. Okay. Doesn't know anything about the government contracting process? So what I've been telling people on both the government side and the industry side is look, if these are the rules we're stuck with, we've got to do a better job up front. I know that's hard because the process of contract formation is the world's most incoherent process. But I think I'm at the point where I'm saying to companies and government agencies, maybe you better get your legal people involved. Maybe they better read section C; maybe they better read the work statement; and just give a good bunch of advice on does this make common sense? Will somebody read these words in a way that it's going to hurt us? And if the court's successful—of course, we're all understaffed—nobody can do all that—but maybe at least the court is giving a signal that we need to move in that direction if we can. Okay. Let's move on to the second issue.

This one is one, I think, that may have changed things more than any other. That's the *Winter vs. Cath-dr/Balti* case.[6] It's an authority case. Again, we've known what the authority rules are. There's no such thing as apparent authority blah, blah, blah. That's what *Federal Crop Insurance* tells us.[7] And so the boards of contract appeals and the old Court of Claims took that logic and said, okay, there's no such thing as apparent authority, but there are implied delegations of authority. And I can remember students saying, "What's the difference between implied authority and apparent authority?" And I'd said, "The words." The words are different. *Federal Crop* stands for the proposition that you never use the word "apparent authority" in a decision. It's just implied.

Okay. Now, why did the boards take that trip? Because they saw cases—and the Court of Claims went along with this—they saw cases where the contracting officer had basically either expressly delegated authority, sent somebody out to solve a problem, or had stood by and watched it happening and had not intervened, and they felt—and the government got exactly what it wanted. I can remember one case where on the witness stand, the contractor's lawyer said to the contracting officer, "Okay, let's assume that the system had worked correctly. Let's

[6] Winter v. Cath-dr/Balti, 497 F.3d 1339 (Fed. Cir. 2007).
[7] Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).

assume that when your technical person and the contractor's technical person made a deal, the contractor's technical person went to their business person. Their business person came to you and said, we need you to put your signature on this deal. What would you have done?" And the CO gave an honest answer. He said, "I would have gone to my technical person and asked if that was the deal they needed to have me make." And then the question was, "Well, if they said yes, what would you have done?" "Well, I would have told them to send me a procurement request for some money, and I would have entered into a mod or I would have issued a change order, whatever the appropriate action was." And so the contractor's lawyer said, "Well, then all you're arguing—you're not arguing about whether the government got what it wanted. What you're arguing about is whether the proper procedure was followed. Was there some slip in the procedure?" And, of course, in that case they found authority.

Now, that's not to say they found implied authority in all cases because they didn't. If you look in our books, they come out about half and half.

In the *Winter* case—and Winter is, of course, the Secretary of the Navy—in the *Winter* case the facts were these: It's a NAVFAC case and at the preconstruction meeting which the contracting officer is supposed to chair, the contracting officer doesn't show up. Another guy shows up, and he comes in and he says, look, this is going to be the perfectly administered contract and here's how we're going to do it. I'm going to be here all the time. I'm going to be available to you on a regular basis, and I am everything. I got all the authority. I'm the construction manager. I'm the COR. I'm the engineer. And I'm also the inspector. He says, I'm everybody, and whenever you have a problem, you will send me an RFI, a request for information, I'll look at it. I'll analyze it, and I'll tell you what to do and you'll do it. At the end of the contract, you gather up all your RFI's, and you will submit them to the contracting officers if you think you're entitled to an equitable adjustment. And then you can work it out with the CO.

Now, the contract contains three clauses that say COR's have no authority. And apparently this contractor's smart enough to understand what he just heard doesn't seem to match his contract. So he sends an e-mail to the contracting officer. And he says to the contracting officer, who is this guy? Who is this guy? And I put in the article the response he got from the contracting officer. Contracting officer basically said he

is—I'll just read you a couple of the phrases—he says responsible for construction management and contract administration on assign projects while providing quality assurance and technical engineering construction advice. Provides technical and administrative direction to resolve problems encountered during construction. A project manager analyzes and interprets contract drawings and specifications to determine the extent of contractors' responsibility. Prepares—and notice how the verbs change on us—prepares and/or coordinates correspondences, submittal reviews, estimates and contract mods. Doesn't say signs contract mods; just says prepares. Okay.

So he gives you all of this advice, tells you how to solve problems, and then he prepares mods. But obviously a CO's got to sign them because people who aren't COs can't sign mods; right? That's the essential thing a CO can do and nobody else can do.

So he believes that the CO has endorsed this procedure. So he does it. And it looks like one of the best administered contract he's ever seen. He submits his RFI's, he gets told what to do, he does it, and job gets done. He gathers up roughly thirty RFI's as he was told, takes them to the CO. The CO does exactly what this guy told him was going to happen. He analyzes them all, and he writes a letter and saying you're entitled to equitable adjustment on twelve of them, I think, and go back and negotiate the equitable adjustment with the same guy. So everything is going great for the contractor. He goes back, and nobody will talk to him. That's the end.

So he files a claim. When he files the claim, the CO withdraws his letter. That fascinates me. I love the idea. I mean, if you're going to—my suggestion to you is if you think you might withdraw a letter, write it in disappearing ink the first time. I don't know what withdraw means. Can you make something go away? I mean, I suggest you make patent lawyers go away, but that's a different technique.

I don't know. Anyway, he withdraws the letter. The appeal goes to the ASBCA. The ASBCA sees no authority issue here. I mean, the CO has sat there and watched this happen. He didn't chair the meeting; right? He obviously must have known because he participated in the process. So the board just goes ahead and takes it on the merits, rules on the merits. And the government loses a relatively minor—we're not talking a whole lot of money, relatively minor amount of money. It goes on appeal to the circuit and the circuit says there's no expressed authority here and

there's no implied authority. They basically say and they read the DFARS as saying—and you can read it this way—it's saying that you cannot delegate contracting officer authority to a COR. You cannot. So they reverse.

Now, that changes the law of government contracts. That basically destroys the concept of implied authority. That doesn't change the teaching very much because we've always said that you've got to take these issues to the CO; right? You can't bypass contracting officers if you expect to get equitable adjustment. But we've always noted—but if you do slip up there's a loophole. There's a way out. There's an escape hatch. I've been watching the decision since *Winter*. This is four years now and we haven't had an implied authority decision since then.

The court says there's still an existing line of authority under a case called *Landau*.[8] And this is authority for people operating in an environment where there are no COs like border patrol agents or people, state department people setting up exhibits after all kinds of fricky-fracky little fact situations where there fundamentally is no CO. It's not a procurement in the normal sense. And apparently that's still good law according to court. I have no idea why. But in our procurement, in our standard procurement contract area, the court seems to be saying that there is no such thing as implied authority.

Now, so what do you teach? You teach contractors you can't do anything without telling the CO about it. You must take everything that happens out there that could possibly end up in a request for equitable adjustment. You must take that to the CO and you must get the CO to do something about it. And that's a very unrealistic thing to have to teach because the COs are not at the site in most cases; these are mostly construction contracts. The construction contractor needs advice in most cases. They can't actually stop the work and wait. What's the CO going to do? CO can't say go ahead and do it because the CO doesn't have any money either; right? A CO's got to go get money from somebody. So it's a tough rule.

The only answer is pepper the CO with everything that happens at the operating level. And then I don't think that's a satisfactory answer because you got to tell them—in a lot of cases, the deal made at the working level, when they make the deal, they think it isn't going to cost

[8] H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989).

money. It's only later they learn that it did have a financial impact. So now you've got to say, you've got to look and see if there's any possibility it can cost money. You've got to tell the CO about it. Okay. That's the second area.

Third area—those are the two big ones I think. The third area is a case called *Am-Pro*,[9] and I don't think this is a problem. I'm not sure. It sent a few dozen practicing attorneys' kids to college with legal fees, but other than that, I don't think it's had a big significance. *Am-Pro* is a weird case. The issue is bad faith. And bad faith has been a part of government contract law for a long time in the termination for convenience area—some of you may recognize that—it's always been a way to get around the termination. Of course, a contractor's trying to get around a T4C in order to get anticipated profits. And the Court of Claims ruled many years ago that bad faith, if you could prove bad faith, then you could get around the termination for convenience. And the court said that to prove it, you had to have: irrefragable evidence.

I always liked that. That's such a nice word. I don't know that anybody knows what it means, but it has a really good sound to it: irrefragable. I mean, just the very, the consonants in the word sort of indicate very hard, really tough: "irrefragable."

Well, for some reason in 2002, a panel of the circuit decided that they wanted to get rid of the word irrefragable. Now, they didn't have a T4C case. They had an economic duress case. So they said the way you prove economic duress is through bad faith, which nobody ever said before. They invented that. That just came out of nowhere. And the subsequent economic duress case that we had by another panel didn't even pay any attention to it. But anyway, they said you've got to prove bad faith, and they said and the way you prove bad faith is through clear and convincing evidence, not irrefragable. But they said clear and convincing evidence of specific intent to harm the contractor.

Specific intent to harm, which, you know, is almost impossible to prove. So it's probably the same as irrefragable, maybe, who knows.

The problem there, I think, is that immediately the Department of Justice began arguing, well, if you need to prove bad faith for economic duress, you also need to prove bad faith for violation of the duty of good

[9] Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002).

faith and fair dealing. And part of the duty at good faith and fair dealing is the duty to cooperate, the duty not to hinder. And they also argued that you've got to prove it in the superior knowledge cases, failure to disclose vital information. So we've got a line of arguments. It's has not gone to the Federal Circuit yet, but the Federal Circuit decision, I think, created this line of arguments, and we've got a bunch of different decisions from judges on the Court of Federal Claims on the question of, particularly, the duty to cooperate. Do you have to have specific intent to harm in order to win a case on duty to cooperate?

Now, we've had a duty to cooperate cases going back right after the Civil War. We've got a ton of old Court of Claims cases on duty to cooperate and Supreme Court cases. There's never been a mention of motive in any of those decisions. Nobody's ever asked the question of what did the government intend when they breached the duty to cooperate. The question has always been, did the government have a duty, an implied duty, not expressed, and did they cooperate? So this idea of bringing specific intent to harm into all of those other issues was a fascinating idea. Obviously, it's a way to win cases. But it hasn't gone to the circuit yet, and in my view the decisions of the judges in the Court of Federal Claims on the side of not letting this duty migrate any further, or this concept of bad faith migrate any further are the better reasoned decisions. I put several of them in the article.

So I think maybe that's not an issue, maybe. Hopefully now, if it is an issue, if that does migrate into the normal kinds of breach or constructive change cases that we've seen over the years, that means you're taking a lot of equitable adjustments away from contractors. And then of course the question is, how would contractors respond to that? Would they put contingencies in their price? Exactly what would they do? And nobody knows the answer to that.

Okay. I put some issues on accounting disputes in here. The one that shocked us was *Rumsfeld vs. United Technologies*,[10] which is a pretty sophisticated accounting problem. It's a deal that Pratt & Whitney made with some of its major vendors, where they would share the risk of profit or loss on new engine development contracts; the commercial deal that moved over into government contracting. And they, Pratt & Whitney, argued that those were collaborative agreements with people, risk-sharing agreements and therefore, the prices they paid for those parts in

[10] Rumsfeld v. United Techs. Corp., 315 F.3d 1361 (Fed Cir. 2003).

the engine should not be considered to be material costs and put into the G&A base. DCAA went along with that for a couple of years and then saw that it was having an impact, so they went the other way, which is normal DCAA practice. And that went to the court, eventually.

First, it went to the ASBCA. There were six accounting witnesses. All the senior people who'd been in on writing the cost accounting standards and were very experienced in the area, the board judge ruled in favor of Pratt & Whitney, very close case, could have gone either way, I think. And the circuit reversed; again, not a big deal on the merits. What's fascinating is that the circuit said the big mistake the board judge made was hearing expert testimony. I mean, the words—the term of the contract is—the accounting term is material cost. Anybody can—any normal human being can figure out what material costs are. You just grab you the *Webster's* dictionary, you look up cost. Try it sometime. You'll see quite a few definitions, and you know what it means. So accounting testimony is improper when you're interpreting the cost accounting standards.

How many of you have read the cost accounting standards? Would anybody argue that the folks who wrote them were consulting Webster's dictionary when they wrote it? I mean, I've never heard such nonsense, right? It's written in accountingese. If you're not an accountant, you can't understand the fool things; right? And the idea that a judge knowing nothing about our world could just read the words and say, "I know what they mean," that's a crazy idea.

Now, I was at an ABA meeting, and one of my students had a little dinner party at the meeting. And the lawyer who lost that case was there. And at the end of the dinner party he said, I have a present I want to give the lawyer who lost the case, their next accounting expert, and he handed him a little pocket Webster's dictionary, which I thought was kind of cute.

Anyway, a goofy decision. Okay. On page 606, it's the fifth issue; unabsorbed overhead. Unabsorbed overhead is a bogus idea. It always had been. John and I wrote for years that this was a crazy idea. This is the idea that somebody has shut down for a while in a construction contract. They've somehow not been able to absorb their home office overhead, so the government will repay them; right? Now, what's actually happened is that if they shut you for—or you shut them down for six months, they do the work in another six-month period, and they

recover they—allocate their home office overhead on a different period later. But do they lose any money? Well, maybe they lose the interest or whatever. But, you know, it's one of those bogus concepts. But the court said many years ago, we don't want to use accounting to figure out home office overhead. We don't want to look at facts. We want a formula. And so they used the Eichleay formula, which the ASBCA invented before any of you were born.

Now, that became then the only way you could prove unabsorbed overhead. And finally in a case called *P.J. Dick*,[11] another panel of the circuit decided that they were sick of these cases. They were getting about one case a year. So they said, we're going to write a decision that lays out the rules of unabsorbed overhead. It is so clear that everybody understands, and so we'll never have another case. And it's worked. They've only had two since then. That's 2003. They've only had two cases—no, only one case in eight years. There's been some cases at the Court of Federal Claims.

The problem is that the rules they wrote are totally asinine. They have no connection to reality. The rule is they created this term that you've got to prove—the contractor has to prove that they were on standby, whatever that means. And on standby, they said to prove that—you've got to prove three things. The first thing you've got to prove is that the government caused delay was not only substantial, but of an indefinite duration. So if the CO says, I order you to stop work for six months, you're not on standby because it's not indefinite duration, and it makes no sense at all.

The second thing is, they said you got to prove that you're required to be ready to resume work at full speed, as well as immediately. So if the CO says, I order you to stop work, but when I lift the order, you can remobilize, you're not on standby no matter how long you're sitting there. Okay. What they've done is they've given the CO the ability to never have to pay unabsorbed overhead which is great for the big companies. What they've done is to take away some profit from the big company because this is all windfall. I had somebody from Bechtel in my classes a couple weeks ago, and I said to him, how many contracts do you have going at one time at Bechtel? Five hundred, maybe? If one of them gets delayed for six months, can you see the impact of that on your home office overhead? I mean, you couldn't see it in the third decimal

[11] P.J. Dick, Inc. v. Principi, 324 F.3d 1364 (Fed. Cir. 2003).

place. There is zero impact.

What about the small company? What about the company who's used up all their bonding capacity on this contract? They're stuck. They're hurt. Now, what I'm telling your contracting officers is this: When it comes to big companies, use the rule. You shouldn't be paying them extra home office overhead, so don't. Use one of the two techniques, but don't use that technique with the small company because it does not benefit you to bankrupt your contractor, or to financially hurt them. So you should not use the rule in that case. That's my view.

And I don't know whether you give them the same advice. I hope you would because it's an unfair rule. What the rule should be is you should look at the impact on the company. If the impact on the company is that they cannot take more work, then you ought to pay some home office overhead. So my advice is, forget what the court said. They don't know diddly-squat about what they're saying. Although, you know, if your only goal in life is to win lawsuits, then fine. But otherwise, if your goal is to treat your contractors fairly, which I think your goal should be, then you shouldn't use it. Okay.

Now, I want to digress for a minute because I want—I'm running out of time. I'm going to steal some of Steve's time; it wouldn't be the first time. I want to talk a minute about the role of government lawyers. We had a faculty member many years ago. He was deeply involved in the activities of St. John's Church over on Lafayette Square, and they were running a luncheon program debating ethical issues and he asked me to go over and debate a Department of Justice lawyer on whether the ethical rules applied to government contract lawyers, government lawyers. And I said I'd love to do that. That's something I like to talk about.

So I went over there, and I said government lawyers, unlike private lawyers, has two ethics rules they got to abide by. One is zealous representation of the client and—and the other is proving to the world that the government has a fair organization who treats people fairly. The DOJ lawyer, they came in and said, "I couldn't disagree with you on anything more than that. Government lawyers have *no* obligation to show the citizenry that they treat people fairly."

When, right after John died, the Court of Federal Claims gave John and I the Golden Eagle award, and we went up to Philadelphia. We got the award. The judge, chief judge, said to—John was dead, his wife was

there—he said, would you like to say a few words. And I never turn that down, so I said sure. I got up, and I said it's a great honor to get this award because you're the successor of what I believe is one of the great courts and it was a court that believed that in many cases, the government won the case when the court ruled against them.

And my wife and I were walking out of the convention center there afterwards up in Philadelphia, and we happened to be walking behind the chief judge and the head of the trial Court of Claims Civil Division. I heard one of them say to the other, "I wonder what he meant by that?" And I thought, that's the problem. That's the problem. That we don't—we don't seem to have that vision of what the role of the government people, in particular lawyers, is. It's more important to show everybody that the government is fair than it is to win a case. And I have believed that for a long time.

Now, we have two decisions that are very disturbing, and I'll just give you a quick one. One is a case called *Moreland*,[12] which is a 2007 case. And that's a simple case where the contractor submitted an REA and then a claim and they went through negotiations. Contracting officer finally issued a decision for zero. On the witness stand, the contracting officer was asked: When you were analyzing the claim and negotiating, did you conclude that the contractor was entitled to $200,000? And he said yes, approximately 200,000 was my conclusion. And he said, well, then why did you write the decision for zero? And the answer was: My lawyer advised me to do that to use that as a bargaining chip in subsequent negotiations.

In the *Bell BCI* case,[13] which is about the same time, 2008, we had a withholding of liquidated damages. And on the witness stand, the contracting officer continued to withhold, then we went to appeal. On the witness stand, the contracting officer was asked, did you conclude that there were excusable delay for a third of the liquidated damages? And he said, yes. He said, then why did you continue to withhold liquidated damages in the face of excusable delays? And the horrible answer was, my lawyer advised me to do it. Twice in two years, we have government lawyers advising contracting officers to treat people unfairly. Now, we seem to have forgotten the rule that contracting officers are supposed to give fair decisions when a case goes into the appeals process. When you

[12] Moreland Corp. v. United States, 76 Fed. Cl. 286, 291 (2007).
[13] Bell BCI Co. v. United States, 570 F.3d 1337 (Fed. Cir. 2009).

get a request for final decision under the CDA, the contracting officer is supposed to switch heads, right?—some people say "hats" —and become a judge and give a fair decision. And the idea that it's Steve's fault because we teach professional—we think we teach professional ethics in law school. It's a mandatory course, professional responsibility. But here, we've got two lawyers giving, what I think, is terrible advice. So I wanted to just digress on that to push the view. And the introduction says that one of the reasons that Gil was so interested in the JAG school was to promote fairness between the parties, right?—which makes it a good part of this talk.

Okay. Back to the number six decision. The worst—well, Steve and I were talking before this. Six and seven are running a hot contest between which is the worst recent decision that I wrote about. I said this one; he said the other one. It's very close. It's probably a photo finish.

This is the case called *Richlin*,[14] and it's an interest case under the CDA. In Richlin, the lawyer's an old friend of ours, used to be a member of our faculty, Gil Ginsburg. Richlin is a wage case, back wages case. The contractor had been required to pay higher wages and the CO argued that the government was not obligated to pay him, So he appeals that, and he wins the appeal. Okay. So he's got a board decision that says that the government owes him the amount of the back wages that he hadn't yet paid his workers and the job's over. The CO says to him, I'm not going to pay you. I'm not going to issue a mod for that board decision because I don't think you're going to pay the workers. They're all gone.

Now, Gil's a problem-solving guy, Gil Ginsburg. Gil says, I can solve that problem. I'll set up an escrow account and issue a mod, pay the money to me, I'll pay the workers. And the CO apparently is happy with that. So he does it. The workers get paid. Then they file this claim for interest on the money under the CDA. And that ends up at the circuit, and the circuit says, you don't get any interest on the money because you never touched the money. The statute says interest on amounts found due contractors on claims shall be paid to the contractor; "amounts found due" contractors.

The circuit decision never tries to analyze what "amounts found due" means. It seems pretty simple to me. You won the case. You got a board decision saying the government owes you this amount. They go to the

[14] Richlin Sec. Serv. Co. v. Chertoff, 437 F.3d 1296 (Fed. Cir. 2006).

legislative history. When I saw that, it blew my mind. When you're interpreting a contract, plain meaning governs. But here's a panel that says when you're interpreting the statute, plain meaning doesn't govern, use legislative history. Justice Scalia probably rolled over—well, he's not in his grave—rolled over somewhere. He probably doesn't know about the decision. But, I mean, that's—okay. Whatever. Whatever.

And finally, *Rick's Mushroom*,[15] which is the seventh. *Rick's Mushroom* is a cooperative agreement. Okay. Would you all agree that a cooperative agreement is a contract? Does it strike you that a cooperative agreement is not a contract? The Tucker Act says that the court has jurisdiction over contracts, expressed and implied; not implied in law, but implied in fact. Okay. And this is an express cooperative agreement. So the question is: does the court have jurisdiction?

Now, we've got a long line of cases saying outside of the contract—because the Tucker Act also says violations of regulations, violations of statutes, violations of the Constitution, all those are the kind of jurisdiction under the Tucker Act. And the Tucker Act—and the court has said for many, many years this old Court of Claims law that when you get into those other areas of jurisdiction, you've got to be able to cite the statutes you're talking about or the Constitution or wherever you find it. You've got to find an intent somewhere to pay the contractor money, right? But you don't have to find that in a contract. They never said you have to find that in the contract because contract law says if you breach your contract, you've got to pay money, right? That's just fundamental contract law.

The old Court of Claims found an exception to that rule, and it was some fricky-fracky promise of some prosecutor to pay some witness money. It was a criminal law kind of contract. It wasn't a procurement contract. It's a case called *Kania v. United States*.[16] And they said, well, the term "contract" in the Tucker Act can't cover this kind of thing here. If you're going to claim that some prosecutor made some deal with some witness, you got to prove—you got to find me a statute that says we should pay money. And you can't find that statute. And the circuit followed that with another case. Along comes *Rick's Mushroom*, and they use—although the language in those cases, in my view, is very clear that they're talking about some special kind of exception—*Rick's*

[15] Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1344 (Fed. Cir. 2008).
[16] Kania v. United States, 650 F.2d 264 (Ct. Cl. 1981).

Mushroom says the cooperative agreement, you've got to find some promise somewhere to pay money. Apply the law that applies to statutes to this kind of contract. You know, so I wrote it up. I said, well, they never say why cooperative agreements are like deals made in the criminal law field, which is what the exception seemed to be. They just sort of dump cooperative agreements in that other area, and I have no idea why. And of course, DOJ loves the case. They cite it pretty frequently. They tried to talk the court out of jurisdiction. They don't win very many, but it just stands there as a really, really reasoned—I hesitate to use that word—non-reasoned case is a better explanation. Okay.

Where are we? Well, the final case I cite is a case called *Bell BCI*.[17] That's a release case. And again, the Court of Federal Claims judge, experienced government contract guy who analyzes his own transactions—it's delay and disruption cost, cumulative cost. They signed a blanket release according to the government, and they've then had cumulative effects later because of more and more changes being piled on. And the judge awards them delay and disruption costs across the board and the court reverses that, sends it back and says no, no, no. The release reads on delay and disruption costs up to and through the big mods you signed where you had to release, they quit signing releases after that. And you've got to separate out how much delay and disruption was caused by the subsequent, say, different things that happened and the prior things. And I don't know how you do that. And the case hadn't reappeared. What it says is that, again, you can't look at the factual context of signing a release which we've looked at for years. You are to only read the words in the release.

And so what I have to tell people in class is: Never in the middle of a contract, never sign a blanket release. Never. Always reserve cumulative delay and disruption because you don't know what's going to happen in the future. Now, again, that's harmful to the process; right? Because it means that you can't fully resolve issues, but you've got to advise people that you've got to protect yourself.

What I teach now, a lot of, is what I call defensive contract administration. You've got to defend yourself against this court because they're squeezing down on the rules. Some of them hurt the government; most of them hurt contractors. Nobody knows what the outcome is going to be. Does that mean prices go up? Exactly what's going on? What we

[17] Bell BCI Co. v. United States, 570 F.3d 1337 (Fed. Cir. 2009).

do know is that they are a very literalist court. They like to read words. They don't like facts. And if they don't like the facts that the lower court says are the facts, they disregard them.

I put one of Pauline Newman's dissents in here where she, on the *Bell BCI* case, where she is highly critical of the court because they just flat out disregard all of the factual findings that the lower court makes. Now, two other articles since mine—Stan Johnson wrote one about Judge Newman's dissents.[18] She's the last vestige of the old Court of Claims who believes in a fair outcome, and she's written a ton of dissents. She'd go a whole article on her dissents in the Public Contract Law Journal. And then Steve Schooner has a very recent article[19] in the American University which is a really great article because he quotes me a lot.

Our part used up a lot of time, but I'd love to have some questions.

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[18] W. Stanfield Johnson, *The Federal Circuit's Great Dissenter and Her "National Policy of Fairness to Contractors"*, 40 PUB. CONTRACT L.J. 275 (2011).

[19] Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067 (2011).

THIRTY-NINTH KENNETH J. HODSON LECTURE IN CRIMINAL LAW[1]

MAJOR GENERAL MICHAEL D. CONWAY[*]

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[*] Major General Mike Conway was born in Grimsby, Lincolnshire. He graduated in law from King's College, London, in 1981 and was called to the Bar of England and Wales in 1982. After training as a pupil barrister and working in London, he was commissioned into the Army Legal Corps as a captain in 1985. He served in Germany, England and, as an exchange officer, at HQ Land Command, Sydney, Australia. After promotion to Lieutenant Colonel in 1994, he served as Commander Legal HQ 3rd UK Division; as Commander Legal HQ Northern Ireland; as a prosecution team leader at the Army Prosecuting Authority (UK); in the Ministry of Defence as Staff Officer Grade 1 (SO1) International Law and as SO1 Legislation; and in the Operational Law Branch as Chief Operational Law and later as Colonel Operational Law. When serving as SO1 International Law he was a member of the UK delegation to the 2001 Geneva Review Conference of the 1980 Convention on Certain Conventional Weapons. From 2003 he served as Colonel Legal ALS2 (the International Law Directorate of the Army Legal Services), responsible for service legal advice in MOD on international and operational law and legislation affecting the armed forces, including the Armed Forces Bill 2006. In December 2003 he was a member of the UK delegation to the 28th International Committee of the Red Cross Conference in Geneva. He served as Colonel Prosecutions (UK) before promotion and appointment as Brigadier Advisory (then Director Legal Advisory) at the Directorate of Army Legal Services in 2006. He attended the Royal College of Defence Studies in 2010 and was promoted in October 2010 to Major General as the Director General Army Legal Services.

Major General Conway served in Bosnia for 6 months during the first UK NATO deployment on Operation RESOLUTE. He was attached to Headquarters 3 Commando Brigade, Royal Marines, during their winter deployment to Norway in 1987, and served in Headquarters Strike Command at the end of the 1991 Gulf Conflict during Operation HAVEN. He was a student in the 124th Basic Course at the U.S. Army's Judge Advocate General's School, Charlottesville. He was admitted to the Bar of New South Wales during his posting to Australia, and as an honorary member of the United States Army Court of Military Review when at Charlottesville.

[1] This is an edited transcript of a lecture delivered on 16 May 2011 by Major General Michael D. Conway, Director General Army Legal Services, British Army, to members of the staff and faculty, distinguished guests, and officers attending the 59th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

Thank you very much. "Boon" what was it? Boondoggle; someone may have to explain that to me later **[laughter]**. Good morning, all of you, and I begin by saying it was particularly pleasing to be invited to speak on this occasion, in this country, in this state, and in this school; and I feel particularly privileged to deliver a presentation which is made each year in honor of General Hodson, who served the JAG Corps and his country with such fine distinction.

When I was asked to do it, I thought, "What shall I talk about?" It's always slightly unnerving because you never quite know what the audience is going to be like. My predecessor as Director General was a man called Major General David Howell—some in this audience will know him—and he told me the story of a visit he paid to Australia, where he attended a conference of their Army. The speaker was less than exciting, and he went on and on at length until eventually one of the people in the audience could stand it no longer. He was drinking from a can of beer **[laughter]**. I don't know about you but you may think that drinking from cans of beer in military audiences is a little unusual. He threw the can at the speaker **[laughter]**. Fortunately, it missed, but unfortunately it hit someone sitting in the first row, who collapsed, and while people gathered around trying to assess the damage to his head because that's where it had hit him, the speaker just carried on regardless **[laughter]** until the man on the floor said, "Hit me again. I can still hear him **[laughter]**." Now I'm certain that this distinguished audience will not behave in that way, but if ever it does happen to me, I can only hope that, being English, the beer will be warm **[laughter]**.

I was originally given a little more time, but I decided that perhaps I should cut it down slightly. What should I cut down? Well, unfortunately I'm not going to discuss the Royal Wedding at all **[laughter]** unless there are any questions; and as the only question that anyone will ask is "Were you invited?": the answer is "no," so we've dealt with that **[laughter]**.

I was very generously given a broad latitude to speak, and I considered carefully where to start. I recalled one of the most fundamental principles of English law and law in other legal systems that ignorance of the law excuses no person from talking about it **[laughter]**, and so I decided to talk about service and military law. I ought to say that I'm expressing my own views. I do not represent the British Government and the opinions and particularly the mistakes are all mine. Also, being lawyers and being military lawyers, we are infused with a great deal of tradition. I'm going to break a tradition today. Many of you will be

familiar with the words of Lord Acton, who said famously, "Power corrupts, but absolute power corrupts absolutely," to which you may add "PowerPoint can really mess you up." **[laughter]** And so, most unusually, I'm going to speak without visual aids.

The United Kingdom's military law system has undergone a number of changes in recent years during my service. We don't really look like we did when I joined all those years ago as a fresh-faced captain with a fresh-faced Captain Tellitocci on the Basic Course. In part, those changes have come about as a result of cases in the European Court and in our own courts based on the European Convention on Human Rights, and I think it might be of interest to you to examine how these have affected the way we do our legal business and the effect these have had on our system, to see how we have traveled, and thereby to allow you, perhaps, to make comparisons with your own system in the United States.

Since I am going to talk about changes, I pause here to reflect that the British Army, as well as the Royal Navy and the Royal Air Force, are currently undergoing different kinds of changes. In the case of the Army, 7,000 posts are to be lost with redundancy terms offered to some personnel. The program is a phased one, and it will be complete by about 2015. By then, changes in the situation in Afghanistan may mean that if the Government still faces financial difficulties there may be consideration of further reductions. There are also structural changes being considered within the United Kingdom, and as you well know, it has been proposed to withdraw British troops from Germany.

Now as I mention reductions, that's not very meaningful unless you know what you're dealing with. You have much larger organizations in the United States, and other armies simply don't have the numbers of personnel or the numbers of lawyers that you have here. I was explaining to someone just now that my colleague, General Kumar, who is the Indian Director of Army Legal Services, has a team of about a hundred lawyers; that's less than we have in the British Army. He has an Army of about 1.1 million, and his lawyers do not operate below corps level. Anyone in my organization below the rank of about colonel does not know what a corps is. We don't have one, and we haven't had one for some time.

It may be helpful to give you some statistics to get an idea of scale. At least one of you may hail from Michigan, and there may be people from Wyoming and Oregon. Each of those three states on its own covers

a land area larger than that of the United Kingdom. The population of Michigan is about ten million, and the populations of Oregon and Wyoming are about four million and six hundred thousand respectively. The UK's population is some sixty-two million. The Regular Army is about a hundred thousand, or approximately the gate that would go into a large football stadium for a massive football match or an American football match.

Now size of our force and size of the numbers of lawyers is very important to me as a Director and the Head of Arm in our Army. Despite the current round of cuts affecting the British Army, we, the lawyers, have been given five extra posts in reparational law area. We number about 140 officers, all solicitors and barristers, or attorneys. When, about 15 years ago, our Army was much bigger than it is now and the lawyers were about 50 strong. The reasons for this increase in our size are to do with the increase and the increasing role in operational law, not just in what might be called the traditional area of the laws of armed conflict, or IHL, but operationally crucial work in intelligence law and cyber law.

The second reason that we've had such an increase in our numbers is the reforms to the military criminal justice system, including the setting up of independent elements within that system. And if the theme of this part of my presentation is the expansion of the requirement for legal advisors, I nevertheless recognize that it is not always bound to be the case that lawyers will increase in numbers. Every one of my officers knows that the value placed on them and on ALS as a group and the legal support they give to the Army is constantly under scrutiny. Plans to reduce our numbers and to consider other proposals, such as increased levels of joinery with the other two services, are bound to be looked at very carefully when the Army faces cuts in personnel and the finances are under such pressure.

About eight years ago, the Chief of the General's Staff, General Sir Mike Jackson, who some of you may have heard of, said in a newspaper interview at a time when the Army was bigger than it is now, "The only part of the Army that's growing is the lawyers. Make of it what you will," he said **[laughter]**. Well some of us have been making quite a lot of it. In the current, more straitened times, I'm often reminded of another quotation, one made by the Roman writer Horace a few years before the birth of Christ. "*Nos numerus sumus et fruges consumere nati*," he said. "We are but numbers, born to consume resources."

There's no getting away from resources, but I have reminded very senior officers and politicians of something very important as far as operational law is concerned. In accordance with the additional protocols to the Geneva Conventions, plans must have legal advice; and what that means is that in operations the lawyer is the only person who is legally required to be there. All the rest from the force commander down are, legally speaking, optional extras; nice to have **[laughter]**. Now the politicians I've said this to look rather quizzical when I mention it. The senior officers I've mentioned it to look extremely pained.

On a more serious note, I have been at pains to make it understood that while real fighting and other operational matters are crucial raison d'être for armed forces, even when they are not involved in operations, discipline is what makes an armed force what it is. If my own Army is not involved in Afghanistan, Iraq, or other operational matters, it will, of course, train for the next operational task, but whatever it does there will be charges that require handling by commanding officers and courts-martial, there will be complaints under the service complaint system, there will be inquiries, and all of the other new business of armed forces legislation. Whatever conflicts may come and go, the discipline operation in peacetime and in war is perpetual as long as there are armed forces.

The UK's military criminal system is based on a recognition of the unique environment in which personnel operate. The law reflects UK civilian criminal law as far as it's possible to do so; that is the law of England and Wales. But, of course, military law has to have modifications and there are separate military disciplinary offenses. An advantage of all this is that service personnel wherever they serve can face a legal system they are familiar with when they are accused of wrongdoing. A Soldier alleged to commit a theft or an assault in Kandahar or Basra or Germany or England can be dealt with in the same way for that offense.

The Armed Forces Act 2006 saw the MOD[2] involved in the most significant legislation of the past 50 years for that department. There were three Service Discipline Acts for each of the three services, and the opportunity was taken in the 2006 Armed Forces Act to repeal those three separate Acts and to have one main statute dealing with service discipline and to introduce changes where necessary and sensible to do

[2] Ministry of Defence.

so. The Act was based on the recognition that it was unwieldy to have three separate Acts, particularly as more and more operations are conducted jointly, and it provides for the current system of service justice, including complaints and inquiries as well as courts-martial and summary dealing; and by "summary dealing," I mean the process by which commanding officers deal with charges involving service personnel.

Before I look at its provisions, I turn to deal briefly with the Human Rights Act and some of the changes brought about before 2006. Now since the 1950s, the UK has been a signatory to the European Convention on Human Rights, and this was written in the aftermath of the Second World War to provide a baseline of fundamental rights and freedoms. Many countries inside and outside the European Union have signed the Convention, and its Court, the European Court of Human Rights, has built up a substantial body of case law. Some of the important provisions of the Convention are these: Article 2, which protects the right to life; Article 3 prohibits torture in human and degrading treatment or punishment; Article 8 protects the right to respect for family life, home, and correspondence; Article 10 protects the freedom of expression; and Article 14 prohibits discrimination. The provisions are very basic. They were designed, as I said, for a world in the aftermath of a terrible war to provide some baseline for countries that had been unable to deal with each other in sensible and legal ways.

In the present context, important provisions are Article 5, which protects the right to liberty and security and is concerned with matters such as arrest and imprisonment, and particularly Article 6, which protects the right to a fair trial, and it says this: in a determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent court—I'm so sorry—an independent and impartial tribunal established by law. It also provides for the presumption of innocence and provides minimum rights for those charged; for example, having adequate time to prepare a defense, to examine witnesses, and to have legal assistance at public expense if a person has not sufficient means. While it is correct that Article 5 has had an impact on service procedures, for example, where it provides that a person arrested or detained must be brought promptly before a judge or other officer authorized by law, it is Article 6 and the right to provide a fair trial that has made a major impact on the UK's procedures for service personnel.

It was open to applicants to take cases to the European Court of Human Rights. It didn't happen very often in the case of the United Kingdom. The process was slow and quite expensive and our own courts did not directly apply the provisions of the Convention. The Human Rights Act, which was passed in 1998, contained important provisions designed to give further effect to rights and freedoms guaranteed under the Convention. For example, a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration, or advisory opinion of the European Court of Human Rights insofar as it is relevant to those proceedings.

Primary legislation and secondary legislation, whenever enacted, must be read and given effect to in a way which is compatible with Convention rights. It provides that the Supreme Court and various other senior courts, including the Court-Martial Appeal Court, is permitted to make declarations of incompatibility where the Court is satisfied that a provision of primary legislation and in some circumstances secondary legislation is incompatible with a Convention right. This is not a power to strike legislation down, but there is a power for a Minister of the Crown where he considers there are compelling reasons for amending legislation following a court's declaration to amend the legislation by order. The Act also makes it unlawful for a public authority to act in a way that is incompatible with a Convention right, and the Army, the services are public authorities for these purposes. In essence, therefore, the Human Rights Act 1998, which came into force in 2000, was concerned with the direct application by the UK courts of rights under the Convention, and people could raise Convention points at courts in the United Kingdom, including the Service Courts, and they do.

But even before the Human Rights Act, there were cases that affected our system of justice. I said that not many people went to the European Court, but some did and were successful. In the case of *Findley and the United Kingdom* in 1997, the European Court considered our court-martial system as it existed then. As was normal at the time of the trial of Findley, the trial was convened by a convening officer, and in his case, because it was a more serious level of trial, by a general officer who convened a general court-martial. At the trial, Findley pleaded guilty to three charges of assault, two charges of conduct to the prejudice of good order and military discipline, and two charges of making threats to kill a person; and as was normal after the trial, the sentence and the hearing were confirmed by the confirming officer; and as was usual at

that time, the confirming officer was the same general who had convened the trial.

By the time the case reached the European Court of Human Rights, the European Commission had already ruled that there had been a violation of the fair trial provisions of Article 6 and the UK Government did not contest this. The Court found that since tribunals had to be impartial, they had to be subjectively free of personal prejudice and bias, as well as being impartial from an objective viewpoint. The Court found that the convening officer played a significant role in Findley's trial, deciding which trials were—which charges were brought; deciding on the type of court-martial. He convened the court, and he appointed the members and the prosecuting and defending officers. The court members were subordinate to the convening officer and within his chain of command, and therefore the Court found that in light of all of that Findley's complaints about impartiality and independence could be objectively justified. Also the role of the confirming officer included power to vary sentence, and the Court found this contrary to the basic and well established principle that a power to give a binding decision may not be altered by a nonjudicial authority. I would add that it's also important to consider how this failed to take account of victims' rights. Although the Court's decision was concerned with Findley where there wasn't a victim as such, I recall prosecuting a case where a Soldier received a three-year prison sentence but due to a technical defect within a two-day period the confirming officer had not confirmed the case, and the conviction was therefore quashed and the three-year sentence quashed with it.

The confirming officer was the divisional commander for whom I worked, and the victim in that case was not consulted. The Court described the flaws in our system as fundamental and said they were not remedied by the fact that there was a judge advocate, a civilian judge, or by the oath taken by the members of the court to try the accused according to the evidence and so on. They also said that the existence of review proceedings could not remedy the problems because the accused was entitled to a first instance trial that was in accordance with the Article 6 requirements. In view of the Government's position in not contesting the matter, even before the court ruling, legislation was prepared to change our system radically. The Armed Forces Act 1996 abolished the role of the convening officer and created three authorities: the Higher Authority; the Prosecuting Authority—in fact, there were

three of these; there was the Army, the RAF, and the Naval Prosecuting Authorities—and the Court Administration Officers.

"Higher Authority" was an officer superior to the commanding officer, and he would receive cases from the commanding officer and decide whether to refer them to the prosecutors for a decision on prosecution. The "Prosecuting Authorities" were responsible for deciding on whether a trial should take place and for conducting those prosecutions. Those Prosecuting Authorities were made up of officers of my service and the other two services under the direction of their respective directors; and so Major General Howell, my predecessor in this post, was additionally the Army Prosecuting Authority for a number of years, and in that role he and the other Prosecuting Authorities were responsible not to some military authority but to the Attorney General, and the Attorney General in our system has a general supervisory function in relation…or a superintending function in relation to prosecutions generally in the United Kingdom.

In addition, it was decided that officers who were selected to sit on boards and courts-martial would not come from the command where the accused was from. Judge advocates were to be appointed in every trial – and at one time they were not, and when they were not something almost always went wrong – and the judge advocates' rulings became binding at that stage, and previously they had only issued advice for the president and the members of the board to accept as they wished. Of course, they tended to accept the advice, but the position was made clearer by the 1996 legislation.

Judge advocates acquired a vote on the sentence but not on the finding. Confirmation of conviction and sentence were abolished but review was not. The Act gave the right of appeal against sentence to accused soldiers, whereas formally there had only been a right of appeal against conviction. The three Service Acts included the rights of an accused to elect trial by court-martial. The Royal Naval provisions, as ever I'm bound to say, were slightly different to the provisions that affected the Army and the Air Force.

The Armed Forces Discipline Act in 2000 made further amendments so that, for example, the right to elect trial was required to be given to all accused who were going to be dealt with by their commanding officers. There was also a Summary Appeal Court established to hear appeals from commanding officers dealing with charges summarily. They

operated by way of a rehearing and the court could not impose a more severe sentence than that that could have been imposed by the commanding officer.

In these ways it was intended to provide compliance with Article 6. An accused had the right to elect trial by court-martial and not to be dealt with by his commanding officer. His commanding officer was not independent from him, and therefore if he elected trial, he would have a right to appear in a court-martial which was Article 6 compliant. If he was dealt with by his commanding officer, then he had the right to appeal to the Summary Appeal Court, and again he would be dealt with by an Article 6 compliant tribunal.

In **[inaudible]** and the United Kingdom in 2002, the European Court found that the 1996 Act had gone a long way to remedying the Article 6 issues identified in Findley's case. It did, however, consider there was another problem. There were insufficient safeguards to exclude external pressure on the ordinary officers who made up the court-martial. Later, in another decision, the Court reconsidered these matters. By then it had heard from our own House of Lords, now the Supreme Court. They had given their views and expressed the opinion that in its first case the European Court had not really considered the matter perhaps as closely as the House of Lords had had an opportunity to do so. And the European Court, like the House of Lords, decided that there were sufficient safeguards and that a board of officers taking their oath and protected by offenses, such as attempts to pervert the course of justice, were sufficiently independent for there to be no breach of Article 6.

I mentioned earlier there were civilian judge advocates. In fact, the position was that there were judge advocates, civilian judge advocates, in the Army cases and the Air Force cases but not in the Royal Navy. Uniformed officers of the Royal Navy were uniformed judge advocates and they sat in naval trials, and that lasted until the case of *Greaves* **[phonetic]**, when the European Court said that this practice was a clear breach of Article 6 and it was stopped and all our judge advocates are now civilian.

Now turning to the 2006 Act and the present law, the 2006 Act in relation to discipline introduced a standing court-martial. Formerly, there were ad hoc trials for each case or a group of cases. The most serious cases, and there's a list of them contained in the Act, starting at treason and working down through murder and various war crimes and rape and

manslaughter and very serious offenses, those cases have to be notified by commanding officers or their units to the Service Police. They will then investigate, and when they refer the case they refer it directly to the Service Prosecuting Authority, provided a simple test is met.

The "Service Prosecuting Authority" is a joint body made up of the three former individual Service Prosecuting Authorities. The Director of Service Prosecutions or his delegated officers take all decisions on the trial. The current Director was appointed about three years ago and he is a civilian QC, a senior member of the Bar in England. All personnel who are facing summary dealing have the right to elect trial at the court-martial at the outset and the right to appeal to the Summary Appeal Court, which is very much the situation that prevailed before the 2006 Act. And so the situation is that we have at the moment police with significant levels of independence, which are to be increased to some degree by a new Act, the 2011 Armed Forces Act. We have a Head of Civilian Prosecutions—sorry, a civilian Head of Prosecutions who is the Director of Service Prosecutions, and there will be power in the 2011 Act for him to delegate his powers to people and not just to officers, and therefore he can delegate his power to civilians.

The most serious kinds of cases do not go to commanding officers for them to decide how they should be dealt with. They used to under the old system, but they go now to the police and then to the service prosecutors; and it's impossible under this system for a commanding officer to dismiss a charge of, say, murder, as he could and in at least one case did before this Act came into force. Judge advocates sit in all trials, including at the Summary Appeal Court. The Court-Martial Appeal Court that hears appeals from courts-martial is made up of civilian judges, and it can be seen, therefore, that there has been a massive change in our system since the days of convening officers and confirming officers and the like.

I should mention one or two things. The system works well. We did not start with a blank sheet of paper for the 2006 Act. We took many features of the old system and tried to incorporate those in the new system. For example, there was always a concern about the central role of the commanding officer in the whole process, and to an extent that has been maintained. And so while very serious cases are referred directly to the prosecutors, all of the other cases are referred by the police to the commanding officer and he can initiate cases of his own volition, and that was something that the three services felt strongly about. We could

have started with a blank sheet of paper and considered something like military magistrates, civilian judges sitting without commanding officers dealing with charges at all, but the services were not interested in that. Various papers have been written over the years on that topic in case summary dealing becomes vulnerable as a result of decisions in the European Court.

Some of the commanding officer's powers have reduced in relation to custody and so on because judges now play a much more prominent role. The numbers of courts-martial have been rising, at least in the Army, over the last few years, but last year there was a drop, a significant fall in the number of Army trials. Usually we had about 640 courts-martial; last year there were about 550 Army courts-martial. The Navy and the Air Force have between them about 80 or 90, so you can see the scale that we're dealing with is nothing like the scale that you're used to dealing with in the United States. Now this reduction may have been due to the tempo of operations. It may have been due to a decrease in the number of AWOL cases, absence without leave cases, and other factors rather than the structural effects from the more recent changes in the Act. It's probably too early to say.

I want to mention two other matters, as well. The three services have long used prerogative powers and powers in Queen's Regulations to take administrative action against personnel, so if a person is convicted by civil court, the Army or the Navy or the Air Force as the employer of that person may decide to take not formal disciplinary action (because that's being done by the civil court) but to take action as an employer. The Army Board, the governing body of the Army, can call upon officers to resign, for instance, if a case is sufficiently serious. This is not done in order to punish people but it is done to safeguard or restore the operational effectiveness of the Army. It's not contained in statute. It's not concerned with charges, but the service publications lay down a procedure for this sort of activity, and the Royal Navy and the Royal Air Force have over recent years adopted the practice originally taken by the Army to have minor administrative awards. Minor administrative awards are meant to be a simple, quick way of dealing with minor transgressions that do not merit formal charging and the statutory processes under the legislation. They involve punishments like extra work; interviews, formal and informal; muster parades; and extra duties. A very simple procedure laid down in relevant service publications. Units like this. You could argue it's probably because it avoids the administrative burden of charges and trials and people electing trial and so on, but they're really

designed for swiftness and simplicity and to restore operational effectiveness where there is no need to take formal disciplinary action.

I also mentioned earlier on complaints. Under the Service Discipline Acts and under the 2006 Act it is permitted to make complaints to the Defence Council. Now the Defense Council, which consists of ministers and the senior generals and admirals and their officers, does not actually deal with many cases. They are mainly dealt with by the individual Service Boards, so in the case of the Army, the Army Board, which is the senior generals of the Army. The power to complain remains in the 2006 Act. What the Act did was to establish, first of all, a Service Complaint Commissioner, a civilian, who has the power to refer cases, to monitor, and to make annual reports to the Secretary of State and also establish Service Complaint Panels. The Army Board were receiving quite a number of cases and were simply unable to deal with them in a very speedy way, and therefore it was decided that if they could delegate cases to a panel of brigadiers that would speed up the process and so the power was created. But in certain kinds of case where there is allegation of misconduct or improper behavior or bias, the panel must include an independent member, and the new legislation is likely, likely to increase the involvement of independent members. And so these are further changes that stem from a realization that what had gone on for a number of years needed amendment to make sure that we are complying with European Convention and our own provisions and a realization that greater civilian involvement and independent involvement would help with that.

Article 6 writes, "The right to a fair trial can be engaged in the process of complaints," and the 2011 Act, as I've suggested, will increase civilian involvement to ensure compliance. All of this stems from the fact that we have to operate fairly. In all the cases I've mentioned, there was no finding of a court that there was actual bias. Nobody found a case where a convening officer did something out of malice or a confirming officer did something out of malice or bias. It was the appearance of bias, the appearance of a lack of impartiality that was crucial in all of those cases. In order to ensure compliance with Article 6, you have to be sure that you can objectively justify what you are doing.

The system I've described, the new system, therefore looks rather different to yours. Within the British Army, people are very familiar with it, and while the pressure to change may have come from our ACHR obligations, when we were looking at the work on the 2006 Act—and I

did some of the work on that Act—nobody was seriously suggesting that here was a golden opportunity to revert to the age of the convening officer and the confirming officer and the powers that used to exist. The tenacity of the services to hold on to some redealing, the powers of the commanding officer, will be tested in the future, and not least because the phase of some redealing where the Soldier or the Sailor or the Airman appears in front of his commanding officer is of itself not compliant with Article 6 because the commanding officer lacks the independent—independence that the Article requires. The system is saved, however, because as a whole he can elect trial before he's dealt with and can appeal from some redealing and so that in those two ways there is access to a first instance, Article 6 compliant tribunal.

There are plenty of solicitors who will take these points at our courts-martial. Only last month the High Court decided in a case involving judicial review where the High Court oversees the proceedings of lower tribunals. In a very lengthy judgment, it decided on a case brought by one of our Army padres who was very unhappy with the way the Army Board dealt with his particular complaint. The High Court found that the—that he failed in his application for judicial review of the case, and it dealt with the case in some detail, but it proves the point that there will always be people who will challenge the system.

As I speak, there are hundreds of cases being brought against the Ministry of Defence arising out of incidents in Iraq, and I'm certain there will be many more rising out of incidents in Afghanistan: personal injury claims, claims that people should have been tried, applications for judicial review of the behavior of the police and of the prosecutors in not trying people and not investigating cases, and also major public inquiries. One of those which is about to come to an end is the inquiry into the death of Mr. Baha Mousa. Mousa died in Iraq having been held in our custody, in our jail for a period of some 36 hours. One soldier was convicted of a war crime as a result of the treatment of Mr. Mousa, although he was not convicted of causing his death. A number of others were acquitted of various charges in relation to that incident, and because the judge found that there had been a wall of silence that prevented the court-martial from getting into the incident really closely, at least partly because of that a public inquiry was ordered. Many of us have given evidence at that public inquiry, and it will report next month its findings. The Army has very carefully considered how it should react to any findings. It has been shown that our procedures now are as tight and professional as they can be, and to an extent I mentioned at the start the

five posts which we have been given in Army Legal Services. Those posts arise because of the pressure from that inquiry and other inquiries which are just about to begin to be seen to do the right thing.

I mentioned Horace earlier on. I want to finish with a quote by Horace. He said, "*Vis consili expers mole ruit sua*." "Force without wisdom falls of its own weight." Now as I draw to a close and in honor of General Hodson, I salute all of you and those you work with, who like my officers give legal counsel, wise counsel to help to shape the wisdom that prevents our use of military force from falling of its own weight.

Thank you very much.

THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH[1]

REVIEWED BY DAN E. STIGALL[*]

I. Introduction

Recent years have seen a distinct rise in the academic attention paid to all aspects of what is frequently termed, in the collective, national security law,[2] and various subcategories of international and domestic law which relate to national security.[3] This increased academic interest, spurred by world events such as the U.S. conflicts in Iraq and Afghanistan and the increased focus on counterterrorism, has resulted in such heightened attention that many U.S. law schools now publish journals which focus exclusively on national security law[4] and even offer LL.M. programs specializing in this distinct academic area.[5] Courses on the law of armed conflict have also burgeoned.[6] Concomitantly, since

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[1] GEOFFREY S. CORN, VICTOR HANSEN, M. CHRISTOPHER JENKS, RICHARD JACKSON, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH (2012).

[2] Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT'L. SECURITY L. & POL'Y 161, 162 (2005) ("Although the study of national security law has always built upon a foundation of constitutional law, in recent years it has necessarily grown in scope to include coverage of fundamental principles of public international law, international criminal law, international humanitarian law, and numerous domestic statutes.").

[3] *Id.*

[4] *See, e.g.*, J. NAT'L SECURITY L. & POL'Y, http://jnslp.com (last visited Dec. 21, 2012).

[5] For instance, both The George Washington University School of Law and Georgetown Law School now offer LL.M. programs in National Security Law. *See, e.g.*, Georgetown Law School, http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/national-security/index.cfm (last visited Dec. 21, 2012) (describing its National Security Law LL.M.) ("The National Security Law LL.M. degree is a highly competitive one-year advanced degree program, created to give students the opportunity to engage in critical thinking about national security law.").

[6] AM. BAR ASS'N, CAREERS IN NATIONAL SECURITY LAW, at xi (1st ed. 2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/natsecurity/nsl_text.authcheckda

2001, the number of textbooks designed to function as instructional tools to teach the law of armed conflict has burgeoned.[7]

Notable among those contributing to the literature in this recently fecund field are scholars who are current or former military lawyers, some of whom have entered academia after serving with distinction in the U.S. military for many years. The addition of these voices to the academic discussion has deepened the discourse, lent to the literature needed practical insight, and enriched the discussion with viewpoints informed by years of military experience, training, and indoctrination.[8] While the contribution by military legal scholars to international law is certainly not a new phenomenon—after all, some of the earliest writers on international law and armed conflict were military lawyers[9]—commentators have noted the impact of recent writing by military lawyers and their marked inclination to approach issues through an "operational" lens.[10]

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m.pdf ("The number of accredited law schools offering courses on national security law has increased from one in 1974 to seven in 1984 to eighty-three in 1994. Today over 130 schools offer such courses.).

[7] *See* Françoise J. Hampson, *Teaching the Law of Armed Conflict*, 5 ESSEX HUM. RTS. REV. No. 1, July 2008, at 6 ("Since 2001, particularly in the United States, a large number of academics have begun to address LOAC issues, some of whom appear to be uninhibited by ignorance. The role of an academic drawing up a reading list has changed dramatically. It was once a matter of identifying the isolated examples of relevant material. It is now a matter of identifying what is worth reading amongst the mass of material produced."). Notably, some textbooks have addressed facets of the law of armed conflict for decades. *See, e.g.*, THOMAS EHRLICH & MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE (1993).

[8] *See* Kenneth Anderson, *Readings: The Rise of Operational Law of Armed Conflict as an Academic Specialization*, LAWFARE (Apr. 29, 2012, 5:37 PM), http://www/awfareblog.com/2012/04/readings-the-rise-of-operational-law-of-armed-conflict-as-an-academic-specialization ("This new writing is genuinely academic in the sense that it is more than just operational manuals for JAG officers, limited in their audience to military practitioners. These practitioners-turned-academics are developing theoretical accounts of operational law issues. And although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines "operational law" in an academic sense.").

[9] *See, e.g.*, ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 73 (1947) (noting that one of the earliest commentators in this field, Balthasar Ayala, a Spaniard writing in the Sixteenth Century, "served in the high position of Auditor General (which may be likened to that of the American Judge Advocate General) in the army sent out by Phillip II against the Netherlands").

[10] Anderson, *supra* note 8 (noting, "although these writers do not always share the same views among themselves, there is a core orientation that at least partly defines "operational law" in an academic sense").

The Law of Armed Conflict: An Operational Approach, written by a phalanx of six authors with extensive military backgrounds, is a product of this academic approach. As its title implies, the book seeks to provide "operational context"[11] to an academic discussion of the law of armed conflict which is informed by the authors' collective experiences serving as military advisors in the U.S. armed forces. All of the authors have independently made their respective marks in the field of international law, especially as it pertains to the law of armed conflict[12]—and five of the same six authors previously collaborated on a book which "focused on the operational resolution of issues related to the application of military power by the United States . . . ."[13] This book, however, is distinct in that it is not an academic treatise but a textbook designed for classroom instruction and which seeks to provide the first real manual for broader classroom instruction on this subject from an "operational" perspective.[14]

II. The Operational Approach to International Law & the Law of Armed Conflict

The operational approach to international law is one with deep origins and which has cohered over the past two decades within the military legal community.[15] With the advent of military-specific publications for legal scholarship and centralized military institutions for legal education,[16] military attorneys in the United States have focused,

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[11] *See* CORN, HANSEN, JENKS, JACKSON, JENSEN & SCHOETTLER, *supra* note 1, at xxvii.

[12] *See, e.g.*, Geoffrey S. Corn, Hamdan, *Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295 (2007); Eric Talbot Jensen & Chris Jenks, *All Human Rights Are Equal, But Some Are More Equal Than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 HARV. NAT'L SECURITY J. 171 (2010).

[13] MICHAEL LEWIS, ERIC JENSEN, GEOFFREY CORN, VICTOR HANSEN, RICHARD JACKSON, JAMES SCHOETTLER, THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (2009).

[14] CORN ET AL., *supra* note 1, at xxvii.

[15] *See* Lieutenant Colonel Marc L. Warren, *Operational Law—A Concept Matures* 152 MIL. L. REV. 33, 36 (1996) (citing Lieutenant Colonel David E. Graham, *Operational Law (OPLAW)—A Concept Comes of Age*, ARMY LAW., July 1987, at 9).

[16] *See* THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, THE JUDGE ADVOCATE GENERAL'S SCHOOL, 1951–1961, at 1 (1961) (noting that "The Judge Advocate General's School, U. S. Army, located on the Grounds of the University of Virginia opposite the Law School, is the United States Army's military law center. It is an approved law school rated by American Bar Association inspectors as offering the highest quality specialized graduate program in law to be found in America, and provides a graduate law school atmosphere

with increasing frequency and acumen, on exploring and explicating the legal universe that surrounds and undergirds armed conflict. Military lawyers, thus, have propelled the ascendance of the concept of "operational law"—an area of law typically defined as the "body of foreign, domestic, and international law which impacts specifically" on the activities of military forces.[17] As the U.S. Army Field Manual on Legal Support to Military Operations notes, "Operational law encompasses the law of war but goes beyond the traditional international law concerns to incorporate all relevant aspects of military law that affect the conduct of operations."[18]

In elaborating on the concept of operational law, Marc L. Warren, a retired judge advocate and a luminary in the field of military law, has noted that "[operational law] is not a specialty, nor is it a discrete area of substantive law. It is a discipline, a collection of all of the traditional areas of the military legal practice focused on military operations."[19] Moreover, Warren stresses that "[i]f the essence of the Army is its operations in the field, then operational law is the essence of the military legal practice." This legal approach reflects the professional role of a military legal advisor. As the 2012 *Law of Armed Conflict Deskbook* notes:

> Military operations involve complex questions related to international law. International law provides the framework for informed operational decisions, establishes certain limitations on the scope and nature of command options, and imposes affirmative obligations related to the conduct of U.S. forces. Commanders, rely on Judge Advocates to understand fundamental principles of international law, translate those principles

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where the modern Army lawyer is professionally trained in the many aspects of military law. The School's function is to orient the Army lawyer in the fundamentals of military law, to keep his training current, and to give him specialized legal training on an advanced level. As a military law center it attaches considerable importance to its research and publications, including texts and case books, as well as several legal periodicals.").

[17] *See* Warren, *supra* note 15, at 36 (citing THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 1-1 (1996)).

[18] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-20 (26 Jan. 2012).

[19] Warren, *supra* note 15, at 37.

> into an operational product, and articulate the essence of the principles when required.[20]

Given the fact that so many military attorneys are steeped in a legal culture that emphasizes an operational approach to law, it is unsurprising that an operational approach to legal scholarship—especially as it involves the law of armed conflict—would eventually emerge. Predictably, the scholarship on international law that emerges from this operational mindset bears the distinct markings of its military upbringing, such as its keen focus on the practicalities and routine problems confronted by military lawyers advising on issues related to armed conflict. But one must take care to avoid conflating an academic style with a military discipline and to distinguish the idea of "operational law" from any specific approach to legal scholarship. Likewise, it would be incorrect to imply that one particular approach to international law and its subcategories necessarily carries more "operational" legitimacy than others—especially in a field as laden with indeterminacy, competing theories, and competing practices as international law.[21] A word such as "operational" can, therefore, be one of treacherous and evasive meaning. It suffices to say that, in the context of legal scholarship, "operational" has become a descriptive term used to indicate a practitioner-based approach—and, in the specific context of the law of armed conflict, one which has been championed by military scholars.[22]

III. The Text: A Practical, Straightforward Discussion of the Law of Armed Conflict

Given his distinguished place in the pantheon of military attorneys and his influential writing on the maturation of the concept of "operational law," it is appropriate that Marc L. Warren also writes the

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[20] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK 1 (2012) [hereinafter DESKBOOK].

[21] *See* Martti Koskenniemi, *International Law in the World of Ideas*, THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 48–49 (James Crawford & Marti Koskenniemi eds., 2012).

[22] Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1435 (2008) ("Those who criticize the extent of judge advocate involvement during military operations thereby reveal their lack of operational experience. The law of war is complicated. Applying it in a progressively complex combat environment requires specialized training, practical experience, and in-depth knowledge of the operational art. Most civilians typically fall short in these regards.").

foreword for this book, emphasizing its aim of both elucidating its subject matter but also demonstrating how the law of armed conflict is applied in practice.[23] In that regard, one of the notable characteristics of this book is the breadth of the subject matter it seeks to address. The book is logically organized and, within its 599 pages, walks the reader through the major topics that comprise the corpus of the law of armed conflict—*jus ad bellum*, *jus in bello*, and *jus post bellum*. These include the legal bases for the use of force; the history of the law of armed conflict; the legal "triggers" for the law of armed conflict; and the principal subjects of concern to this area of the law (conflict classification, distinction, targeting, means and methods of warfare, etc.).

IV. The Pros: A Strong Emphasis on the Practical

The authors of *The Law of Armed Conflict: An Operational Approach* have placed much emphasis on practicality and constructed a discussion of the law of armed conflict from a decidedly U.S.-centric perspective. On that score, to facilitate the practical and operational approach of the book, the authors have designed the text around an operational scenario which is carefully interwoven into the discussion and which serves to provide an interlinking theme and operational focus—so that students are provided with theoretical discussion but also challenged by practical problems. The reader is, thus, asked to approach each chapter through the lens of a junior judge advocate advising commanders in the context of the 1989 U.S. invasion of Panama (Operation Just Cause).[24] The brief summary of the scenario at the beginning of each chapter serves as a sort of vignette to focus the reader and provide situational context—giving an idea of the sort of situation in which the material to be discussed might be needed. Each chapter then contains the relevant substantive material pertaining to the topic and concludes with questions designed to encourage the reader to use the material to resolve practical legal problems that arise during the course of military operations.[25] This scenario-based aspect of the book immediately serves to separate it from other competing texts which lack such practical emphasis.

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[23] CORN ET AL., *supra* note 1, at xxii.
[24] *Id.* at xxviii.
[25] *Id.*

Additionally, *The Law of Armed Conflict: An Operational Approach* contains a great deal of important background information that serves to allow an uninitiated reader to grasp basic concepts that are critical to an understanding of the law of armed conflict and its application. The authors take great pains to walk the reader through the basic history, key players, fundamental government structures, and the relevant international framework. For instance, the introduction is notably helpful in that it contains an overview of the national security organization of the United States Government. The various roles of the Secretary of Defense, Chairman of the Joint Chiefs of Staff, Service Secretaries, and Combatant Commanders are clearly explained.[26] Such basic information is helpful as the complex chains of command which characterize the U.S. national security structure are not always clear or intuitive for the non-military or inexperienced reader. Many casual observers of world events would not fully appreciate, for instance, that the Chairman of the Joint Chiefs of Staff—who appears regularly alongside high-level national leaders at widely televised press conferences and serves as the principal military advisor to the President of the United States[27]—is not actually in command of military operations when they are carried out.[28] Instead, it is the Combatant Commanders (four-star generals and admirals who, with rare exceptions, are generally less visible to the public) who are directly in command of forces conducting military operations.[29] Similarly, the roles of the various U.S. armed forces are expressly defined as are key concepts such as an "operational chain of command" and a "joint task force."[30]

This sort of introduction gives important background and also serves to provide some context at the outset so that the reader understands, albeit from an exclusively U.S. perspective, the institutional framework in which questions pertaining to the law of armed conflict are generally considered and the organizations to which this field of law most directly pertains. The subsequent discussions and study questions are, therefore, grounded in this basic understanding of the organizational context in which the U.S. military lawyer must operate. While such information is not legal in nature, it is imminently practical information and necessary for a complete understanding of the operational context in which most

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[26] *Id.* at xxix–xxx.
[27] *Id.* at xxix.
[28] *Id.*
[29] *Id.* at xxx.
[30] *Id.* at xxx–xxxi.

decisions relevant to the law of armed conflict are made. No comparable textbook exists which explains this institutional framework in such detail.

In a similar vein, the first chapter of the book begins with a concise, basic discussion of the legal framework governing the use of force by states. The chapter briefly discusses the history of *jus ad bellum* and recounts the most prominent theories on the law governing the resort to war, tracing the intellectual and legal development to the current framework which is governed by the United Nations (UN) Charter.[31] Importantly, however, the chapter takes time to first explicate the UN system, its various organs, and the key aspects of the UN Charter which bear upon the legal authority of states vis-à-vis the use of force. The authors then go on to address the authorities granted under Chapter VI of the UN Charter for the pacific settlement of disputes as well as the more expansive authorities for the use of armed force granted under Chapter VII. Attention is given to the legal authority under the UN for peacekeeping,[32] the establishment of ad hoc tribunals,[33] and the development of the International Criminal Court.[34] This discussion is comprehensive and explains not only the textual language of the UN Charter but also the various Security Council resolutions and General Assembly resolutions which have shaped the international approach to UN operations.

Among the other unique practitioner-oriented aspects of this book is its section on weapons and tactics, which discusses the process of conducting a legal review of weapons systems.[35] This section gives detailed guidance on numerous specific weapons systems such as shotguns; small arms and small arms ammunition; edged weapons (such

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[31] *Id.* at 2–4.

[32] *Id.* at 7–8. It should be noted, however, that this section somewhat inaccurately states that the Uniting For Peace Resolution, passed by the UN General Assembly at the urging of the United States, "hasn't been applied to any particular international situation." *Id.* at 6. In fact, the Uniting For Peace Resolution was used in 1956 to authorize and deploy an international emergency force (UNEF) which was tasked with maintaining peace between Israel and Egypt in the aftermath of the 1956 Suez Crisis. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ATTACKS 35–36 (2005). Thereafter, in 1960, the Uniting For Peace Resolution was again used to authorize the initial deployment of a UN force to Congo (ONUC) that eventually conducted military operations against a secessionist group in Katanga Province. *Id.* at 37–38.

[33] CORN ET AL., *supra* note 1, at 10–11.

[34] *Id.* at 12.

[35] *Id.* at 199.

as knives and bayonets); .50 caliber rounds; explosive munitions; depleted uranium; silencers; certain non-lethal weapons (such as rubber bullets and sponge batons); and "cyber weapons."[36] The section even contains a sample memorandum from the actual office within the U.S. Army bureaucracy responsible for conducting such legal reviews.[37] Although such weapons reviews are a critical aspect of military legal practice and a central subject of many treaties relevant to the law of armed conflict, no other comparable textbook addresses this subject in such a concrete fashion and in such detail. This makes the text unique as it goes beyond a mere theoretical discussion of the law of armed conflict and gives the reader a practical understanding of how the United States implements the treaty obligations being discussed.

The chapter on targeting, however, provides what is perhaps the best example of the difference between an "operational" approach to the law of armed conflict and more conventional academic approaches. Many textbooks on the law of armed conflict cover the way in which targeting is regulated by international law, the rules governing the targeting of combatants, protected persons and places, etc.[38] This text, however, is distinguishable in that is also discusses the targeting process and how U.S. forces go about the business of targeting enemy personnel or materiel within the framework of the law of armed conflict.[39] The chapter opens with a discussion of the targeting process, using graphics taken directly from the U.S. Army field manual on targeting and joint publications from which the U.S. military derives its targeting doctrine.[40] It is only after that process is thoroughly described that the chapter begins to elucidate the general principles of targeting, distinction, etc., so that the entire academic discussion is framed within an operational discussion that gives the reader an idea of who is responsible for targeting decisions and how they go about their work.[41] Thus, the practitioner-based approach of this book provides readers rare insight into how the rules governing modern warfare are applied and the institutional framework in which its practitioners operate.

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[36] *Id.* at 214–21.
[37] *Id.* at 228.
[38] *Id.* at 164–89.
[39] *Id.* at 161–64.
[40] U.S. DEP'T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS 2-1 (26 Nov. 2010).
[41] CORN ET AL., *supra* note 1, at 159.

V. The Cons: An Occasional Emphasis on Policy and Practice over Legal Analysis

The book does, however, have its peculiarities. A notable characteristic of *The Law of Armed Conflict: An Operational Approach* is its expansive view of permissible military action. For instance, the second half of the first chapter details the basic legal framework for the use of force found in Articles 2(3), 2(4), and 51 of the UN Charter.[42] Articles 2(3) and 2(4) form the legal bulwark designed to outlaw the use of force by states. The language of this chapter indicates a degree of indeterminacy in the meaning of Article 2(4):

> Article 2(4) has become the accepted norm restricting the use of force among States. However, universal acceptance does not mean universal understanding. Although the international community as a whole accepts Article 2(4) to be binding, nations have very different views on what the language actually means. For example, the prohibition refers to the "threat or use of force," as opposed to words such as "war" or "aggression." The Charter contains no definitions section, leaving each nation to determine what constitutes a use of force.[43]

By noting the existence of contention but not exploring the validity of competing claims, such language might leave the reader with the impression that Article 2(4) is the subject of greater controversy or disagreement in the international community than is the case. As Dinstein notes, "When Governments charge each other with infringements of Article 2(4), as happens all too frequently, such accusations are always contested."[44] But, in noting the existence of such disputes, it is equally important to evaluate the strength of competing claims and take into account the extensive treatment of Article 2(4) by noted commentators and authoritative international bodies. The weight of such authorities indicates that "[t]he correct interpretation of Article 2(4) . . . is that any use of inter-State force by Member States for whatever

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[42] *Id.* at 14.
[43] *Id.*
[44] *See* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 97 (Cambridge Univ. Press 5th ed. 2011).

reason is banned, unless explicitly allowed by the Charter."[45] The authors, however, never discuss these authorities and only note the fact of disagreement—never explaining or probing the quality of the dissenting or contradictory arguments. Accordingly, any extant disagreement in the international community vis-a-vis Article 2(4) of the UN Charter is overemphasized in a way that inures to the benefit of an argument for more expansive military action.

In contrast, when discussing the concepts of anticipatory and preventive self-defense, the authors tend to minimize the controversy surrounding the legitimacy of these bases for the use of force and, instead, present these concepts as being more accepted than a review of the literature would warrant.[46] For instance, while the authors do note that such attacks were considered "beyond the scope of appropriate self-defense" twenty years ago, the text states that preventive self-defense has "only recently begun to receive acceptance."[47] Similarly, though noting that the international community is "dramatically split on this notion of self-defense," the authors conclude by noting that "it is clear that some States have already justified the use of armed force against another State under this theory."[48] But the authors do not note the relative rarity of attempts by states to justify their actions based on arguments of preventive self-defense.[49] Moreover, the authors sidestep discussion of

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[45] *Id.* at 90–91; *see also* NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 77 (2010) ("The more persuasive opinion is that Article 2(4) prohibits any use of force on foreign territory, other than in accordance with the exceptions to the Charter."). *See also* FRANCK, *supra* note 32, at 12 (noting the inclination of some to read Article 2(4) as permitting more limited uses of force and stating, "Such a reading of Article 2(4) is utterly incongruent, however, with the evident intent of sponsors of this amendment.").

[46] CORN ET AL., *supra* note 1, at 22–24.

[47] *Id.* at 23.

[48] *Id.* at 24.

[49] James Mulcahy & Charles O. Mahony, *Anticipatory Self-Defence: A Discussion of the International Law*, 2 HANSE L. REV. 231, 242 (2006).

> Israel did not seek to rely on anticipatory self-defence when it launched what appeared to be a pre-emptive strike on Egypt, Syria and Jordan in 1967. Israel argued that the actions were taken in response to a prior armed attack. In the Security Council debates on the action Israel claimed that Egypt' s blocking of the Straits of Tiran to passage by Israeli ships was an act of war. This, according to Israel, was the armed attack justifying self-defence under the Article 51 regime. Additionally, when the USA forcibly intercepted nuclear weapons in transit from USSR to Cuba during the Cuban Missile Crisis of 1962, the aggressor did not rely on the doctrine of

the wide condemnation of such state action[50] and the weight of existing authority which states that such preemptive action is illegal under international law.[51] Dinstein, for example, notes that "[t]he idea that one can go beyond the text of Article 51 and find support for a broad concept of anticipatory or preemptive self defense in customary international law . . . is counterfactual"[52] and that "the option of a preventive use of force is excluded by Article 51."[53] This position is echoed by the UN High-level Panel on Threats, Challenges and Change which concluded that the use of force based on an anticipated threat could only be lawful if authorized by the UN Security Council.[54]

> [I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from

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> anticipatory self-defence, relying instead on regional peacekeeping under Chapter VIII of the UN Charter.

Id.

[50] *Id*. at 244, noting that, when Israel attacked an Iraqi nuclear reactor in 1981 and asserted a right to use pre-emptive force,

> Some states rejected anticipatory self-defence generally, while others held the view that the facts of the incident did not justify the use of pre-emptive force, because Israel failed to prove that Iraq had plans to attack them. Even the USA condemned the actions of Israel, however this was on the grounds that Israel had not exhausted peaceful means for the conclusion of the dispute. What is important is the fact that none of the states sitting in the Security Council agreed with the anticipatory self-defence justification employed by Israel.

Id.

[51] *See generally* TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER (2010).

[52] *See* DINSTEIN, *supra* note 44, at 197.

[53] *Id*. at 200; *see also* Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, *in* AM. SOC'Y OF INT'L LAW TASK FORCE PAPERS 1, 2–3 (2002), *available at* http://www.asil.org/taskforce/oconnell.pdf ("Preemptive self-defense, however, is clearly unlawful under international law. Armed action in self-defense is permitted only against armed attack.").

[54] U.N. High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, transmitted by Note of the Secretary-General*, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report.pdf.

> collectively endorsed action, to be accepted. Allowing one to so act is to allow all.[55]

The omission of such discordant views serves to create an unnecessary imbalance in the discussion—an imbalance which is maintained throughout the discussion of this particular topic. For instance, the authors also include a brief discussion of Dinstein's theory of "interceptive self-defense,"[56] which holds that states may be able to respond in self-defense when a hostile state has irrevocably committed to an attack in such a way that the state has "embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon."[57] The authors do not, however, note the fact that this very theory posited by Dinstein emanates from his utter rejection of anticipatory or preventive self-defense and is articulated as a curative to the problem faced by the restrictions of Article 51.[58] It is a middle ground proposed by Dinstein which permits lawful self-defense before the impact of an attack (albeit an attack which must be underway) is felt—but, importantly, it is a theory offered in contradistinction to preemptive actions which Dinstein holds to be in violation of international law.[59] This aspect of the rationale undergirding Dinstein's theory of interceptive self-defense, however, finds no mention in the discussion. Accordingly, the considerable authority rejecting notions of anticipatory and preventive self-defense are minimized in a way that inures to the benefit of an argument for more expansive military action.

This is not to imply that the positions taken by the authors are not defensible or legally supportable. There is certainly an abundance of literature and logic by which one could defend the positions articulated in the text and many legal scholars, in fact, subscribe to the interpretations the authors posit—but the authors seem to mute the debate on complex legal issues in favor of articulating an identifiable rule of thumb. To achieve this, the authors eschew a comprehensive legal discussion in favor of more forceful articulation of an expansive view of these areas of the law and, in the process, posit a maximalist position on the use of force.[60]

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[55] *Id.* ¶ 191.
[56] CORN ET AL., *supra* note 1, at 23.
[57] *See* DINSTEIN, *supra* note 44, at 204.
[58] *Id.*
[59] *Id.* at 196, 203–05.
[60] *See* DESKBOOK, *supra* note 20, at 38.

This seemingly partisan approach may merely be a function of the operational approach to legal scholarship. In a text in which the authors seek to provide an intensely practice-based approach to the law, expatiation may be avoided in favor of a more concise discussion of the law as it is applied by U.S. military legal advisors. Such breviloquence, however, is—to borrow a military metaphor—a double-edged sword. Such an intense focus on legal positions and practices adopted by practitioners in a given time and place (versus a broader discussion of the legal issues) can serve to unduly narrow the scope of analysis.

VI. Conclusion

In sum, *The Law of Armed Conflict: An Operational Approach* is a valuable contribution to the field of international law as it relates to the law of armed conflict. It is an experiential guide through the law of armed conflict from a U.S. military perspective. The book's discussion of the law of armed conflict is enriched by the practical insight and knowledge of its authors, all of whom are distinguished practitioners with years of military experience. This combination of practical experience, knowledge of U.S. military practice, and scholarly acumen form what is clearly the book's principal virtue. But every virtue has a concomitant defect and, in this case, the book's keen focus on U.S. practice in a military context occasionally crowds out broader legal discussions and omits critique. As such, explanations of policy positions on certain issues can sometimes take the place of a fulsome, multidimensional explanation of the topic—leaving readers instructed on a particular policy position or insight into U.S. military practice, but left without a deeper examination of the myriad legal issues attendant to that position. Fortunately, this defect is occasional rather than recurring and does not, in the final analysis, unduly detract from the book's value as a resource and a unique educational tool.

That said, the book's approach does raise separate questions about a practitioner-based approach to the law of armed conflict. One may, at once, recognize the value of such scholarship yet question whether classroom instruction on the topic should not also include a fulsome discussion of competing theories and critical approaches to accepted practices. Warren notes in the foreword of this book, "The reader can become as knowledgeable as possible about the law of armed conflict

without having served as a legal advisor in combat."[61] The author of this review would revise this statement somewhat and posit instead that, through this book, the reader can attain a solid understanding of the law of armed conflict, learn as much as possible about U.S. positions relating to the law of armed conflict, and learn how U.S. military lawyers approach this specific subset of international law. But there is, of course, a range of knowledge and a deeper understanding of international law that exists beyond any single nation's various policy positions or what has become a standardized approach. And recent history has taught us that even the most virtuous nations—nations with luminous democratic traditions—can, even if only briefly, err and adopt policy positions of questionable legality.[62]

Critical approaches and explanations of competing views, accordingly, have their value. As Yeats noted, "there is no longer a virtuous nation and the best of us live by candlelight."[63] A curriculum that is too narrowly focused on a single approach and eschews a broader legal discussion in favor of emphasizing the standardized practices and policies of one nation's military may, therefore, be practical and effective on many levels—but it has its dangers.

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[61] CORN ET AL., *supra* note 1, at xxii.

[62] *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct in Interrogation Under 18 U.S.C. §§ 2340–2340A, at 34 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

[63] *See* STAN SMITH, W.B. YEATS: A CRITICAL INTRODUCTION 44 (1990).