

Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq¹

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I. Introduction

After the successful military surge of 2007 and 2008 improved the security situation on the ground in Iraq,⁴ the mission of U.S. Forces shifted to political engagement and economic revitalization.⁵ The U.S. Department of Defense (DoD) reconstruction projects are a vital component to supplement the efforts made by the Government of Iraq (GOI) and other U.S. agencies to rebuild civil capacity and provide assistance to needy populations and formerly-oppressed persons. The DoD reconstruction programs center on the provision of essential goods and services,⁶ encourage Iraqi workers and businesses to engage in self-sustaining market-based economic activities, and allow for the development of mechanisms to transition reconstruction responsibilities to the GOI.⁷

Non-kinetic reconstruction efforts play an important role in exploiting and sustaining security gains by denying avenues for the resurgence of extremist activities. Commanders use U.S. reconstruction-funded programs to win the hearts and minds of the local populace by promoting economic growth, improving infrastructure, and strengthening local and provincial institutions. To permit the widest distribution of benefits, the vast majority of DoD reconstruction projects are for small dollar amounts and focus on those individual Iraqis most in need. Micro-grants

and the distribution of medical supplies are common examples that serve these purposes.⁸

From the beginning of the Iraq operation through the middle of fiscal year (FY) 2009, U.S. agencies contributed approximately \$49 billion to promote reconstruction in Iraq.⁹ Although the majority of reconstruction spending has generally been undertaken by entities other than the U.S. military,¹⁰ the DoD engages in essential reconstruction and rebuilding efforts to supplement the work of agencies like the Department of State and the U.S. Agency for International Development (USAID). The Commander's Emergency Response Program (CERP) has been the primary tool used by the DoD, and provides urgent, humanitarian assistance to the Iraqi people.¹¹ In addition to CERP, in April 2008, the GOI provided the United States with \$270 million in Iraqi Commander's Emergency Response Program (I-CERP) funds for brick and mortar reconstruction for the Iraqi people.¹² The I-CERP program seeks to capitalize on the success and speed of execution of the CERP program.¹³ The Disarmament, Demobilization, and Reintegration (DDR) Program, which was financed using Iraqi Security Forces Funds (ISFF), was also established in FY 2008¹⁴ and was used to teach military-aged Iraqi males marketable skills to increase their value in the labor pool.¹⁵ Additionally, the United States is leveraging opportunities to use Iraqi businesses and laborers through Coalition Forces supply and service contracts financed with Operations and Maintenance-Army (OMA) funds.

Multi-National Corps-Iraq (MNC-I) C8 publishes updated versions of the Money as a Weapon System (MAAWS), MNC-I CJ8 standard operating procedures (SOP), which addresses financial resource operations in

¹ This article is the third in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps-Iraq, Headquarters, 2008-2009. Each article in the series discusses one significant legal issue that arose in each of The Judge Advocate General's Corps' functional legal areas during the deployment. Articles in the series will cover Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims.

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⁴ See, e.g., MICHAEL E. O'HANLON & IAN LIVINGSTON, IRAQ INDEX: TRACKING VARIABLES OF RECONSTRUCTION & SECURITY IN POST-SADDAM IRAQ 5 (Feb. 26, 2010) (showing weekly attacks against the coalition and its partners falling by almost 80% from May 2007 to December 2009).

⁵ See, e.g., Thom Shanker & Stephen Farrell, *Odierno Succeeds Petraeus in Iraq*, NY TIMES, Sept. 17, 2008 (comments from General Odierno).

⁶ This U.S. focus coincided with the GOI's goal to make 2008 the year that Iraq focused its reconstruction efforts on the provision of essential services to its citizens.

⁷ See *supra* note 5.

⁸ See HEADQUARTERS, MULTI-NATIONAL FORCE-IRAQ, MNC-I C8 OPERATION IRAQI FREEDOM (OIF) AFTER ACTION REPORT (AAR), MNC-I C8, at 15 (Mar. 2009) [hereinafter MNC-I C8 AAR] (covering deployment of XVIII Airborne Corps).

⁹ CURT TARNOFF, IRAQ: RECONSTRUCTION ASSISTANCE, CONGRESSIONAL RESEARCH SERVICE, at summary (Aug. 7, 2009).

¹⁰ See, e.g., Michael Waterhouse & Carolyn C. Smith, *Iraq Reconstruction Resources: Fact Sheet*, CDS Report for Congress, September 24, 2003, at CR-2.

¹¹ See *supra* note 8, at 3 (comparing reconstruction funding streams).

¹² *Id.* at 18.

¹³ These funds were wired from the Iraqi Treasury to a bank account in New York to be spent by U.S. units for the benefit of the Iraqi people.

¹⁴ The DDR program was funded with certain reprogrammed two-fiscal year FY 2007 ISFF appropriated funds.

¹⁵ See *infra* note 50.

Iraq.¹⁶ Revisions to the MAAWS capture the latest changes in law, regulation, and FRAGO guidance. The MNC-I Commanding General and C8 may place additional restrictions on the use of appropriated funds, but MAAWS policies cannot be less restrictive than those contained in law, regulation, and FRAGO guidance.

This article explores the evolution of DoD reconstruction programs and the resulting legal issues faced during the post-surge phase, especially issues faced during XVIII Airborne Corps' deployment from January 2008 to April 2009. Most of these same legal issues will be faced by judge advocates who are currently and will be deployed to Iraq. Many of the programs described in this article will continue as they are or in an altered form and continue to generate enduring fiscal law issues, even after the termination of the programs. In addition, many of the basic fiscal law lessons learned in Iraq are applicable to fiscal law practiced in Afghanistan. This article focuses particularly on the CERP, I-CERP, and DDR programs. We also discuss the manner in which OMA funds are utilized to encourage the Iraqi economy. Finally, we discuss legal issues that arise across the various DoD programs.

Judge advocates deployed to Iraq and practicing in the fiscal law area should be familiar with each of the CERP, I-CERP, and DDR programs. CERP is likely to remain the primary funding stream for DoD reconstruction efforts. Although nearly all initial I-CERP funds have been committed, judge advocates must be familiar with the I-CERP program in the event that the Iraqis disperse additional I-CERP funds. Initial funding for the DDR program expired at the end of FY 2008. Nevertheless, it is essential to understand the nature of the DDR program in order to appreciate how CERP can be used to replicate aspects of the DDR program and meet commanders' intent.

In early 2010, as part of the drawdown of forces, MNC-I and its higher headquarters Multi-National Force-Iraq (MNF-I) merged to form U.S. Forces-Iraq (USF-I). Although the merger of the two headquarters elements affects certain project approval levels and submission procedures, the authors' observations covering their deployment period from January 2008 to April 2009 and basic fiscal law principles contained in this article remain fundamentally unchanged for judge advocates practicing on the ground in divisions and brigades in Iraq.

¹⁶ The latest version of the MAAWS published during the tour of the XVIII Airborne Corps as MNC-I was dated 26 January 2009. MONEY AS A WEAPON SYSTEM (MAAWS), MNC-I CJ8 SOP (26 Jan. 2009) [hereinafter MAAWS MNC-I CJ8 SOP].

II. The Commander's Emergency Response Program

A. Use of CERP in Iraq

The CERP was originally established with funds from seized Ba'ath party assets.¹⁷ The program is now funded through a specific authority¹⁸ in the annual Defense Authorization and Appropriation Acts to use OMA on projects that address the urgent, humanitarian needs of the Iraqi people.¹⁹ The DoD Financial Guidance published in June 2008, and updated in January 2009, defines "urgent" as "any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action."²⁰ Prior to the June 2008 guidance, the concept of "urgent and humanitarian" had not been formally defined by the DoD or Congress, and was instead left up to command discretion.²¹ In addition, the June 2008 guidance contains the requirement that projects must be "small-scale," meaning generally less than \$500,000 per project.²²

In response to these program requirements, in FY 2008, MNC-I spent approximately \$1.2 billion in CERP, up from \$882 million in FY 2007.²³ As of the end of February 2009, MNC-I committed approximately \$146 million (and obligated \$138 million) of FY 2009 CERP throughout the theater of operation.²⁴ Because of the large amount of congressionally-appropriated funds spent through the duration of the CERP, auditors generally cast a close eye on CERP projects. In addition, Congress has sought to place various limits on the use of CERP to ensure that funds are being spent within the intent of the program. These factors,

¹⁷ *Id.*

¹⁸ The fact that CERP is an authority to use Operations and Maintenance-Army funds rather than a separate appropriation means that every dollar that commanders use for CERP is one less dollar that can be used for the U.S. military's own OMA-funded operations.

¹⁹ *See, e.g.*, Defense Supplemental Appropriations Act for Fiscal Year 2008, Pub. L. No. 110-252, § 9104, 122 Stat. 2323.

²⁰ DoD Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 27, subject: Commander's Emergency Response Program (CERP) Guidance § 270102 (June 2008) [hereinafter June 2008 DoD CERP Guidance].

²¹ That there were no formal definitions for the terms "small-scale" and "urgent and humanitarian" until that time was highlighted by the GAO CERP oversight team. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: ACTIONS NEEDED TO BETTER GUIDE PROJECT SELECTION FOR COMMANDER'S EMERGENCY RESPONSE PROGRAM AND IMPROVE OVERSIGHT IN IRAQ, GAO-08-736R, at 6 (23 June 2008) [hereinafter the CERP GAO REPORT]. In anticipation of and in response to this GAO report, the DoD inserted definitions for these concepts beginning in its mid-2008 CERP guidance.

²² June 2008 DoD CERP Guidance, *supra* note 20. However, at no point in the CERP program's existence has the term "small-scale" been defined by a specific dollar amount.

²³ MNC-I C8 AAR, *supra* note 8, at 15.

²⁴ MNC-I C7 WEEKLY CERP UPDATE TO MNC-I CHIEF OF STAFF (27 Feb. 2009).

explained below, serve to multiply the importance of judge advocate legal reviews of CERP projects.

B. Restrictions on the Use of CERP

In evaluating proposed CERP projects, the MNC-I staff goes to extensive lengths to verify that each project is in fact small-scale, urgent, and permissible under one of the CERP categories.²⁵ Corps staffers now make a concerted effort to refocus division and brigade CERP projects towards smaller projects that target individual Iraqis most in need, such as medicine for clinics, micro-grants and school supplies. In the first quarter of FY 2009, MNC-I saw the average cost per project drop to \$20,000 (from \$83,000 in FY 2008), despite an increase in the average number of projects by fifty percent.²⁶ Over time, MNC-I has shifted the burden for building larger infrastructure projects worth over \$500,000 to the Iraqi government, with emphasis on using I-CERP funding or the Iraqi budget process.

Both the June 2008 and January 2009 DoD Financial Guidance²⁷ place additional restrictions on CERP that did not previously exist during the surge period. Many of these new DoD restrictions are reactions to media and congressional scrutiny and recent Government Accountability Office (GAO) reports.²⁸ An example of a new restriction is the elevation of approval authority for CERP projects exceeding certain dollar amounts. The June 2008 DoD guidance states that, among other things, projects greater than \$500,000 are expected to be few in number, and projects greater than \$2 million need approval by Central command (which, in turn, delegated this authority to the MNF-I Commander).²⁹ Previously, the MNC-I Commander was the final approval for all CERP projects regardless of the dollar amount; however, projects are always constrained by the “small-scale” requirement.³⁰ This emphasis on reducing the number of larger projects stems from the GAO’s concern about defining the term “small-scale.”³¹ In response to provisions contained in the FY 2009

Defense Authorization Act,³² the January 2009 DoD Financial Guidance further tightened approval level authority. Projects over \$1 million need a certification from the Secretary of Defense or the Deputy Secretary of Defense (if delegated) stating that the CERP project is intended to address an urgent humanitarian need that immediately assists the Iraqi people.³³ Projects are also limited to \$2 million.³⁴ Only the Secretary of Defense can waive the \$2 million funding limit and only if he “(a) determines that the project is required to meet urgent humanitarian relief and reconstruction requirements and that it immediately assists the Iraqi people, and (b) submits a notification of his waiver in writing to the defense committees within 15 days of his waiver.”³⁵ This focus on project size came shortly after statements from members of Congress who were concerned about the large size of previous projects.³⁶ Notably, the January 2009 DoD Guidance contains a more lenient set of approval authority levels for CERP projects in Afghanistan than in Iraq.³⁷ This is likely a reflection of certain perceived abuses of the CERP program in Iraq in previous fiscal years, the desire to have greater oversight of Iraqi projects, and the shifting DoD emphasis away from Iraq toward Afghanistan.

In addition to DoD Guidance, the terms of the Security Agreement affect reconstruction projects. Under Article 5, the United States must seek approval from the GOI for “major construction and alteration projects.”³⁸ The MNC-I interprets this requirement as applying to CERP and I-CERP projects. The term “major” is not defined in the Security Agreement.³⁹ However, under MNC-I policy, all CERP and I-CERP construction projects exceeding \$50,000 are required to contain a Letter of Sustainment from the local

²⁵ In addition, the MAAWS contains the requirement that every CERP packet must have a legal review from an attorney working for the DoD as either a uniformed service member or civilian. MAAWS MNC-I CJ8 SOP, *supra* note 16, at B-1-6.

²⁶ MNC-I C8 AAR, *supra* note 8, at 15.

²⁷ June 2008 DoD CERP Guidance, *supra* note 20, § 270102.

²⁸ See, e.g., CERP GAO REPORT, *supra* note 21, at 6–7 (recommendations); June 2008 DoD CERP Guidance, *supra* note 20.

²⁹ June 2008 DoD CERP Guidance, *supra* note 20, §§ 270203, 270204.

³⁰ By “small-scale requirement”, we mean that all CERP projects must be within the overarching intent of the CERP program to fund smaller projects, while leaving the larger redevelopment programs to other funding streams, and in particular the Department of State.

³¹ See CERP GAO REPORT, *supra* note 21, at 6.

³² Duncan Hunter National Defense Authorization Act of 2009, Pub. L. No. 110-417, 122 Stat. 4356–4771 [hereinafter 2009 NDAA].

³³ DoD Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 27, subject: Commander’s Emergency Response Program (CERP) Guidance §§ 270102, 270103 (Jan. 2009) [hereinafter January 2009 DoD CERP Guidance].

³⁴ *Id.*

³⁵ *Id.*

³⁶ See, e.g., Dana Hedgepath & Sarah Cohen, *Money as a Weapon: A Modest Program to Put Cash in Iraqis’ Hands Stretches Its Mandate with Big Projects*, WASH. POST, Aug. 11, 2008 (highlighting Senator John Warner’s concerns that approximately \$33 million in CERP was used for the hotel, office, and retail complex at the Baghdad Airport before and during the surge period).

³⁷ January 2009 DoD CERP Guidance, *supra* note 33. See also June 2008 DoD CERP Guidance, *supra* note 20, §§ 270203, 270204 (comparing approval thresholds between Iraq theater and Afghanistan theater).

³⁸ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq art. 5 (17 Nov. 2008) [hereinafter Security Agreement].

³⁹ Ultimately, the definition of “major construction” must be worked out by the various security agreement joint U.S.–Iraq subcommittees. In the meantime, MNC-I adopted the \$750,000 Military Construction Threshold as its guidepost for “major” projects.

government stating that the local government approves of and agrees to accept and maintain the project.⁴⁰ The MNC-I takes the position that the Letter of Sustainment can also serve as an endorsement of the project itself that satisfies the U.S.'s obligation to the GOI under the Security Agreement for that particular construction project. Additionally, for larger and more complicated projects, the U.S. conducts more advanced coordination with the relevant GOI entity to ensure that the project meets with Iraqi approval.

In executing CERP projects under the restraints discussed above, one particularly helpful tool is the Deputy Secretary of Defense's grant of a specific waiver of the competition provisions in the Federal Acquisition Regulation (FAR).⁴¹ While the FAR would normally require various degrees of competitive bidding depending on project type and size, the waiver permits units to avoid occasionally burdensome bidding requirements. Relaxed competition requirements provide MNC-I units with an invaluable tool to expeditiously execute CERP projects and quickly employ the use of reconstruction funds in the most needed areas.

C. CERP Project-Splitting

The implementation of the tiered project approval authority structure occasionally provided units with an incentive to split requirements into separate projects. Project-splitting is an attempt to decrease the price of each project and avoid having the project sent to higher approval levels, where it might be denied and/or delayed. Project-splitting is prohibited because improperly carving up a project into smaller pieces violates the congressional intent of giving larger scale projects direct visibility at higher command levels. The issue of project-splitting in the CERP program is analogous to OMA-funded projects where units split projects to avoid the \$750,000 OMA/Military Construction threshold; both types of splitting are an attempt to avoid project approval by higher authorities.

Multinational Corps-Iraq staff educates subordinate judge advocates about the potential for CERP project-splitting and advises that it is improper to split projects for the purpose of avoiding the appropriate approval threshold imposed by DoD regulation. The MNC-I has undertaken extensive efforts during the project evaluation phase to ensure that projects are properly aggregated for purposes of determining the appropriate approval authority. Judge advocates at division and brigade levels, over time, have

become diligent at spotting and correcting potential projects splits.

For example, units looking to pave one long, continuous road with a total projected cost of \$800,000 might submit a request to pave the north side of the road for \$400,000 and the south side of the same road for the same amount. One could argue that the two submissions are separate "projects" for funding approval purposes, because one project is for the north side of the road and the other one is for the south side. However, the north side construction and south side construction are both part of the same project, particularly if conducted simultaneously, because both submissions are necessary to produce a complete and usable contiguous roadway.⁴²

As with OMA-funded construction, determining the scope of a project for project-splitting purposes is an art more than a science. The methodology is subject to constant revisions and interpretation. The MNC-I weighs a number of factors in determining project definition, to include: gaps in time between phases, geographic proximity or distances, functional purposes, ultimate end-users, and barriers or landmarks separating areas. The MNC-I believes that consistency in legal determinations about projects is necessary to enhance confidence in CERP program execution among the auditor community and to keep faith with Congress and its staff.

D. Sons of Iraq (SOI) Program

The SOI consists of mostly autonomous groups of military-aged males, usually organized by a community leader or tribal elder, who have banded together in a form of community solidarity in an effort to improve the security situation in their area. The organization owes its name to several iterations of the Sunni Awakening tribal council movements that started in western Iraq. Sons of Iraq are best known for forming patrols and manning security checkpoints in their neighborhoods in an attempt to enhance the existing apparatus.

Before transition to the GOI began in the fall of 2008, the SOI program was financed by MNC-I with CERP funds. Specifically, individual SOI members were organized under short-duration contracts by an SOI leader, who would, in turn, deal with U.S. representatives. Although the SOI program is being phased out of CERP funding, it is important for practicing judge advocates to understand how the program was funded. Many of the current CERP issues in Iraq today (such as retraining military-aged males) are legacy issues that derive from the SOI transition process. In

⁴⁰ HEADQUARTERS MULTI-NATIONAL FORCE-IRAQ, FRAGMENTARY ORDER 08-248, MAXIMIZE THE SUCCESS AND BENEFITS DERIVED FROM CERP (27 Mar. 2008) [hereinafter MNF-I FRAGO 08-248].

⁴¹ Memorandum, Deputy Secretary of Defense, for Secretaries of the Military Departments, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for Fiscal Years 2008 and 2009 (24 Mar. 2008) [hereinafter FAR Waiver].

⁴² The "complete and usable" analogy comes from the project splitting analysis performed on OMA-funded construction projects. Although there is no formal guidance to use the OMA-funded analogy for CERP projects, this is likely the most appropriate set of principles to apply.

addition, a similar program has, at times, been contemplated for Afghanistan.

The DoD posited that SOI groups were private security contractors, and that the DoD hired them under services contracts similar to other CERP-funded services contracts.⁴³ Department of Defense contracting officers would task an SOI contractor with guarding a particular area of critical infrastructure (like a neighborhood or roadway), for a certain length of time. An area could be deemed critical infrastructure by a U.S. commander if it contained important and at-risk population centers, roadways, public utility structures, buildings or the like. The SOI leader would then take a portion of this fee and distribute it to the SOI members as a salary in return for their labor as guards.⁴⁴

The protection of critical infrastructure provided the legal basis to fund the SOI program with CERP.⁴⁵ However, the SOI groups were not deemed “security forces,” such that they would fall under one of the prohibited categories of CERP,⁴⁶ since the group members did not report to a unified command structure outside of the particular SOI contract, and did not have police, arrest or detention powers as a security officer would if such officer was an agent of the GOI. Rather, the SOI groups were private security contractors, who were being paid to guard a particular geographic area that qualified as critical infrastructure.

The SOI contract typically spanned a three month period and was not intended to exceed six months in duration. Contracting officers kept periods of performance short to ensure that at each renewal a truly urgent, humanitarian need was being addressed. If the SOI contractor was performing effective work and continued to remedy an urgent, humanitarian need, then the contracting officers would renew the CERP contract for another short-term duration.⁴⁷

As the transition of the SOI to the GOI began in October 2008, the United States continued to renew the SOI contracts and make payments on those contracts until the GOI was able to assume responsibility for groups of SOI.⁴⁸

⁴³ Written agreements with the SOI leaders generally have standard (though simplified) contract terms including terms, pricing, performance metrics, scopes of work, and rudimentary default provisions.

⁴⁴ The SOI members’ pay varied by province and was tied to the general price level in that area. The SOIs in the Baghdad area were typically the highest paid, and received as much as \$300 per month.

⁴⁵ June 2008 DoD CERP Guidance, *supra* note 20, § 270102(R), and January 2009 DoD CERP Guidance, *supra* note 33.

⁴⁶ See June 2008 DoD CERP Guidance, *supra* note 20, § 270301(B).

⁴⁷ Units historically had an incentive to enter into shorter duration contracts and use upcoming renewals as leverage over the SOI leaders to ensure continued performance under the terms of the existing contracts.

⁴⁸ The GOI was planning on taking former SOI and turning them into members of the Iraqi Army and Iraqi Police. Generally, that transition

This was done in order to prevent a gap in wages and income and prevent unrest among SOI group members during the transition stage. After the transition, when various SOI groups reported solely to the GOI, the GOI frequently fell behind on or refused to make payment to certain SOI groups, or simply terminated employment of the SOIs. This failure to make payment caused extensive tension between the SOI community and the GOI. These tensions remain a high priority issue for MNC–I, because of the concern that former SOIs might rejoin any remaining insurgency.

The United States has committed CERP funds in other ways to gainfully employ or train former SOIs. First, the United States has sought to hire former SOIs as laborers under otherwise permissible CERP-funded projects. Where the United States believes that a certain number of manual laborers are necessary to build, for example, a CERP-funded school, the contracting officer or project purchasing officer can mandate that a certain percentage of the workers be former SOIs. This contractual effort is based on the concept that manual laborers might as well be the individuals most likely to destabilize security gains in the event that they are not fully integrated into the workforce (provided of course that they are qualified and trustworthy enough to perform the job). The MNC–I has deemed these SOI employment clauses to be legal because the FAR competition requirements are generally inapplicable to CERP contracts.⁴⁹ Unfortunately, many SOIs are not skilled laborers. Thus, projects that require skilled craftsmen and engineers are often ill-suited as employment opportunities for these individuals.

Second, the United States is seeking to create training and literacy programs for military-aged males. Using CERP for this purpose is particularly important and challenging given that DDR funds expired at the end of FY 2008. Unfortunately, unlike the DDR Program, there is no specific authority under CERP rules to pay stipends to former SOIs who are enrolled in CERP-funded education programs.⁵⁰ The MNC–I currently considers providing sufficient income to SOIs and former SOIs as an essential security mission, because provision of adequate pay lessens the likelihood that they might turn to the potentially lucrative insurgent tasks such as placing improvised explosive devices or providing information on troop movements.

process and integration into the Iraqi Army and Police has happened at a much slower rate than MNC–I had hoped.

⁴⁹ FAR WAIVER, *supra* note 41.

⁵⁰ MNF–I SPEND PLAN FOR IRAQI SECURITY FORCES FUNDS (ISFF) ALLOCATED FOR DISARMAMENT, DEMOBILIZATION, AND REINTERGRATION (DDR) 1 (20 Nov. 2007) (submitted to Congress by the Under Secretary of Defense per Memorandum on 11 December 2007) [hereinafter DDR SPEND PLAN] (The accompanying memorandum, the DDR Submission Memorandum, contains specific request to use a portion of DDR funds for stipends for trainees).

The inability to pay stipends (due to the lack of specific authority to do so in any statutes or regulations) means it is more difficult to convince former SOIs to enroll in these CERP education programs than it was to convince them to become trainees under a DDR program. After receiving relatively generous pay as SOIs, former SOIs are less likely to enroll in training programs without some sort of monetary compensation that is sufficient to provide for their families. The MNC-I hoped that another allocation of DDR would be provided by the DoD in 2009 to address this and other concerns, but no such new allocation was provided.

The SOI program represented a unique use of CERP that both created jobs and promoted security on the ground. The following section discusses a program with a similar goal of easing at-risk groups into civil society.

E. Employment Assistance Manager Programs for Released Detainees

By early 2009, MNF-I was executing a large detainee release program. Under the terms of the Security Agreement, all detainees in U.S. facilities and under U.S. custody who did not have a detention order issued against them by a competent Iraqi court were required to be released in a safe and orderly fashion.⁵¹ The United States no longer has the authority to hold security detainees unless they are properly arrested and processed under Iraqi law.⁵² As a result of the Security Agreement, the United States was scheduled to release as many as 20,000 detainees from its detention facilities in 2009.

The MNC-I has developed contingency plans to deal with security destabilization in the event that these detainees are not properly reintegrated. However, in order to minimize the risk of any such destabilization, MNC-I has created programs to encourage gainful employment for released detainees. Providing released detainees with a stable means of income is intended to lessen the likelihood that they turn to the insurgency for support. Iraq's chronically high unemployment means that the organic domestic economy alone is not able to absorb that many workers from the released detainee population.

In 2009, DDR funds were no longer available for commitment on new projects.⁵³ As such, MNC-I has turned to CERP as a funding source for detainee reintegration efforts. The MNC-I and subordinate units have developed programs with various titles, including the Employment Assistance Manager Program, the Transition Assistance

Program, and the Rehabilitation Manager Program (collectively referred to as "EAMP"). Although these programs have different titles, individually tailored by battlespace owners, the purpose of such programs is to ease the reintegration of released detainees (and in some cases, former SOI) into sustainable employment.

Under these programs, units enter into a CERP-funded contract with an employment manager whose functions include, among other things, job placement. This manager is an influential member of the community (e.g., a sheik, former SOI leader, or leading businessman), who possesses local knowledge of employment conditions that non-community members, like U.S. servicemembers, lack. The power and connections of a community leader often contributes to the employment of at-risk individuals. The influential member uses his community contacts to match the targeted laborers with employers in need of workers. These jobs commonly include positions as blacksmiths, carpenters, engineers, accountants, and manual construction laborers. This program has the additional advantage of contributing to the growth of organic free market activities.

The MNC-I justified the EAMP initiative as a valid use of CERP funding based upon a compelling, urgent, humanitarian need. The programs contribute to economic stability (and ultimately security) by facilitating a source of income for disadvantaged, at-risk segments of society that are usually the primary family bread-winners.⁵⁴ The MNC-I and subordinate units have sought to develop performance metrics to ensure that the influential community members are successful at linking a certain percentage of their target laborers with gainful employment.⁵⁵ As is the case with most CERP contracts, the performance of these influential members requires extensive monitoring to ensure compliance with the terms of their contract. Influential members who did not meet the performance standards are not eligible for payment. Contracting officers generally keep the periods of performance for these contracts to less than three months to ensure that CERP is being used to address only the truly urgent conditions caused by these detainee releases.

⁵¹ Security Agreement, *supra* note 38, art. 22.

⁵² *Id.*

⁵³ DDR SPEND PLAN, *supra* note 50, at 1. See Department of Defense Supplemental Appropriations Act of 2007, Pub. L. No. 110-28, § 1312, 121 Stat. 194 (May 25, 2007) 121 Stat. 194.

⁵⁴ Note that upon their release, detainees typically receive six U.S. Dollars in CERP funds per day for each day they are held in a non-theater level detention facility (e.g., battalion and brigade level holding facilities), unless the commander determines that he has a valid reason not to make payment (such as that the funds might end up supporting insurgent groups).

⁵⁵ See, e.g., CERP GAO REPORT, *supra* note 21, at 6. A key focus of auditors and the media has been that CERP projects, even if they seem effective at the conception stage, generally are not effectively monitored to ensure that contractors are performing sufficiently under the terms of their contracts. Unit redeployment schedules and personnel turnover present a constant challenge to project monitoring. The MNC-I has been sensitive to these concerns and has attempted to mitigate them in the EAMP programs. The DoD understands the importance of project monitoring and has instituted monitoring requirements. See January 2009 DoD CERP Guidance, *supra* note 33, § 270314.

F. The Micro-Grant Program

In addition to the SOI program, the micro-grant program continues to be one of the most successful components of the CERP. The micro-grant program provides financial assistance to disadvantaged entrepreneurs engaged in small and micro-business activities.⁵⁶ The GOI itself recognized the importance of the micro-grant program when it made micro-grants one of the authorized categories of I-CERP. The ultimate purpose is to stimulate sustainable economic activity, create jobs, and encourage the entrepreneurial spirit of nascent business people. Micro-grants are a particularly effective counterinsurgency tool, because the dollars can be quickly distributed to high-value areas and the benefits flow directly to targeted individuals.

In reviewing micro-grants, judge advocates are required to analyze a number of factors before giving a favorable legal opinion. First, the micro-grant applicant needs to show that he is a disadvantaged entrepreneur who is lacking in wealth or available credit. If an entrepreneur is negatively impacted by combat activity or the insurgency, the DoD takes this factor into consideration and it improves the chances of the micro-grant being approved. Second, judge advocates need to see evidence that the proceeds of the micro-grant will be used for the intended purpose stated in the business proposal. Generally, it is easier to obtain this assurance if the micro-grant is an in-kind distribution (like physical tools), rather than a cash payment that can be more easily converted to an inappropriate use. Third, the applicant needs to provide some version of a business concept in the application (even if rudimentary), with evidence of the number of jobs and impact on the community that might be created as a result of the grant. Additionally, the applicant needs to provide some evidence of his character, education, and/or trustworthiness.⁵⁷

More than other types of CERP programs, it is crucial for judge advocates to pay careful attention to their micro-grant legal reviews. The large volume of micro-grants distributed in small increments in the battlespace makes the program susceptible to abuse and scrutiny. Judge advocates usually act as the final check to ensure that micro-grant funds are being used within the intent of the program.

G. Execution and Cash Management

In addition to project selection, MNC-I and subordinate units face extensive legal issues for CERP projects during the execution and management stages. Accordingly, MNC-I has traditionally encouraged judge advocates to remain involved in the CERP program even after project selection.

⁵⁶ See MAAWS MNC-I CJ8 SOP, *supra* note 16, at B-2-1.

⁵⁷ See *id.* at B-2-1 to -5 (providing a list of items that judge advocates need to review in a micro-grant application).

In reviewing past mistakes with the CERP, MNC-I has recognized the importance of establishing a rigorous set of standard operating procedures for project execution and cash management. Such oversight is particularly important in the case of CERP projects. The sheer number of individual CERP projects (for example, each micro-grant is itself a separate CERP project for certain tracking purposes) necessitates enhanced reporting and oversight. In addition, the fact that personnel often carry large amounts of cash around the country for payment raises concerns of theft and the physical safety of personnel tasked with carrying the currency.

As part of the oversight process, units are required to input each individual project into the CERP Project Tracking System⁵⁸ using one of the OSD-Comptroller designated CERP categories. This policy ensures that each project meets one of the authorized categories of CERP. Units are also required to retain detailed individual project expense receipts and documentation in the project folder for compliance review and auditing purposes per MNC-I policy. The MNC-I periodically compiles and aggregates reports and documentation for reporting up the chain to Congress.

The MNC-I has sought to foster the growth of electronic funds transfers (EFTs) as a substitute for cash payments. The EFTs are advantageous for four main reasons. First, EFTs improve force protection because fewer Soldiers are circulating around the battlefield with large amounts of cash. Second, transaction costs are smaller in the long run using EFTs rather than printing and transporting large amounts of paper currency. Third, the use of EFTs helps foster the Iraqi banking sector by increasing the flow of funds through their financial institutions. Fourth, EFTs reduce the risk of theft or embezzlement. The EFTs produce paper trails, making it much easier to trace funds in the event that a paying agent or project purchasing officer attempts to skim off the top.

Additionally, the United States has made a concerted effort to ensure that CERP projects are paid in Iraqi Dinar rather than U.S. Dollars. The goal of making Dinar payments is to stimulate the Iraqi economy by using its domestic currency. The Iraqi Dinar is more likely to remain in the country and its financial institutions than the U.S. Dollar, which can more easily be wired to bank accounts in foreign countries. By keeping the proceeds of CERP projects within Iraq, downstream investment and demand are stimulated, leading to a multiplier effect from the original project funding.

⁵⁸ The MNC-I utilizes the Iraq Resource Management System (IRMS), among other tools. The IRMS is a repository and archive for storing reconstruction and non-reconstruction project data for comptrollers throughout Iraq. Comptrollers enter individual projects into the system at around the time that funds are committed to a project.

Although CERP has been the primary DoD reconstruction program, the advent of the I-CERP program was a welcome addition to the selection available to commanders. As discussed in the next section, I-CERP became an essential complement to the CERP. However, the availability of I-CERP does not eliminate the need for the CERP. There may not be future commitments of I-CERP coming from the GOI and CERP has a more extensive list of authorized categories, which gives commanders greater flexibility in project selection.

III. I-CERP

A. Development of I-CERP

In April 2008, MNF-I and the GOI Supreme Reconstruction Council (SRC) entered into a memorandum of understanding (MOU)⁵⁹ under which the GOI agreed to transfer \$270 million in funds from the Iraqi Treasury to the Federal Reserve Bank in New York.⁶⁰ Under the MOU, MNF-I is tasked to spend I-CERP funds for the benefit of the Iraqi people. An additional \$30 million of I-CERP was not transferred to the United States, but was held by the Iraqis and controlled by the SRC to target projects that the SRC selected. The GOI assisted in the joint creation of the I-CERP program, because it believed that the accumulated U.S. expertise would enhance the efficient channeling of Iraqi budget surplus funds into the reconstruction effort.

The transfer of I-CERP money to the United States was a courageous political act on the part of Iraqi officials. The I-CERP transfer could have created an opportunity for U.S. detractors in Iraqi opposition groups to rally against Iraqi officials for having furnished over \$270 million of Iraq's budget surplus to U.S. control. However, from MNC-I's perspective, the fact that the Iraqis funded the program is evidence of the strength of the Iraqi-U.S. partnership and of an Iraqi endorsement of the success of the CERP program to date. By the time of this article, the initial allotment of I-CERP funds has been committed to projects. However, there remains the possibility that additional I-CERP tranches could be dispersed by the GOI, and that certain funds already allocated to I-CERP projects will be de-committed and used for other I-CERP projects.

Because I-CERP funds originate from the Iraqi budget, there are no legal fiscal year limitations and funds can cross U.S. fiscal years. However, the GOI expressed its firm hope to the United States that MNC-I would identify valid projects and spend the I-CERP funds as quickly as possible in order to maximize the effective impact.⁶¹ The I-CERP has demonstrated that the GOI is beginning to assume responsibility for reconstruction in Iraq. From 2003 until the time that the I-CERP MOU was signed, the United States already committed more than \$3 billion in CERP.⁶² Commanders in Iraq realize that it is unlikely that the U.S. Congress will sustain such a large expenditure of U.S. taxpayer funds for reconstruction in future fiscal years, making it all the more crucial that the Iraqis assume an increasing funding burden. The I-CERP became particularly important for funding large infrastructure improvement projects in light of the increased limitations placed by Congress and the DoD on reconstruction projects costing over \$500,000.⁶³

Although I-CERP funds come from the GOI, the U.S. personnel who execute the program still have fiduciary responsibility for the funds. All U.S. personnel administering the program remain accountable for managing, accounting for, and executing the program.⁶⁴

B. Administration of the I-CERP Program

The administration of I-CERP uses the existing MNF-I and MNC-I CERP procedures, controls, and disbursement mechanisms. In keeping with the intent of the I-CERP MOU, I-CERP rules and procedures mirror CERP guidance unless otherwise stated. However, commingling of CERP and I-CERP funds is strictly prohibited. In accordance with an April 2008 FRAGO, MNC-I has structured its I-CERP program in a manner that would create effective stewardship of the program and be consistent with the MOU. Wherever the MOU prescribes more restrictive measures, reporting requirements or project coordination and documentation, the MOU takes precedence over any CERP policy or procedures.⁶⁵ As with CERP, the FAR competition requirements generally do not apply to I-CERP contracts. In addition, the DoD CERP guidance is not legally

⁵⁹ Memorandum of Understanding Between Iraq Supreme Reconstruction Council of the Secretariat of the Council of Ministers and the Multi-National Force-Iraq Concerning Implementation of the Government of Iraq Commander's Emergency Response Program annex B to MNF-I FRAGO 08-166 (3 Apr. 2008) [hereinafter I-CERP MOU].

⁶⁰ The MNF-I and higher commands addressed the issue of whether these funds were miscellaneous receipts under 31 U.S.C. § 3302(b) (2006). Miscellaneous receipts must generally be deposited in the accounts of the U.S. Treasury. The MNF-I and higher commands determined that these funds need not be deposited into the Treasury's general accounts.

⁶¹ This is one of many issues that arise at the regular meetings between the SRC and MNF-I concerning the I-CERP program. At the beginning of the program, these meetings took place approximately every month. The meetings are less frequent now that the initial I-CERP tranche has been committed.

⁶² CERP GAO REPORT, *supra* note 21, at 1.

⁶³ See January 2009 DoD CERP Guidance, *supra* note 33, § 270103 (institution of more restrictive approval levels).

⁶⁴ HEADQUARTERS MULTI-NATIONAL FORCE-IRAQ, FRAGMENTARY ORDER 08-322, I-CERP IMPLEMENTATION (19 Apr. 2008).

⁶⁵ *Id.*

controlling over the I-CERP program, because I-CERP is not funded by congressionally-appropriated money.⁶⁶

Under the terms of the MOU, I-CERP funds could only be spent in the fifteen non-Kurdish regional government (KRG) provinces.⁶⁷ Money was distributed in proportion to the population of each non-KRG province.⁶⁸ The United States found that it was easier to identify and spend I-CERP in certain areas (such as Baghdad), than in other provinces (like Karbala). This was a function of easily identifiable, “shovel-ready” projects in certain areas and better assistance from local and provincial authorities in identifying projects. Although commanders frequently requested that MNC-I reallocate I-CERP funds among the provinces during the initial stage of the program (namely, away from provinces where the United States was not quickly spending I-CERP and toward those provinces where the funds were rapidly deployed), such unilateral U.S. reallocation is not permissible under the terms of the MOU. The GOI has never expressed a desire to adjust the initial provincial distribution methodology. The MOU lists the categories of eligible I-CERP projects, which are more restrictive than the CERP categories.⁶⁹ The impermissible CERP categories are also impermissible under I-CERP.

At the request of the GOI, I-CERP is primarily a brick and mortar reconstruction program rather than a program to purchase services or personal property items.⁷⁰ According to the MNF-I personnel who deal with the SRC, GOI officials believe that because brick and mortar projects are more perceptible to the public, they more effectively convey to a wider Iraqi audience that the government is working for them. In instances where units propose using I-CERP projects that will solely purchase services or personal property, MNC-I usually denies those I-CERP requests (micro-grants excepted), because the proposals do not meet the program’s primary purpose of brick and mortar projects. However, personal property purchases in connection with or to outfit an otherwise permissible brick and mortar reconstruction program are authorized under the MOU. For example, I-CERP could be used to pay for desks and computers in cases where I-CERP is generally used to build or refurbish a school.

At times, commanders expressed frustration at the fact that the I-CERP project categories are not as permissive as the CERP categories.⁷¹ However, the types of permissible projects are dictated by the MOU with the GOI, and MNC-I does not have the authority to unilaterally broaden the approved categories of I-CERP. In cases where units still seek to fund a project with I-CERP even though it is not in one of the permissible categories under the MOU, there is an informal mechanism by which MNF-I can submit project proposals to the SRC at its periodic I-CERP roundtable meetings.⁷² If the SRC endorses the project, then MNF-I can obtain an informal exception to the MOU, and MNC-I can fund the project with I-CERP. To the extent that the SRC endorses a project that would otherwise not fit into a category in the MOU, the MNC-I Commander himself can grant an exception to his I-CERP policy without being constrained by DoD guidance or congressional legislation, because I-CERP is not congressionally appropriated.

Both the Coalition Forces and the GOI have sought to use I-CERP projects as noteworthy public affairs stories, and as evidence that the GOI is effectively delivering reconstruction efforts/projects to its citizens. In all I-CERP projects, MNC-I units make an attempt to associate projects with the GOI by making signs and other forms of advertisement to let the Iraqi people see that their government is working for them.⁷³ In addition, all I-CERP payments are made in Dinar. The United States uses existing processes at the provincial level as much as possible to obtain local Iraqi participation in planning, coordination, and prioritization of projects, with an eye toward transitioning projects to the GOI upon their completion.

The CERP and I-CERP programs combine to form the bulk of DoD reconstruction efforts. However, a crucial gap in the reconstruction effort needed to be filled during late 2008 and 2009. Namely, MNC-I needed a large-scale training program for otherwise unemployed military-aged males to teach them marketable skills, while creating a productive outlet to divert their attention from insurgent groups. The DDR program provided a valuable tool to commanders during the post-surge Iraq for this purpose.

⁶⁶ See January 2009 DoD CERP Guidance, *supra* note 33, §§ 270101, 270105.

⁶⁷ The GOI made a conscious political decision to exclude the KRG provinces from the benefits of the I-CERP program.

⁶⁸ I-CERP MOU, *supra* note 59.

⁶⁹ *Id.* Permissible I-CERP categories are schools, water purification plants, health clinics, city planning facilities, roads, sewers, irrigation projects, and reconstruction projects that promote small business development in the form of micro-grants.

⁷⁰ *Id.*

⁷¹ There are only eight authorized categories of I-CERP, which is a much shorter list than that allowed under CERP. See I-CERP, *supra* note 59.

⁷² The MNC-I and MNF-I have submitted only a limited number of I-CERP MOU exception requests.

⁷³ Additionally, MNF-I and the SRC agreed to allow I-CERP funds to be used for supervisory fees paid to provincial governments who administer and execute I-CERP projects, so long as the amount of the fees does not to exceed three percent of total project costs.

IV. Disarmament, Demobilization, and Reintegration (DDR) Program

In December 2007, the DoD notified Congress of its desire to use \$155.5 million in ISFF for the DDR Program.⁷⁴ The primary intent of the approved program was to target training and reintegration of former SOIs and released detainees, many of whom previously had relationships with criminal elements and militia groups. The DDR Program provided former SOIs the opportunity to find alternative employment by providing them with the training needed to actively seek civilian employment and become productive members of the community.

Although there is not currently funding available from Congress for the DDR program, judge advocates in Iraq need to be aware of how the program was run and structured. First, there is a chance that a similar program will receive appropriated funding in the future. Second, the GOI may continue to establish its own Iraqi-funded DDR follow-on training projects for programs originally funded by the United States. Finally, MNC-I units are proposing programs similar to DDR for CERP funding, and judge advocates must be aware of the different restrictions between the DDR and CERP funding streams.

The ISFF funds allocated for DDR were combined with GOI funding through the Joint Technical Education and Reintegration Program (JTERP) and the Civil Service Corps (CSC) programs. JTERP provided technical skill training to worthy applicants, but gave priority selection for educational and training services to released detainees and former SOIs. The JTERP was managed by the GOI Prime Minister's Office along with the Ministry of Labor and Social Affairs (MoLSA), Ministry of Higher Education (MoHE), and Ministry of Education (MoE). In contrast, CSC was an MNC-I-led program designed to provide on the job training to former SOIs, released detainees, and other military-aged males in technical applications that lead to employment in the public and private sectors. For FY 2008, the United States provided approximately \$21.5 million in DDR funds to JTERP. The MNF-I expected the GOI to ultimately contribute approximately \$200 million to JTERP projects throughout the duration of the program.⁷⁵ For the CSC Program, the United States anticipated that it would fund the program with approximately \$134 million.⁷⁶

The MNC-I used DDR funds for a variety of training-related purposes. For JTERP projects in particular, MNC-I used DDR funds for facility refurbishment for education facilities, technical education centers and reintegration

centers. In addition, the program purchased resources and training materials for the construction, renovation and rehabilitation of buildings, facilities, infrastructure, and equipment. Under MNC-I's direction and within the purpose of the DDR program, units could give away small equipment to students on completion of DDR training programs, like tools for carpenters or small digging equipment for farmers. So long as DDR funds were ultimately contributing to the training of students, MNC-I concluded that the expenditures listed above fit within the intent of the DDR budget submission to Congress if they were reasonably proportionate to the value of the total project. For the CSC Program, MNC-I used DDR funds to pay for operation and maintenance costs associated with running CSC organizations and classes. The program also funded the procurement of training equipment and raw materials.

One of the most significant aspects of DDR (which remains a crucial issue for understanding the limitations on CERP-funded education programs) was that MNC-I could use DDR funds to pay for modest life support stipends for students participating in the program.⁷⁷ The stipends encouraged students to enroll in the program by ensuring that they received sufficient resources for their families while learning a new skill set.⁷⁸ Without the provision of a stipend, many students would not have been able to attend the training programs; they would instead spend their days seeking alternative methods of income to sustain their families. In many cases, the amount of the stipend was comparable to the daily salary that the individuals would have received in SOI employment. Without the provision of stipends that provided a basic standard of living, it was unlikely that many of the students would have participated in the program.

Although stipends were a legally permissible use of DDR funds, the MNC-I fiscal law team took the position that stipends are an impermissible use of CERP in CERP-funded education programs. The difference between the two programs is that MNF-I gave specific congressional notification of its intent to use DDR funds to pay stipends.⁷⁹ Regarding CERP, however, no such notification or intent has been conveyed to Congress, nor has Congress or the DoD ever granted such specific authority. In the absence of specific authority to use CERP to pay stipends in CERP-funded education programs, stipends would amount to an unlawful benefit to a private individual that is unnecessary to effectuate the intent of any such CERP training program.

⁷⁴ DDR Submission Memorandum, *supra* note 50, at 1. The DDR was not a separate budgetary appropriation. Rather, the program was created by the DoD reprogramming ISFF funds.

⁷⁵ MNC-I C8 AAR, *supra* note 8, at 20.

⁷⁶ *Id.*

⁷⁷ DDR SPEND PLAN, *supra* note 50, at 1.

⁷⁸ A typical DDR training program lasted about six months.

⁷⁹ See DDR SPEND PLAN, *supra* note 50.

Existing DDR funds expired at the end of FY 2008. The DDR programs were ultimately slated to pass to the Iraqis for their continued maintenance and funding.

V. Using Iraqi Businesses and Laborers for OMA-funded Purchases

The OMA program's funds are the lifeblood of the operations and maintenance of the Army and may not be used if the primary intended purpose of any given expenditure is reconstruction for the benefit of Iraqis. However, in limited cases, certain expenditures can satisfy both the purpose of the OMA appropriation and also create derivative reconstruction effects as a secondary benefit.

In circumstances where Iraqi businesses and laborers are capable of providing quality goods and services at competitive prices to Coalition Forces, the United States has sought to contract with Iraqis as a means of stimulating the local economy. In particular, the MNF-I Commander has instituted the Iraqi First initiative, which emphasizes purchases through local Iraqi vendors rather than a Logistics Civilian Augmentation Program (LOGCAP) task order, private contractor, or Army and Air Force Exchange Service concessionaire.⁸⁰ The MNF-I Commander has directed that commanders make an effort at all levels, within legal and regulatory limits and operational requirements, to use available Iraqi services and products. In addition, MNF-I places an emphasis on writing contracts in a manner that encourages contractors to devise and employ training programs to increase the skills of the Iraqi workforce.⁸¹ Unlike the CERP program, the FAR competition requirements do apply to OMA-funded Iraqi First procurement. The MNC-I does not have a waiver of the provisions of the FAR for the Iraqi First Program.

Under the Iraqi First Program, commanders are expected to make periodic reviews of their existing contracts to determine which contracts can appropriately be handled by Iraqi vendors.⁸² The MNF-I expects the Iraqi First Program to contribute to stability operations by infusing money into the Iraqi economy. In addition, directing contracts to Iraqi vendors is an important tool to convince Iraqis that they are partners with U.S. Forces. This program is intended to make at least a small contribution to ending some of the root causes of the insurgency, which include poverty and a lack of economic support.⁸³

Certain services can, by their nature, be more cheaply and efficiently delivered to U.S. personnel by the Iraqis.

⁸⁰ Memorandum for Distribution, from General Raymond T. Odierno, Headquarters Multi-National Force-Iraq, to Subordinate Commanders, subject: Increased Employment of Iraqi Citizens Through Command Contracts (31 Jan. 2009).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Specifically, the United States utilizes extensive Iraqi transportation services, such as trucking and railroad services, to transport supplies through the theater of operations. Iraqi businesses have a comparative advantage in the shipping industry because of their knowledge of the transportation infrastructure and their ability to hire locals.

Unfortunately, one consequence of hiring Iraqis to perform services on U.S. installations is the increased Iraqi traffic into and out of bases on a daily basis, which raises force protection issues. In general, commanders have determined that the force protection concerns caused by additional traffic from Iraqi pedestrians coming through the bases is outweighed by the positive effects on the Iraqi economy and the relationship between Iraqis and the Coalition Forces. Garrison commanders have instituted additional safeguards to ensure that Iraqis are properly vetted before being allowed on forward operating bases.⁸⁴

VI. Common Fiscal Law Issues Faced by Judge Advocates Across DoD Reconstruction Programs

Certain trends and legal issues in reconstruction funding cut across the various DoD funding programs. These common themes often require unified responses from MNC-I and subordinate unit judge advocates that are applicable throughout its various programs.

One such example stems from a common argument that U.S. taxpayer dollars should be spent at home rather than in a foreign country that has at times seen its coffers swell from oil production. Through the post-surge period, as the violence in Iraq diminished and headlines of the war receded from the front pages of U.S. newspapers, Congress became increasingly concerned with the amount of DoD reconstruction funds being spent in Iraq. This sentiment grew when oil was about \$125 per barrel and the GOI projected a \$50 billion national surplus for 2008.⁸⁵ The GAO estimates the cumulative GOI surplus for 2005–2007 was approximately \$29 billion.⁸⁶ High oil prices coincided with a weakening domestic U.S. economy and a worsening U.S. federal budget deficit. In light of these developments, U.S. Forces have been keen to highlight to Congress and the American public attempts to wean the Iraqis off any reliance on DoD reconstruction dollars.

As a result of this concern, the United States has explored GOI funding sources for projects wherever practical, especially for large-scale projects such as roads

⁸⁴ An example is the tightening of badging requirements and security background checks.

⁸⁵ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, STABILIZING AND REBUILDING IRAQ: IRAQI REVENUES, EXPENDITURES, AND SURPLUS 3 (Aug. 2008).

⁸⁶ *Id.*

and bridges. A primary example of this effort is the use of I-CERP instead of CERP in cases where either of the two funding sources is legally permissible (for example, road reconstruction could be legally funded with CERP or I-CERP). Commanders have engaged in a concerted effort (especially for projects over \$500,000) to use GOI-funded I-CERP instead of congressionally-appropriated CERP when I-CERP is available. Additionally, since the June 2008 DoD Financial Guidance, MNC-I has required that for CERP projects over \$500,000, brigade commanders or certain other permitted officers attest that reasonable measures have been taken to ensure that no other sources of aid (such as GOI and NGO sources) are available before CERP is used.⁸⁷ Also, in March 2008, MNC-I instituted a requirement that for all CERP and I-CERP reconstruction or equipment purchases over \$50,000, units obtain an MOU or other agreement in which the local or provincial government agrees to assume any ongoing operations and maintenance costs and maintain the project once completed.⁸⁸ This MOU requirement ultimately decreases Iraqi reliance on U.S. funds for project upkeep, forces the Iraqis to learn valuable lessons on project management, and empowers them with a sense of ownership over their community development efforts.

As a second example of a common concern applicable across reconstruction programs, various units are afraid that CERP and I-CERP MOUs might be treated as international agreements and construed in ways that are unfavorable to U.S. Forces. As a result, MNC-I mandates that the following clauses be inserted into the MOUs to ensure that they are not treated as international agreements:

NOTHING IN THIS MEMORANDUM OF AGREEMENT AUTHORIZES THE COMMITMENT OR OBLIGATION OF APPROPRIATED FUNDS OF THE UNITED STATES OF AMERICA PRIOR TO THEIR AVAILABILITY, OR IN VIOLATION OF ANY APPLICABLE STATUTE, REGULATION OR POLICY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA. THIS DOCUMENT EXPRESSES THE PARTICIPANTS' INTENT TO ACHIEVE THE GOALS OF THIS PROJECT. THE PARTICIPANTS INTEND FOR THIS PROJECT TO BENEFIT THE NEIGHBORHOOD AND ITS PEOPLE FOR YEARS TO COME. IT IS NOT, HOWEVER, A LEGAL INSTRUMENT THAT BINDS THE PARTICIPANTS UNDER INTERNATIONAL LAW. RATHER, IT

⁸⁷ HEADQUARTERS, MNC-I FRAGO 08-023, DISTRIBUTE REVISED USD—COMPTROLLER/USARCENT CERP GUIDANCE (11 Aug. 2008).

⁸⁸ MNF-I FRAGO 08-248, *supra* note 40.

EMBODIES THE ASPIRATIONS
TOWARDS WHICH THE
PARTICIPANTS STRIVE.⁸⁹

As a third example, the United States has concerns that Iraqis are becoming too reliant on U.S. expertise in executing reconstruction programs rather than developing organic Iraqi capabilities. Therefore to a greater extent than in previous years, the United States has made it a priority to include local and provincial leaders in the planning and development process. Wherever feasible, units invite local and provincial leaders to project planning and execution sessions. For example, U.S. units might allow GOI engineers to participate in project development. One of the goals of this approach is to vest the local governments in these programs, which should make it more likely that they sustain the projects when they are completed.

As a final example of a common issue that arises across programs, MNC-I fields concerns that there are duplicative (and therefore wasteful) efforts among the various U.S. agencies (like the Department of State) operating in the battlespace. In response, for CERP and I-CERP projects of \$50,000 or greater, per the MAAWS, MNC-I requires that units coordinate with the Department of State Provincial Reconstruction Teams (PRT) to ensure interagency cooperation and visibility.⁹⁰ Coordination with the Department of State is intended to reduce duplication of effort⁹¹ and preserve precious reconstruction dollars across agencies.

VII. Predictions for Future Reconstruction Efforts

In many respects, the future of DoD-funded reconstruction programs in Iraq is tied to the broader strategic effort in the country. Congress's desire to continue funding reconstruction programs will depend on its tolerance for continued military presence in the country generally. If recent experience is any indication, congressionally-appropriated DoD reconstruction funds are likely to be used only for small dollar projects that truly have a demonstrable humanitarian impact on the Iraqi people. Congress and the DoD exhibited clear intentions during the second half of FY 2008 and the beginning of FY 2009 to discourage the use of CERP for large-scale projects.⁹² Accordingly, the United

⁸⁹ *Id.*

⁹⁰ The PRTs are the lead entities on the ground in the battlespace that identify and organize the Department of State reconstruction program. Provincial reconstruction teams typically have close relationships with local Iraqi government officials and have parochial knowledge of development conditions.

⁹¹ Provincial reconstruction teams generally use Department of State funds, rather than DoD funds, for projects that they themselves conceive and execute.

⁹² *See, e.g.*, January 2009 DoD CERP Guidance, *supra* note 33 (approving thresholds for projects over \$500,000).

States is likely to focus its reconstruction efforts towards the micro-level projects that will directly and immediately impact the lives of Iraqis.

Reconstruction funding will continue to be used to create employment opportunities and training programs for those individuals who are most likely to return to violence in the event that they do not find alternative stable and productive employment prospects. Because of the operational needs of commanders on the ground, the U.S. mission will likely continue to fund projects that directly and immediately improve the lives of those military-aged males and former SOIs who are most at risk of rejoining insurgent or criminal groups (like micro-grants).

The United States will continue efforts to use its reconstruction planning and execution efforts as a mentoring tool to empower the Iraqis to develop technical expertise. Ideally, Iraqis will take the lead in the project selection and execution stages. The ultimate end-state is to make the Iraqis proficient enough to manage a project from selection to execution to completion to sustainment.

Despite the funding challenges faced and the additional restrictions on reconstruction expenditures originating from Congress and the DoD, reconstruction funding remains an invaluable tool to U.S. forces in Iraq. By employing money as a counterinsurgency tool, commanders capitalize on opportunities to quell violence by helping to restore a sustainable society for the Iraqi people. The reconstruction efforts in post-surge Iraq have opened a window of opportunity and stability which is conducive to political reconciliation and have allowed the United States to pursue troop drawdown options.