

# Knowing When to Say No and Providing a Way Forward: The Commander's Emergency Response Program and the Advising Judge Advocate

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## I. Introduction

After several weeks of sustained “combat operations,” U.S. Forces from a brigade combat team (BCT) have successfully created a small pocket of relative peace within an unnamed province in Afghanistan. The commander of this BCT has managed to forge a fragile but budding trust between the troops under his command and the local civic leaders. Unfortunately for the commander and the local leaders, routine violence, unchecked criminal activity, and widespread corruption has led to chronic deficiencies within the local government, hampering its ability to provide basic but essential services to the local population. The BCT commander recognizes this problem and employs the resources of the Commander's Emergency Response Program (CERP) to address these shortcomings. Within a few days, local contractors start refurbishing schools, digging wells, installing generators, and cleaning rubble from the streets. Within weeks, a sense of normalcy returns to the province and the budding trust continues to flower.

Unfortunately, the “normal” doesn't last long. While out on patrol, a platoon from the BCT is ambushed along a desolate route on the edge of the province. Four Soldiers are killed and an equal number are wounded. The next day, two Soldiers from the BCT are killed by a sniper attack while manning a checkpoint on the outskirts of an unnamed town. The BCT commander has received no viable intelligence to effectively locate and terminate this old but reemerging threat. The BCT commander is convinced that the local leaders know something. In response, the commander plans to order the suspension of all CERP projects in the area until the local populace begins to “cooperate,” by providing some actionable intelligence regarding the location of these militants. The BCT commander requests a meeting with the local leaders so that he can formally outline his ultimatum. Prior to the meeting he turns to you, his Brigade Judge Advocate (BJA), and asks, “So what do you think, Judge?”

Well Judge, what do you think?

Wrestling with the above question is no easy affair, but it serves to illustrate a conflict that lies at the heart of stability and counterinsurgency (COIN) operations.<sup>1</sup> In

some regards, such operations transform a commander from a traditional war fighter into a modern day feudal lord.<sup>2</sup> In this latter role, a commander must function as both a warrior and civic planner.<sup>3</sup> More to the point, a unit's success during stability and COIN operations is contingent on its ability to effectively balance divergent yet interwoven security, information, economic, and political concerns.<sup>4</sup> For many commanders and logisticians, the security mission seems relatively straightforward.<sup>5</sup> Commanders and Soldiers generally understand the right and left limits of an armed engagement and the capabilities of the weapon systems they have at their disposal. Unfortunately, they may not have much familiarity with executing economic and humanitarian operations or the contract and fiscal rules that govern such missions.<sup>6</sup> Too often, the Soldier in the field

<sup>1</sup> See 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); see also U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ 1-2 (15 Dec. 2006) [hereinafter FM 3-24] (defining “counterinsurgency” as those political, economic, military, paramilitary, psychological, and civic actions taken by a government to defeat an insurgency).

<sup>2</sup> *Id.* In this context, the term “feudal” is meant to describe the transitory period from anarchy to a functioning government. In the current conflicts of Iraq and Afghanistan, the modern day U.S. military commander often stands as a “stop-gap sovereign” between the period of fully fledged combat operations and host nation government legitimacy.

<sup>3</sup> Statement based on interviews with civil affairs officers, Major Eugene Hwangbo, 2d Brigade, 10th Mountain Division, S-9, Camp Hammer, Iraq (May 2010) & Captain Thomas Eddy, 2d Brigade, 10th Mountain Division, Deputy S-9, Camp Hammer, Iraq (May 2010) [hereinafter Hwangbo & Eddy Interviews] (These officers routinely described the Commander's Emergency Response Program (CERP) project selection process as a real life version of *Sim City*. *Sim City* is a computer game that lets the player design and build his own city, which must be administered well if it is to thrive.).

<sup>4</sup> U.S. INTERAGENCY COUNTERINSURGENCY INITIATIVE, U. S. GOV'T COUNTERINSURGENCY GUIDE 2 (Jan. 2009) [hereinafter COIN GUIDE] (defining COIN as “[a] blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes. Unlike conventional warfare, non-military means are often the most effective elements, with military forces playing an enabling role. COIN is an extremely complex undertaking, which demands of policy makers a detailed understanding of their own specialist field, but also a broad knowledge of a wide variety of related disciplines”).

<sup>5</sup> See FM 3-24, *supra* note 1, ¶ 8-1 (noting that “[l]ogistic providers are often no longer the tail but the nose of a COIN force. Some of the most valuable services that military logisticians can provide to COIN operations include the means and knowledge for setting up or restarting self-perpetuating sustainment designs”).

<sup>6</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-615, MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE OVERSIGHT AND INTERAGENCY COORDINATION FOR THE COMMANDER'S EMERGENCY RESPONSE PROGRAM IN AFGHANISTAN 10 (May 2009) [hereinafter GAO-09-615]. This Government Accountability Office (GAO) audit found that

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regards these rules as unnecessary bureaucratic impediments that neither support nor complement the mission.<sup>7</sup> Such beliefs, justified or not, can alienate the leaders an attorney must advise. For instance, in the scenario described at the beginning of this article, the answer is likely a resounding “no.” A commander may not conditionally withdraw CERP funding to advance the unit’s intelligence-gathering efforts. To advise his commander effectively, the Judge Advocate (JA) must fully understand why the answer is “no,” and what other options are available.

The CERP is often described as an unconventional “fiscal weapon system,” but efforts to portray it as such are often at odds with the way the CERP must be implemented.<sup>8</sup> Specifically, the Department of Defense Financial Management Regulation (DoDFMR) and the theater-specific J8 Standard Operating Procedures (Money as a Weapon System, or MAAWS) state that CERP **may not** be used (1) to provide a direct or indirect benefit to U.S., coalition, or supporting military personnel, or (2) to conduct psychological operations, information operations, or other U.S., coalition, or Iraqi/Afghan Security Force operations.<sup>9</sup> With these prohibitions in mind, it seems counterintuitive to regard the CERP as a natural extension of a commander’s

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“personnel assigned to manage and execute CERP had little or no training on their duties and responsibilities.” The report added that “[o]ne of the attorneys responsible for reviewing and approving CERP projects received no CERP training before deploying. Unsure of how to interpret the guidance, the attorney sought clarification from higher headquarters, which delayed project approval.”

<sup>7</sup> United States Forces–Iraq (USF–I) CERP conferences held from 9–10 February 2010 and 7–8 July 2010 at Victory Base Complex (VBC), Iraq [hereinafter CERP Conference Insights] (statement based on insights gained from the conference). The conference attendees included representatives from the brigade combat team (BCT) civil affairs teams and BCT commanders, CERP project purchasing officers and pay agents, the division CERP teams, various general officers, and the USF–I CERP staff, to include the USF–I Chief of Staff. Attorneys, at all command levels, involved in the CERP process were also in attendance. At both conferences, commanders and staff officers routinely suggested that the CERP process from project approval to implementation was often too cumbersome and unnecessarily document intense.

<sup>8</sup> See Andrew Wilder & Scott Stuart Gordon, *Money Can’t Buy American Love*, FOREIGN POL’Y, 9 Dec. 2009, available at [http://www.foreignpolicy.com/articles/2009/12/01/money\\_cant\\_buy\\_america\\_love](http://www.foreignpolicy.com/articles/2009/12/01/money_cant_buy_america_love) (noting that “[m]arketing aid as a strategic ‘weapons system’ is clearly a more effective way to convince Congress to appropriate funds than calling to alleviate human suffering and poverty in far-flung corners of the developing world”); see also Colonel Rick L. Tillotson, *The Commander’s Emergency Response Program: A Versatile Strategic Weapon System Requiring an Azimuth Adjustment* (4 Jan. 2010) (describing CERP as a versatile non-kinetic weapon system) (submitted as a research report to the faculty of the Air War College in partial fulfillment of graduation requirements) (on file with author).

<sup>9</sup> U.S. DEP’T OF DEF., REG. 7000.14-R, VOL. 12, CH. 27, ¶ 270301A (Jan. 2009) [hereinafter DoDFMR]; U.S. FORCES–IRAQ (USF–I) J8, STANDARD OPERATING PROCEDURES (SOP), MONEY AS A WEAPON SYSTEM, at B-3 (Mar. 2010) [hereinafter MAAWS] (This is the primary SOP for Iraq.); U.S. FORCES–AFGHANISTAN J8, PUB. 1-06, MONEY AS A WEAPONS SYSTEM—AFGHANISTAN, COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) STANDARD OPERATING PROCEDURES (SOP) 3 (Feb. 2011) [hereinafter MAAWS–A] (This is the primary SOP for Afghanistan.).

warfighting ability. The purpose of this article is to explore this difficulty and workable approaches for negotiating problems confronting the CERP practitioners and the JAs who advise them.

With these questions in mind, this article begins by describing the fiscal law landscape giving rise to the CERP, including the CERP’s initial policy impetus and the current state of the law. Next, this article examines the primary field references available to the CERP end user, the DoDFMR and the MAAWS, as they relate to CERP projects. In particular, this article takes a look at the past and current regulatory guidelines related to spending CERP funds and implementing CERP funded projects. Finally, this article examines the right and left limits of the CERP as a non-lethal targeting tool and explores the possible challenges that may emerge as a result of specific statutory and regulatory limitations. But rather than treating these limitations as bureaucratic impediments, this article seeks to offer advising JAs potential solutions.

## II. The Fiscal Landscape

The CERP originally emerged as a creature of opportunity, but it quickly became a rising star among Department of Defense (DoD) “mainstay” appropriations.<sup>10</sup> Generally speaking, the very idea of the CERP cuts against and redefines the textbook division of labor between the DoD, Department of State (DoS) and other U.S. Government international aid organizations (e.g., the United States Agency for International Development (USAID)).<sup>11</sup> In years past, a newly minted JA was taught that the DoD fights wars and everyone else cleans up the mess. America’s recent engagements in Iraq and Afghanistan have necessitated an abrupt departure from this convention and a renewed focus on civil capacity-building and effect-based operations.<sup>12</sup> The

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<sup>10</sup> 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); Captain Charles Bronowski & Captain Chad Fisher, *Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq*, ARMY LAW., Apr. 2010, at 50 (discussing in some detail the use of CERP in Iraq from January 2008 through April 2009).

<sup>11</sup> See EXEC. OFFICE OF THE PRES. OF THE U.S., NAT’L SEC. PRESIDENTIAL DIRECTIVE/NSPD-44, at 2 (Dec. 7, 2005) (requiring the Secretary of State to coordinate and lead “stabilization and reconstruction activities”); see also *The Honorable Bill Alexander*, 63 Comp. Gen. 422, 423 (1984) (“DOD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as U.S. Agency for International Development (USAID)) . . . or (for minor projects) as incidental to the provision of security assistance”); Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151(b) (2006) (giving USAID, under policy guidance from the Secretary of State, “responsibility for coordinating all U.S. development-related activities”).

<sup>12</sup> See, e.g., Captain Adam Scher, *Political Advisors: Harnessing the Soft Power of the Brigade Commander*, MIL. REV., Jan. 1, 2010, at 73, 74, available at [http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview\\_20100228\\_art013.pdf](http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20100228_art013.pdf). Captain Scher noted that

“clean-up aspect” of the mission can no longer wait until the fighting has stopped. In fact, in COIN operations, the “clean-up aspect” may be the most vital component of mission success.<sup>13</sup> Inevitably, a renewed focus on the manner in which the DoD fights our nation’s wars has also necessitated a renewed focus on how the DoD pays for them. The CERP, as noted above, is a unique departure from past practices and a tacit recognition of an evolving military mindset.<sup>14</sup> In order to understand the CERP and its present day challenges, it is important to generally understand the fiscal landscape from which it emerges and the direction it is currently heading.

## A. The Statutory Purpose

### 1. The Early Stages

In the early stages of the Iraq war, before Congress provided a statutory basis for the CERP, commanders in the field were making use of the CERP concept.<sup>15</sup> At first, the CERP was financed by the mountains of cash uncovered after the fall of Sadaam Hussein and his Ba’athist regime.<sup>16</sup>

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[M]oney is the most significant weapon system. The brigade combat team can effectively command, control, and apply funds to each of its subordinate elements using the arts and science of nonlethal operations. . . . During the deployment of the 3d Brigade Combat Team, 101st Airborne Division (Air Assault), in support of Operation Iraqi Freedom from 2007 to 2009, the brigade combat team continually used money as an instrument of combat power by targeting critical aspects of society. . . .

*Id.*; see also 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](http://www.rand.org/pubs/testimonies/2010/RAND_CT340.pdf) (containing the testimony of Seth G. Jones, a senior political scientist at the RAND Corporation). Mr. Jones, relying on a memorandum from General Stanley McChrystal to Secretary of Defense Robert Gates citing General McChrystal as saying that “our strategy cannot be focused on seizing terrain or destroying insurgent forces; our objective must be the population.”

<sup>13</sup> See DoDI 3000.05, *supra* note 1, ¶ 4a (Department of Defense (DoD) policy is that the DoD must now be as proficient in conducting stability operations as combat operations.).

<sup>14</sup> See *id.* ¶ 4a(3) (DoD policy is that the DoD shall “lead stability operations to establish civil security . . . repair and protect critical infrastructure, and deliver humanitarian assistance until such time as it is feasible to transition lead responsibility to other U.S. Government agencies, foreign government, or international governmental organizations”—policies in keeping with the uses of CERP.).

<sup>15</sup> See Martins, *supra* note 10, at 3.

<sup>16</sup> *Id.* (describing how the initial resources for CERP were initially funded with “ill-gotten Ba’athist Party cash” from seized assets).

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 USA 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

The Coalition Provisional Authority (CPA), acting as the *de facto* sovereign,<sup>17</sup> quickly put the uncovered cash to work by empowering local commanders to execute “humanitarian relief and reconstruction requirements within their areas of responsibility” by carrying out programs that could “immediately assist the Iraqi people.”<sup>18</sup> The early projects varied in size and complexity but most were small, low-dollar projects that could be quickly implemented.<sup>19</sup> In providing cash directly to field commanders, the CPA sought to take advantage of the tactical commander’s unique vantage point, resulting in significant strategic and tactical gains.<sup>20</sup> However, the confiscated cash soon grew scarce, prompting commanders to take their case to Washington.<sup>21</sup> Commanders asserted that the CERP provided results that

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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. 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].

<sup>17</sup> See L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 5, 32 (2004) (stating that the origin of the CPA’s authority was unclear, but The report states, *inter alia* 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.

*Id.* at CRS-39. In any event, the CPA vested itself with executive, legislative, and judicial authority over the Iraqi government from 21 April 2003 until 28 June 2004).

<sup>18</sup> Martins, *supra* note 10, at 11.

<sup>19</sup> See 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 6 (Jan. 25, 2008) [hereinafter SIGIR-08-006] (noting that in 2004 less than 1% of CERP projects cost more than \$500k, though this climbed to 3.8% by fiscal year (FY) 2006).

<sup>20</sup> See Martins, *supra* note 10, at 3. According to now Brigadier General Martins, “a multitude of emergency needs developed in the vacuum of functioning Iraqi civil institutions” and U.S. combat forces were often closer to the problems affecting the indigenous population than any other U.S. or Iraqi government agency. *Id.* He also explained that

[f]rom early June to mid-October, 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.

<sup>21</sup> See *id.* at 10 (noting that the assets used to support CERP would “not last beyond 2003 if the accelerated rate of spending continued”).

people could see; and, without it, Soldiers in the field would be deprived of a critical tool for shaping a stable security environment.<sup>22</sup>

In response to commanders' requests and reports of battlefield success, Congress adopted the CERP as an American- rather than Iraqi-funded obligation.<sup>23</sup> But unlike most other funding sources, Congress authorized the Secretary of Defense to suspend the normal statutory and regulatory requirements traditionally needed to spend taxpayer money.<sup>24</sup> This allowed the CERP to remain true to its roots as an easily-accessible, user-friendly money store. In essence, Congress simply codified what was already taking place on the ground, and on 6 November 2003, President Bush signed the bill into law and the CERP became a formal DoD appropriation, securing the DoD's role in the "clean up" business for the long haul.<sup>25</sup>

## 2. New Law—Same Purpose

In February 2010, President Obama submitted his Fiscal Year (FY) 2011 budget request to Congress. He sought \$1.3 billion in CERP funds.<sup>26</sup> On 16 September 2011, the Senate Committee on Appropriations recommended this be reduced to \$900 million, with \$100 million committed to Iraq, and

<sup>22</sup> CERP Conference Insights, *supra* note 7 (Commanders, who had done multiple deployments in Iraq and had experience with CERP, asserted that it was a critical tool for shaping the security environment.); *see also* Dana Hedgpeth & Sarah Cohen, *Military Says Special Case Buys a Lot of Goodwill in Iraq*, WASH. POST, 11 Aug. 2008, available at [http://o.seattletimes.nwsources.com/html/nationworld/2008107036\\_iraqcash12.html](http://o.seattletimes.nwsources.com/html/nationworld/2008107036_iraqcash12.html). Marine Colonel John A. Koenig, who oversaw \$160 million worth of CERP projects in Anbar province last year, was quoted as saying that "you can't shoot yourself out of an insurgency . . . a rifle only gets you so far. It shows you have some force. The CERP allows you to develop our answer to al-Qaeda." *Id.*

<sup>23</sup> Martins, *supra* note 10, at 11. In 2008, the Government of Iraq (GOI) transferred \$270 million of its own funds to the United States for spending under the Iraqi CERP (I-CERP) program, separate from but similar in concept to CERP (U.S.-funded CERP spending for FY 2008 was \$1.2 billion). Bronowski & Fisher, *supra* note 10, at 50–51, 57–58. This article focuses on CERP rather than I-CERP.

<sup>24</sup> *See* Memorandum for Sec'y of the Military Dep'ts, et al, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for Fiscal Year 2010 (Mar. 24, 2010) [hereinafter Waiver Memo] (on file with author) (An identical memorandum has been signed by the Secretary of Defense (SECDEF) each year the CERP appropriation has been effect. The memorandum effectively waives the application of the Federal Acquisition Regulation (FAR) to all contracts issued under the CERP.).

<sup>25</sup> 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 (2003) (establishing a CERP fund of \$180 million from DoD operation & maintenance funds, which commanders in Iraq could use "notwithstanding any other provision of law . . . to respond to urgent humanitarian relief and reconstruction requirements," but requiring quarterly DoD reports to Congress on the use of those funds).

<sup>26</sup> OFFICE OF THE UNDERSECRETARY OF DEFENSE (COMPTROLLER), FISCAL YEAR 2011 BUDGET REQUEST 11 (Feb. 2010) (PowerPoint slideshow), available at <http://www.defense.gov/news/d2010rolloutbrief1.pdf>

\$800 million to Afghanistan.<sup>27</sup> In part, this recommendation reflected the operational shift from Iraq to Afghanistan.<sup>28</sup> It also reflected a larger problem. For years, factions within the State and Defense departments had vied for control of the "post-war" reconstruction effort and the money financing that undertaking.<sup>29</sup> However, commanders managed the security environment, controlled the battle space, and most importantly, commanders had CERP funds, and a broad mandate for using them. At first, they concentrated on small-scale, immediate-impact projects, but as the CERP evolved, large-scale, high-dollar projects had become a normal part of a commander's non-lethal targeting regimen.<sup>30</sup> Congress now sought to constrain what commanders could do with CERP funds. The Senate Appropriations Committee stated:

*CERP Projects.*—The Committee includes new language in the Commander's Emergency Response Program [CERP] general provision that requires all projects executed under this authority shall be small scale, and shall not exceed

<sup>27</sup> S. REP. NO. 111-295, at 207 (2010), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt295/pdf/CRPT-111srpt295.pdf>.

<sup>28</sup> *Id.*; *see also* Report of the Committee on Armed Services, House of Representatives, on H.R. 1540, H. REP. NO. 112-78, at 240 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hprt78/pdf/CRPT-112hprt78.pdf> (Committee report on the FY 2012 DoD Appropriations Bill, discussing CERP in Afghanistan):

The committee notes that this section does not authorize the use of the Commanders' Emergency Program in Iraq, as previously authorized...The remaining U.S. forces in the Republic of Iraq are operating in a strictly training and advisory capacity to Iraqi Security Force units. The committee believes that any immediate humanitarian needs such units encounter should be addressed through Iraqi funding sources.

*Id.*

<sup>29</sup> CERP Conference Insights, *supra* note 7. During the July 2010 CERP conference, a rather heated discussion took place between military civil affairs officers and representatives from the USAID concerning the relative value of micro-lending versus micro-grants. The micro-lending concept relies on the issuance of small repayable interest-bearing loans to private business owners, while the micro-grant program delivers interest-free, non-repayable cash grants. Military commanders favored the latter, but USAID was a firm supporter of the former, and wanted military commanders to use the CERP to help strengthen the micro-lending concept. These representatives further argued that issuing micro-grants to business owners was actually retarding the reconstruction effort. *See also* Rajiv Chandrasekaran, *U.S. Military, Diplomats at Odds Over How to Resolve Kandahar's Electricity Woes*, WASH. POST, 23 Apr. 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/22/AR2010042206227.html>.

<sup>30</sup> *See* *Recurring Problems in Afghan Construction: Hearing Before the Commission on Wartime Contracting*, 110th CONG. 6 (2011) [hereinafter Fields Statement] (statement by Arnold Fields, Special Inspector General for Afghanistan Reconstruction). Major General (Retired) Fields noted that "SIGAR found that while large-scale projects accounted for only 3% of all CERP projects, they consumed more than 67% of CERP funds" from 2005 through the first three quarters of 2009.

\$20,000,000 in cost (including any ancillary or related elements in connection with such project). The Committee believes it is necessary to alter current authorities because this program has been used and is being considered as a means to pay for large-scale reconstruction projects and other Department of Defense efforts that are outside the scope of the purpose of CERP. The proper role of the CERP program is to enable commanders in the field to respond to urgent, small scale, humanitarian relief projects that provide an immediate benefit to the local population and the coalition troops serving in the area. The program was not designed to fund large-scale reconstruction projects that are the responsibility of the Department of State and the U.S. Agency for International Development [USAID]. This provision also prohibits spending funds on projects that are identified separately but are clearly related to other projects and collectively exceed the \$20,000,000 threshold.<sup>31</sup>

Thus, it seems Congress wants to refocus the CERP back to funding small scale immediate-impact projects like digging wells and supplying portable generators to existing facilities, and return the reconstruction mission to the traditional stakeholders (i.e., DoS and USAID). Practically, however, a \$20 million cost ceiling is still pretty high: a commander could fund the construction of a 100-room Baghdad hotel for \$4.2 million and many other seemingly large projects for a lot less.<sup>32</sup> Congress needs to be stricter if it intends to return the CERP to a small-project focus and shift the bulk of the DoD's reconstruction mission back to its civilian counterparts.

The National Defense Authorization Act (NDAA), signed by President Obama on 7 January 2011, made some effort to bridge the gap between congressional intent and actual reform. Specifically, the NDAA retained the committee's \$20 million limit for projects, reduced the CERP funding to \$500 million for FY 2011, and added additional notification requirements for projects expected to cost \$5 million or more.<sup>33</sup> More importantly, the NDAA

shifted \$400 million in proposed CERP funds, roughly half of the DoD's reconstruction budget set aside for Afghanistan, to create the Afghanistan Infrastructure Fund (AIF).<sup>34</sup>

The AIF is a "CERP-like funding source" created to fund large scale projects in Afghanistan. But unlike the CERP, use of the AIF **mandates** both DoS involvement and approval.<sup>35</sup> For many, this effort represents a long awaited step in the right direction, because it more concretely provides for interagency involvement. But in other ways, it mostly serves as a duplicative funding source that commanders *might* initially be reluctant to use. Put another way, since a \$450,000 hydraulic lift for a water treatment plant could be purchased and installed under either CERP or AIF authority, a commander will likely purchase it under the former authority if it is more convenient to do so. However, since the implementation of AIF essentially places half of the DoD reconstruction-COIN budget under "interagency control," commanders will ultimately have to cede ground to the DoS and the USAID. This means that even if a military commander could *unilaterally* complete a \$450,000 hydraulic lift project with just CERP funds, he should only do so as a matter of last resort. This point is especially relevant considering Congress's renewed interest in limiting the CERP to funding small scale quick win projects.

Despite this interest, Congress placed no specific restrictions on the types of projects a commander can independently pursue. In fact, the CERP's statutory purpose is still rather vague: "to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within [commanders'] areas of responsibility" and "provide an immediate and direct benefit to the people of Iraq or Afghanistan."<sup>36</sup> Thus, Congress left commanders considerable leeway in using CERP funds. But, as will be discussed below, the DoD has implemented more stringent self-imposed rules.

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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).

<sup>34</sup> *Id.* § 1217. The Afghanistan Infrastructure Fund (AIF) is a two-year appropriation. The funds set aside under the NDAA remain available until 30 September 2012.

<sup>35</sup> *Id.*; 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 General David H. Petraeus, Commander, International Security Assistance Force/U.S. Forces—Afghanistan. The memorandum further discusses the DoD and the Department of State (DoS) working groups and the types of projects suitable for funding under the AIF.

<sup>36</sup> See NDAA FY11, *supra* note 33, § 1212(d)(2). However, even this language was not present in earlier versions of the program; its addition emphasizes the Congressional concerns noted earlier in this article. The practical meaning of the change is still unclear, but it does denote a meaningful shift away from the use of the CERP as a "nation building" fund source.

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<sup>31</sup> S. REP. NO. 111-295, at 207 (2010).

<sup>32</sup> See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER'S EMERGENCY RESPONSE PROGRAM: HOTEL CONSTRUCTION COMPLETED, BUT PROJECT MANAGEMENT ISSUES REMAIN, SIGIR-09-026, at 1 (26 July 2009).

<sup>33</sup> Ike Skelton National Defense Authorization Act for Fiscal Year (FY) 2011, Pub. L. No. 111-383, § 1212(c)(2), 124 Stat. 4137, 4389-90 (2011) [hereinafter NDAA FY11] (One-Year Extension and Modification of CERP). 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

## B. The CERP as a Necessary Expense

A basic tenet of fiscal law is that appropriated funds may only be used for the purposes for which they are formally designated.<sup>37</sup> Under the Necessary Expense Doctrine, appropriations are available for expenses which are necessary or incident to the proper execution or achievement of the object of the appropriation.<sup>38</sup> This doctrine recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose.<sup>39</sup> The application of the doctrine is, in most cases, a matter of a commander's discretion.<sup>40</sup> This discretion is not unfettered. In order to determine if a proposed expenditure falls within an authorized purpose or function, a commander must consider the following: (1) the expenditure bears a reasonable relationship to the purpose of the appropriation sought to be charged, (2) the expenditure is not prohibited by law, and (3) the expenditure is not provided for by another appropriation.<sup>41</sup>

For FY 2011, Congress provided the DoD a discretionary budget of approximately \$685 billion, including about \$159 billion for Overseas Contingency Operations (down from \$163 billion in 2010).<sup>42</sup> Of this, CERP represented \$500 million (down from \$1.2 billion in FY 2010).<sup>43</sup>

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<sup>37</sup> 31 U.S.C. § 1301(a) (2006). This requirement was originally enacted in 1809. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. 1, at 4-6 (3d ed. 2004).

<sup>38</sup> See Internal Revenue Serv. Fed. Credit Union-Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (For an expense to be proper under the "necessary expense" test, the expense must be "reasonably necessary in carrying out an authorized function" or "contribute materially to the effective accomplishment of that function.").

<sup>39</sup> See Customs and Border Protection—Relocation Expenses, B-306748, 1997 WL 56937, at \*2 (6 July 2006) (The "necessary expense" doctrine reflects a respect for an agency's legitimate exercise of discretion to determine how best to accomplish the objects of its appropriation. Although not unlimited, it is a rule of reason and of deference.).

<sup>40</sup> Department of the Air Force—Purchase of Decals for Installation on Public Utility Water Tower, B-301367, 2003 WL 22416499, at \*2 (Oct. 23, 2003) (noting that necessary expense doctrine is, in the first instance, "a matter of agency discretion," and commander's use of funds lie within his discretion); see also Matter of: Customs Service, 1997 WL 56937, at \*2 (July 6, 2006) (The "necessary expense" doctrine reflects a respect for an agency's legitimate exercise of discretion to determine how best to accomplish the objects of its appropriation, and is a rule of reason and of deference.).

<sup>41</sup> The Honorable Bill Alexander, 63 Comp. Gen. 422, 427-28 (1984).

<sup>42</sup> OFFICE OF THE UNDERSEC'Y OF DEF. (COMPTROLLER), UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2012 BUDGET REQUEST 1-1 (2011), available at [http://comptroller.defense.gov/defbudget/fy2012/FY2012\\_Budget\\_Request\\_Overview\\_Book.pdf](http://comptroller.defense.gov/defbudget/fy2012/FY2012_Budget_Request_Overview_Book.pdf).

<sup>43</sup> See 155 CONG. REC. H15007-02, at H15346 (Dec. 16, 2009) (explanatory statement for amendments to DoD Appropriations Act, FY 2010) (noting that the President requested \$1.5 billion in CERP funding but Congress reduced that amount by \$300 million). This congressional statement also

The CERP, at first glance, seems small compared to the rest of the DoD budget. However, its flexibility greatly increases its standing compared with other funding sources. For example, the Overseas Humanitarian Disaster and Civic Aid (OHDACA) program also provides the DoD a funding mechanism for demining support, humanitarian assistance, and foreign disaster relief.<sup>44</sup> The OHDACA, however, has a couple of impracticalities that make it less than ideal for COIN and stability operations. First, OHDACA is a DoD worldwide resource, designed with a level of generality that is not normally suited for brigade level implementation in Iraq and Afghanistan. Second, in addition to DoD-wide availability, the total OHDACA budget was roughly a \$110 million funding source that is rationed among several theaters of operation. The CERP, on the other hand, is a half-billion dollar Iraq- and Afghanistan-centered funding source specifically designed for BCT level execution. As such, it is ideally suited for current and future stability operations, provided commanders understand its purpose and the limits of their discretion.

## III. Implementing Guidance

Currently, the CERP has two primary sources of implementing guidance, the DoDFMR and the MAAWS (the MAAWS-A in Afghanistan). The DoDFMR is promulgated by the DoD and provides policy guidance and the overall strategic framework for CERP spending. The MAAWS, on the other hand, is issued by the theater commanders for Iraq and Afghanistan, and serves as the tactical level blueprint for day-to-day CERP project implementation and administration. Both the DoDFMR and the MAAWS have evolved considerably throughout the history of CERP. The rules that govern the program are creatures of trial and error that reflect the DoD's ever-changing operational pace and lessons learned from past engagements. As a consequence, today's BCT commander serving in Afghanistan may not recognize the very program he helped to craft as a battalion commander during Operation Iraqi Freedom (OIF) in 2005. This section explores the evolution of these two sources and what they look like today.

### A. The DoDFMR

#### 1. 2003–2008

On 25 November 2003, the Undersecretary of Defense (Comptroller) issued implementing guidance on using appropriated funds for the CERP. As expected, this

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warned the DoD that it needed "to greatly improve its management and oversight of CERP and its justifications of CERP budget requests."

<sup>44</sup> 10 U.S.C. § 401 (2006); Major Timothy Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 1, 15.

guidance held close to the CERP's pre-legislative origins. For example, it relied on a similar set of permissible project categories and practice procedures as established by the CPA.<sup>45</sup> More importantly, it kept the CERP as a BCT-centric program with a minimalist approach to higher level oversight.<sup>46</sup> In April 2005, the Comptroller's guidance was replaced by Volume 12, Chapter 27 of the DoDFMR. The DoDFMR formally codified prior practices, while adding slightly more program direction. In particular, it spelled out fifteen permissible CERP categories and seven prohibited purposes. The permissible uses included:

- A. Water and sanitation;
- B. Food production and distribution;
- C. Agriculture;
- D. Electricity;
- E. Health care;
- F. Education;
- G. Telecommunications;
- H. Economic, financial and management improvements;
- I. Transportation;
- J. Rule of law and governance;
- K. Irrigation;
- L. Civic cleanup activities;
- M. Civic support vehicles;
- N. Repair of civic and cultural facilities; and
- O. Other urgent humanitarian or reconstruction projects.<sup>47</sup>

<sup>45</sup> See 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).

<sup>46</sup> *Id.*; see also HALCHIN, *supra* note 17, at 32 n.109. Halchin quotes Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs:

We're in a war; we're in a global war on terror. We have—many of the restrictions on how money is appropriated and spent are based on rules and statutes that have developed over a course of time that was not a period of war. So we've got a certain disconnect between the need to spend money quickly now, and we've got certain funds available to do that—the CERP [Commanders Emergency Response Program] is a pot of money that's got fewer restrictions, relatively speaking, attached to it. It is certainly understandable that a military commander who just knows if he had \$10 million he can address some issues, isn't going to necessarily be the one who's patient enough to sort through all the peacetime restrictions on the use of funds. That's somebody else's job. . . .

<sup>47</sup> U.S. DEP'T OF DEF. REG. 7000.14-R., vol. 12, ch. 27, ¶ 270202 (Apr. 2005), available at [http://comptroller.defense.gov/fmr/12/12arch/12\\_27.pdf](http://comptroller.defense.gov/fmr/12/12arch/12_27.pdf). (This version of the DoDFMR described the designated categories as a representative list of possible project areas. However, the word "representative" was struck from the September 2010 version of the DoDFMR.) The historical versions of volume 12, chapter 27 of the DoDFMR referred to in this article are available at *DOD Financial Management Regulation 7000.14-R, Volume 12: Archived Sections*, OFFICE

The prohibited purposes included:

- A. Direct or indirect benefit to U.S. or Multi-National Force-Iraq (MNF-I) personnel;
- B. Entertainment;
- C. Weapons buy-back programs, or other purchases of firearms or ammunition;
- D. Reward programs;
- E. Removal of unexploded ordnance;
- F. Duplication of services available through municipal governments; and
- G. Salaries of Iraqi or Afghan military or civilian government personnel.<sup>48</sup>

In its first few years, the language of the DoDFMR offered no further details concerning the program's scope or limitations, and it failed to define terms like "small-scale," "urgent," or "immediate."<sup>49</sup> Thus, the category of "other urgent humanitarian or reconstruction projects," could be interpreted to mean any additional category not already covered *or* essential needs such as food, water, clothing, and shelter.<sup>50</sup> In essence, a commander could treat the aforementioned category as a "catch-all" provision to cover any project idea he deemed appropriate.<sup>51</sup> This was not necessarily a bad thing, but it did make it much more difficult to effectively measure program performance from one commander to the next or to integrate specific CERP projects into a broader humanitarian and reconstruction effort.<sup>52</sup>

OF THE UNDER SEC'Y OF DEF. (COMPTROLLER), <http://comptroller.defense.gov/fmr/12/12arch/>.

<sup>48</sup> *Id.* ¶ 270401.

<sup>49</sup> The DoDFMR did not define the terms "small-scale" and "urgent" until 2008.

<sup>50</sup> Hedgpeth & Cohen, *supra* note 22. In the absence of detailed guidance, some highly unusual purchases were made.

\$48,000 was spent on 6,000 pairs of children's shoes; an additional \$50,000 bought 625 sheep for people described in records as 'starving poor locals' in a Baghdad neighborhood. Soldiers ordered \$100,000 worth of dolls and \$500,000 in action figures made to look like Iraqi Security Forces. About \$14,250 was spent on 'I Love Iraq' T-shirts. More than \$75,000 sent a delegation to a women's and civil rights conference in Cairo. And \$12,800 was spent for two pools to cool bears and tigers at Zawra Park Zoo in Baghdad.

*Id.*

<sup>51</sup> In practice, the term "other urgent humanitarian or reconstruction projects" has been construed to mean "essential needs," such as food, water, temporary shelter, and clothing. The more recent versions of the MAAWS explicitly provide the aforementioned definition.

<sup>52</sup> See Hedgpeth & Cohen, *supra* note 22. Relying on statements from Gen. Peter W. Chiarelli, the authors noted, "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.'" This

In September 2005, the DoDFMR was amended to include four more permissible categories:

O. Repair of damage that results from U.S. coalition, or supporting military operations and is not compensable under the Foreign Claim Act.

P. Condolence payments to individual civilians for the death, injury, or property damage resulting from U.S. coalition, or supporting military operations.

Q. Payments to individuals upon release from detention.

R. Protective measures, such as fencing, lights, barrier materials, berming over pipelines, guard towers, temporary civilian guards, etc., to enhance the durability and survivability of a critical infrastructure site (oil pipelines, electric lines, etc.).<sup>53</sup>

Additions O, P and Q formally permitted commanders to provide CERP funds to private individuals. More specifically, it provided commanders with the ability to offer relief to Iraqi citizens harmed as a result of coalition combat activities.<sup>54</sup> The last addition, protective measures, expanded the use of the CERP beyond “normal” humanitarian and reconstructive purposes. Now commanders were permitted to use the CERP to harden non-military critical infrastructure sites through the use of barrier material or hiring civilian personal security forces. The DoDFMR also provided some guidance as to what it meant by “critical infrastructure sites” by including supporting examples such as oil pipelines and electric lines. This suggested that the DoD intended to restrict the funding of protective measures to those defending areas or facilities that are critical to the orderly functioning of civil society or the

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problem was also echoed by the 2d Brigade, 10th Mountain Division civil affairs team stationed in Camp Hammer, Iraq, in 2010. Captain Eddy, the deputy S-9, explained that much of his frustration centered around integrating the diverse desires of the battalion commanders with the brigade and division command intent. Lack of uniform and meaningful performance measures made coordination difficult. See Hwangbo & Eddy Insights, *supra* note 3.

<sup>53</sup> U.S. DEP’T OF DEF. REG. 7000.14-R vol. 12, ch. 27 ¶ 270103 (Sept. 2005) [hereinafter DoDFMR September 2005], available at [http://comptroller.defense.gov/fmr/12/12arch/12\\_27-Sept2005.pdf](http://comptroller.defense.gov/fmr/12/12arch/12_27-Sept2005.pdf).

<sup>54</sup> See Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, ARMY LAW., Feb. 2004, at 39, 41–42 (Even before the 2005 amendment to the DoDFMR, CERP was used to pay claims that could not be settled under the Foreign Claims Act (FCA) because the damage resulted from Coalition combat activities or for other reasons.).

government’s ability to provide essential services to its people.<sup>55</sup>

In addition to the new permissible categories, the September 2005 DoDFMR expanded the prohibitions (the additions are in boldface):

A. Direct or indirect benefit to U.S. **coalition or other supporting personnel.**

**B. Providing goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces.**

C. Entertainment.

**D. Except as authorized by law and separate implementing guidance, weapons buy-back programs, or other purchases of firearms or ammunition.**

E. Reward programs.

F. Removal of unexploded ordnance.

G. Duplication of services available through municipal governments.

**H. Salaries, bonuses, or pensions of Iraqi or Afghan military or civilian government personnel.**

**I. Training, equipping, or operating costs of Iraqi or Afghan security forces.**

**J. Conducting psychological operations, information operations, or other U.S. coalition, or Iraqi/Afghanistan Security Force operations.**<sup>56</sup>

The September 2005 DoDFMR thus offered a fairly clear distinction between using the CERP for the benefit of the indigenous population (allowed) and using the CERP for the benefit of local security forces (forbidden).<sup>57</sup> Also

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<sup>55</sup> In 2009, the U.S. Army used CERP funds to build a protective wall to defend the Khadimiya Mosque, reasoning that it was “critical infrastructure” because the mosque had both cultural and religious significance to the Iraqi people and Shi’a Muslims. In 2010, the Commander of Multinational Forces–Iraq (MNF–I), declared that polling stations in Iraq could be treated as “critical infrastructure” sites during the Iraqi national elections of March 2010, and CERP funds could be spent protecting them. Thus, in practice, the term “critical infrastructure” was fluid and adaptable to the situation on the ground.

<sup>56</sup> DoDFMR September 2005, *supra* note 53, ¶ 270301. Separate appropriations under the Iraqi Security Forces Fund (ISFF) and the Afghan National Security Force Funds (ANSF) were established to equip, train, and support the host nation national armies and police forces. Major Kathryn M. Navin, *Herding Cats II: Disposal of DOD Personal Property*, ARMY LAW, Apr. 2010, at 25, 32.

<sup>57</sup> See *id.*; see also U.S. DEP’T OF DEFENSE INSPECTOR GENERAL, IMPLEMENTATION OF THE COMMANDERS’ EMERGENCY RESPONSE PROGRAM IN AFGHANISTAN 5–6 (28 Feb. 2007) [hereinafter DOD IG REPORT]. The report noted the following violations:

eliminated was the ability to use CERP funds to finance Information Operations (IO) for either U.S. Forces or Iraqi or Afghan Security Forces.

In November 2007 and May 2008, the DoDFMR was amended again. Neither version differed significantly from the September 2005 DoDFMR. The November 2007 version simply clarified when a condolence payment could be made. Commanders were formally permitted to use CERP to make condolence payments to the surviving kin of fallen Iraqi or Afghan security force personnel (“martyr payments”). The May 2008 version added the term “physical” in connection with the word “injury” under the condolence payment category, suggesting that non-physical injuries (e.g., combat-related psychological damage) would not be compensable under CERP.<sup>58</sup>

## 2. May 2008–August 2008

Over the years, CERP-funded projects grew in size and complexity (Appendix, Table 1). What started out as “walking-around money for commanders to achieve a desired effect in their battle space,” slowly became “a de facto reconstruction pot of money.”<sup>59</sup> This meant that rather than focusing on small-scale, urgent, immediate-impact projects, commanders were gradually moving into nation building.

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Sorkh Parsa District Center (\$240,000). According to the unit Project Purchasing Officer, the building will house district officials, a court, and the Afghan National Police. The project is a prohibited use of funds because it is funding an operating cost of Afghan security forces.

Repair of National Police Vehicles (\$10,000). The project was to provide funding to enhance the mechanical and repair capabilities of the Afghan National Police vehicles. The project was a prohibited use of CERP funds because it provided services to the police.

Oruzgan Afghan National Police Building Prep (\$9,600). The project was to clean up and prepare the site for the future Afghan National Police Station. The project was a prohibited use of CERP funds because it provided services to the police.

Emergency Medical Technician Course (\$21,800). The course was offered only to the Afghanistan National Army and Afghanistan National Police. The project was prohibited because it provided services to the national army and police.

*Id.*

<sup>58</sup> U.S. DEP’T OF DEF., REG. 7000.14-R vol. 12, ch. 27, ¶ 270103P (Nov. 2007); U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270103P (May 2008).

<sup>59</sup> Ernesto Londono, *U.S. “Money Weapon” Yields Mixed Results—Review of Military Program Sought*, WASH. POST, July 27, 2009, available at <http://www.uscloseup.com/content/us-money-weapon-yields-mixed-results> (citing a statement given by Ginger Cruz, a Deputy Inspector General in the Office of the Special Inspector General for Iraq Reconstruction).

The key factor driving this shift was the lack of affirmative guidance from the DoD as to what constituted a small-scale and urgent project, leaving commanders with the responsibility for developing their own definitions.<sup>60</sup> A Government Accountability Office (GAO) investigation in 2008 revealed that this lack of guidance led to myriad on-the-ground interpretations. Specifically, the GAO found:

[O]ne commander told us that he would not execute projects that cost more than \$200,000, whereas another commander told us that he executed projects that cost more than \$1 million. Another commander focused on projects that cost from \$20,000 to \$100,000 that would immediately provide drinking water to the local population, while other CERP-financed water projects have cost more than \$5 million. Yet another commander chose to execute projects that would be completed while his unit was deployed. Furthermore, our review of the quarterly reports to Congress demonstrated the wide spectrum in size and costs of projects. For instance, projects ranged from a waterline repair costing slightly more than \$100 to an electrical distribution system costing more than \$11 million. In addition, during our 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 \$2,500 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.<sup>61</sup>

The GAO concluded that “without a clearer definition of small-scale and urgent, commanders are developing a wide range of interpretations such that it is difficult to determine whether the projects being selected by the commanders in fact are consistent with DoD’s intent for the program.”<sup>62</sup> In response, the DoD stated that its use of broad selection criteria for CERP projects was intentional. More

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<sup>60</sup> See DoDFMR September 2005, *supra* note 53.

<sup>61</sup> 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].

<sup>62</sup> *Id.* at 4.

specifically, DoD officials asserted that “any modification, specifically defining small-scale and urgent, might affect the program’s flexibility, which is a large part of what makes it such an attractive tool for commanders to use.”<sup>63</sup> Despite this position, the DoD considered the GAO’s criticisms and made several substantive changes to the DoDFMR in June 2008. Of note, the DoD offered, for the first time, formal definitions of “small-scale” and “urgent”:

270102. The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the indigenous population. As used here, urgent is defined as any chronic or acute inadequacy of an essential good or service which, in the judgment of a local commander, calls for immediate action. In addition, the CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government. Small-scale would generally be considered less than \$500,000 per project.<sup>64</sup>

This definition provided some clarity, but it was not dispositive. What constituted “urgent” was still a matter of the commander’s discretion, and the term “small-scale,” with the inclusion of the word *generally*, could still apply to projects that exceeded \$500,000. In essence, this definition provided a response to GAO criticism, without actually constraining how commanders selected and funded projects.

The June 2008 DoDFMR also prohibited using CERP for providing “[s]upport to individuals or private businesses (except for condolence, detainee, or martyr/hero payments; battle damage payments or micro-grants).”<sup>65</sup> Taken literally, this provision had far-reaching implications, because it precluded commanders from providing CERP funds directly to non-government organizations (NGOs) and other private actors such as sheiks and religious leaders.<sup>66</sup> This meant that

in order to properly finance many CERP projects, a commander had to work by, with, and through the Afghan or Iraqi government. This issue is explored in greater detail later in this article.

The June 2008 DoDFMR also, for the first time, required commanders to coordinate all CERP-funded projects costing more than \$50,000 with the interagency provincial reconstruction teams (PRTs) or provincial support teams (PSTs) prior to project execution.<sup>67</sup> This requirement responded to criticisms that DoD reconstruction projects were insufficiently coordinated with other agencies.<sup>68</sup> Since this requirement was short on details, commanders were left to tailor the level of coordination on their own. The June 2008 DoDFMR further required military commanders to “[e]stablish and publish a command CERP policy that includes subordinate approval authority levels and detailed procedures as necessary to ensure commanders carry out CERP in a manner consistent with mission requirements, applicable laws, regulations and guidance.”<sup>69</sup> In essence, this provision mandated the creation of standard operating procedures (SOPs) for executing CERP-funded projects. The Joint Task Force commands of Iraq and Afghanistan (Multi National Corps–Iraq (MNC–I) and Commander Joint Task Force (CJTF) in Afghanistan) had already codified local policies for administering and spending CERP dollars (i.e., the MAAWS). This provision made it a DoD directive. In addition to a formal SOP, the DoD also required oversight instructions and the establishment of performance metrics. Each of these requirements was loosely defined, providing the command considerable flexibility in terms of actual execution.<sup>70</sup>

In August 2008, the DoDFMR was amended yet again.<sup>71</sup> This revision included one major change:<sup>72</sup> it added

<sup>63</sup> *Id.* at 3.

<sup>64</sup> U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270102 (June 2008) [hereinafter DoDFMR June 2008].

<sup>65</sup> Micro-grants are gifts to disadvantaged entrepreneurs. Under the January 2009 MAAWS, to qualify, an entrepreneur had to present evidence that the money would be used for a proposed business, demonstrate that he lacked wealth or available credit, and provide evidence of his character, education, or trustworthiness. The micro-grant program has been characterized as “one of the most successful components of the CERP.” Bronowski & Fisher, *supra* note 10, at 56.

<sup>66</sup> See CERP Conference Insights, *supra* note 7. This was a very contentious issue at USF–I in the winter of 2009–2010, especially for commanders who served in Iraq prior to this rule. Many commanders simply preferred to work through non-governmental power brokers such as sheiks, former SOI leaders, and influential religious figures.

<sup>67</sup> DoDFMR June 2008, *supra* note 66, ¶ 270302C; see also Furin, *supra* note 44, at 17–21 (providing detailed discussion on the role of Provincial Reconstruction Teams (PRTs) in conducting stability operations). Provincial Reconstruction Teams included civilian personnel from the U.S. Departments of State, Agriculture, and Justice, as well as USAID and military personnel. In Iraq, the Department of State held lead authority over the PRTs; in Afghanistan, the DoD held lead authority. *Id.* at 17–18.

<sup>68</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 07-549, MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE DOD’S STABILITY OPERATIONS APPROACH AND ENHANCE INTERAGENCY PLANNING 24–25 (May 2007). The report noted that Combatant Commanders have achieved limited interagency participation in development of military plans because: (1) DoD has not provided specific guidance to commanders on how to integrate planning with non-DoD organizations; (2) DoD practices inhibit the appropriate sharing of planning information with non-DoD organizations; and (3) DoD and non-DoD organizations lack an understanding of each other’s planning processes and capabilities, and have different planning cultures and capabilities. *Id.*

<sup>69</sup> DoDFMR June 2008, *supra* note 64, ¶ 270204C.

<sup>70</sup> *Id.* ¶¶ 270314, 270315.

<sup>71</sup> U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27 (Aug. 2008) [hereinafter DoDFMR August 2008].

<sup>72</sup> This version also took into account the fact that Congress had appropriated CERP funds for use in the Philippines. Military Construction,

two instructive annexes (A & B). Annex A listed nineteen categories of permissible CERP projects, each with “preamble language” and a list of project types. For example, the CERP category of “transportation” was described as follows:

**[Preamble Language]**

**18. Transportation:** Includes infrastructure and operations. Infrastructure includes the transport networks (roads, railways, airways, canals, pipelines, etc.) that are used as well as the nodes or terminals (such as airports, railway stations, bust stations and seaports). The operations deal with the control of the system, such as traffic signals and ramp meters, railroad switches, air traffic control, etc.

**[Project Types]**

- A. Transportation infrastructure, including roads, railway tracks, airports, ports, etc.
- B. Roads (including gravel cobblestone, etc.)
- C. Culverts
- D. Bridging
- E. Traffic control measures<sup>73</sup>

Generally speaking, the preamble language served as a categorical definition, while the project types provided a sampling of potential project concepts.<sup>74</sup> Annex B provided

guidance for writing the Commander’s Narrative needed to satisfy the congressionally mandated quarterly reporting requirements.<sup>75</sup>

*3. January 2009*

The January 2009 version of the DoDFMR (which is current as of 1 November 2011) included a few more changes, including a twentieth permissible CERP category:

**T. Temporary contract guards for critical infrastructure.**<sup>76</sup>

According to Annex A, this project category included funding the “Sons/Daughters of Iraq and similar initiatives in Afghanistan guarding critical infrastructure, including neighborhoods and other public areas.”<sup>77</sup> In fact, MNC–I had previously been funding the Sons of Iraq (SOI) using CERP funds,<sup>78</sup> and U.S. funding of the program was already being phased out under a memorandum of agreement with the Government of Iraq (GOI).<sup>79</sup> This did not forbid similar initiatives in Afghanistan. Nor did it preclude the issuance of non-SOI security efforts in Iraq (such as providing female security guards to search female voters at polling stations).

Another addition to the 2009 DoDFMR was a cost-sharing requirement for CERP-funded projects exceeding \$750,000. In an effort to obtain more GOI buy-in, the DoD now required the GOI to provide supporting funds for such projects.<sup>80</sup> No such requirement applied to Afghanistan.

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Veterans’ Affairs, and Related Agencies Appropriations Bill, 2008, Pub. L. No. 110-252, 122 Stat. 2323, 2404. The DoDFMR designated the Department of the Navy as the Executive Agency in charge of CERP in the Philippines. *Id.* ¶ 270202.

<sup>73</sup> DoDFMR August 2008, *supra* note 71, annex A, ¶ 19.

<sup>74</sup>

The DoDFMR described these Annexes as “guidance” rather than an exhaustive list of permissible projects, DoDFMR August 2008, at ¶ 270103, and commanders treated them as such. For instance, Multinational Corps–Iraq (MNC–I) authorized the phased construction of the Baghdad International Airport Economic Zone (BEZ) from February 2005 to February 2008. The main BEZ initiative consisted of four projects—a business center, a convention center, a hotel, and an office tower—intended to be used by for-profit businesses run by the Iraqi Ministry of Transportation (MOT). These projects were approved under the CERP category of “economic, financial, and management improvements.

See SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: PROJECTS AT BAGHDAD AIRPORT PROVIDE SOME BENEFITS, BUT WASTE AND MANAGEMENT PROBLEMS OCCURRED 2–3 (26 Apr. 2010) [hereinafter SIGIR-10-013]. However, Annex A listed only three project types under Economic, Financial, and Management Improvements: marketing assistance programs, bazaars, and micro-grants. DoDFMR August 2008, *supra* note 71, annex A, ¶ 7. None of these described the BEZ. The current (January 2009) version of Annex A adds “refurbishment of district centers” to this project

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category, DoDFMR, *supra* note 9, annex A, ¶ 6D, perhaps acknowledging the propriety of the BEZ project.

<sup>75</sup> DoDFMR August 2008, *supra* note 71, annex B.

<sup>76</sup> DoDFMR, *supra* note 9, ¶ 270104T.

<sup>77</sup> *Id.* annex A, ¶ 17.

<sup>78</sup> Bronowski & Fisher, *supra* note 10, at 53–55. On 8 September 2008, the Prime Minister of Iraq issued executive order 118-C, which mandated that all Sons of Iraq (SOI) members under contract with U.S. Forces move from U.S. control to the GOI payroll, beginning on 1 October 2008. Prime Ministerial Order Number 118C (8 Sept. 2008) (on file with author).

<sup>79</sup> Bronowski & Fisher, *supra* note 10, at 53; see also Memorandum of Understanding for Implementing the Transfer and Transition Responsibilities of the Sons of Iraq (Sahwa) from the Multi-National Corps–Iraq to the Government of Iraq According to His Excellency the Prime Minister’s Order 118C (Oct. 2008) (on file with author). However, as the GOI was not always able to retain the SOI on its payroll, CERP funds could be and were used to hire former SOI as laborers on otherwise valid reconstruction projects, and to provide job training for them. Stipends to support them while they trained, however, were not authorized. Bronowski & Fisher, *supra* note 10, at 54–55.

<sup>80</sup> DoDFMR, *supra* note 9, ¶270205A. Cost sharing could be omitted on an exception basis if the command could show that the effort directly supported the U.S. security mission in Iraq. This exception seems rather vacuous and no further explanation is provided to illustrate the type of missions that would qualify for such an exception.

Another change was the addition of the words “repair,” “restore,” and “improve” to the preamble language of some of the CERP categories in Annex A.<sup>81</sup> The inclusion of these qualifiers suggested a shift in DoD emphasis. Words like “repair” and “restore” seemed to limit CERP projects to the betterment of existing structures rather than the construction of new facilities. But the words were not added to every section. The preamble for “education” continued to provide for “projects to repair or reconstruct schools,” but the list of project types included projects to “[b]uild, repair, and refurbish schools.”<sup>82</sup> The preamble language seems to limit construction to improving an existing footprint, but the project list suggests a broader mandate. This lack of clarity left local JAs to make “best guess” efforts regarding the right and left limits of project permissibility. However, the proposed changes offered in the draft 2010 publication of the DoDFMR provide some invaluable insight concerning the DoD’s intent.

#### 4. Proposed DoDFMR Changes

In April 2010 the Office of the Undersecretary of Defense (Comptroller) (OUSDC(C)), distributed a draft edition of the DoDFMR to the CERP-practicing world of the DoD’s subordinate commands.<sup>83</sup> The proposed changes have not been finalized,<sup>84</sup> but this article examines the proposed changes and their likely effects on the CERP-practicing universe.

The proposed changes eliminate the clumsy qualifiers concerning what constitutes a “small scale project.” The draft section reads as follows:

The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist as the Iraqi and Afghan people, respectively. As used here, urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate

<sup>81</sup> *Id.* annex A, ¶¶ 8 (electricity), 11 (healthcare), 14 (protective measures), 18 (telecommunications), 19 (transportation), 20 (water & sanitation). Thus, the preamble for “electricity,” went from “electrical production, distribution, and secondary distribution infrastructure” to “[p]rojects to repair, restore, or improve electrical production, distribution and secondary distribution infrastructure.”

<sup>82</sup> *See id.* annex A, ¶ 7 (This paragraph was unchanged from the August 2008 version.) Paragraph 1 of Annex A (Agriculture) also remained mostly unchanged, and seemed to allow for outright new construction in that area.

<sup>83</sup> U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27 (forthcoming late 2011) [hereinafter DoDFMR 2011] (draft publication on file with author).

<sup>84</sup> As of 1 November 2011.

action. In addition, the CERP is intended to be used for small-scale projects that can be sustained by the local population or government. For purposes of the CERP, “small-scale” means less than \$500,000 per project. Projects using appropriated funds of \$500,000 or more should be the exception, though the Afghanistan area of operations is understood to require some larger projects to address infrastructure development.<sup>85</sup>

The word *generally* has been removed, so that “small-scale” actually means projects under \$500,000. Furthermore, the term *optimally* has been omitted, suggesting that commanders *must* seek projects that *can* be sustained by the Iraqi and Afghan people. This is an interesting deletion, and highlights a key source of contention between diplomats and generals concerning the direction of the CERP.<sup>86</sup> By the former, the CERP is regarded as a reconstruction or developmental funding source, but by the latter, it is generally thought of as a counterinsurgency or warfighting tool.<sup>87</sup> In practice, most commanders are not purists of either camp and most have wrestled with this duality on a project-by-project basis.<sup>88</sup> In any event, new language in the DoDFMR suggests that if a commander chooses to integrate the CERP into his warfighting mission, he must do so with an eye toward promoting projects that can be sustained in the long run.<sup>89</sup> Other key proposed changes are as follows:

1. The term “representative” is eliminated from the list of permissible categories, suggesting that the list of project types is now comprehensive. (Section 270206)
2. All new construction in Iraq above \$200,000 requires CENTCOM approval. (Section 270204D)
3. All new construction requires a detailed sustainment plan. (Section 270205 A & B)

<sup>85</sup> DoDFMR 2011, *supra* note 83, ¶ 270102.

<sup>86</sup> *See* Chandrasekaran, *supra* note 29 (discussing a dispute between DoS officials and commanders in Afghanistan over how to spend reconstruction dollars. One U.S. military official noted that “this is not about development—it’s about counterinsurgency.” However, Karl Eikenberry of the State Department wrote “proposals to buy generators and diesel fuel for Kandahar would be expensive, unsustainable and unlikely to have the counterinsurgency impact desired”). *Id.*

<sup>87</sup> *Id.*; *see also* SIGR-10-013, *supra* note 74, at 8 n.6 (MNC-I funding of the BIAP Economic Zone was partly designed “to recognize the GOI’s contribution to the war effort.”).

<sup>88</sup> In 2010, the IAD in Iraq routinely made a distinction between civil military operations (CMO) and capacity building. The former were described as short-term “quick win” projects, while the latter represented long-term endeavors to enhance institutional stability. Both were financed with CERP funds.

<sup>89</sup> This point is discussed further *infra* Part IV.

4. Former detainee payments<sup>90</sup> have been eliminated as a CERP category. (Section 270206)
5. A new CERP category, Internally Displaced Person (IDP) Payments, has been added.<sup>91</sup> (Section 270206L)
6. Micro-lending and micro-lending capitalization is prohibited. (Section 270401M)<sup>92</sup>
7. Support to International Organizations (IO) or Non Governmental Organizations (NGO) is prohibited, except for execution of approved CERP projects. (Section 270401L)
8. Only a “commander” in the U.S. chain of command is authorized to approve use of CERP funds. (Section 270205C)
9. Only DoD personnel may serve as Project Purchasing Officers and Pay Agents. (Section 270205C)<sup>93</sup>
10. Eliminates language authorizing CERP payments to SOI as contract guards. (Appendix A)
11. Condolence, battle damage, hero payments and micro-grants are capped at \$2,500. (Appendix A)<sup>94</sup> Exceptions to these limits require approval from Commander, USCENTCOM.

In addition to these added controls, the proposed changes provide a more consistent use of language in the supporting annexes (or appendices).<sup>95</sup> For instance, words like “repair” and “restore” are consistently used to describe instances where CERP is limited to the betterment of an existing footprint, like repairing the roof on a jail or

<sup>90</sup> As the name suggests, these are “Payments to individuals upon release from Coalition . . . detention facilities.” DoDFMR, *supra* note 9, annex A, ¶ 10.

<sup>91</sup> One-time payment of up to \$500 to facilitate transportation and/or subsistence for Afghans displaced by United States or coalition operations.

<sup>92</sup> In Iraq, the issue of micro-lending versus micro-grants has been the subject of a long-running debate. The reasons are two-fold. First, most BCTs lack the technical expertise to effectively manage CERP micro-lending projects. Second, although micro-lending might help to bolster the banking industry, the interest rates are generally too high for small farmers, because the cost of the loan usually exceeds the average farmer’s profit margin.

<sup>93</sup> Prior guidance had not been clear on this point.

<sup>94</sup> Under previous guidance, commanders were permitted to issue micro-grants to “individuals.” However, the word “individual” has been deleted from the 2011 draft version. The deletion of the word “individual” from the micro-grant category now seems to preclude that option. Instead, the field of potential beneficiaries seems to be limited to “existing” small business owners. See DoDFMR 2011, *supra* note 83, app. A.

<sup>95</sup> The supplemental sections are no longer referred to as Annexes A and B. Instead, they are called Appendices A and B.

restoring the damaged wall of a mosque.<sup>96</sup> Whereas the word “build” appears to logically denote the permissibility of new construction, such as building a new school or hospital in a place where one had not previously existed.<sup>97</sup> The word “improve” is used to denote instances where it is permissible to use CERP dollars to extend the capacity of an existing structure, such as building additional power lines or extending an existing road.<sup>98</sup>

### 5. Role of the DoDFMR

Is the DoDFMR simply meant to provide guidance or to establish ironclad rules? In the early stages of the CERP, it was certainly more the former. Today’s version favors the latter course, with more reporting requirements and less deference to commanders. Despite these changes, the DoDFMR still provides commanders rather streamlined procurement, especially when compared to the traditional world of government contracting.<sup>99</sup> In any event, the

<sup>96</sup> See U.S. DEP’T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT 504–05 (28 Mar. 2009) [hereinafter AR 420-1]. This regulation defines repair as the

a. Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.

b. Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components.

c. A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.

*Id.* “Restore” and “repair” are used interchangeably throughout the regulation.

<sup>97</sup> See *id.* at 483. Army Regulation 420-1 generally describes new construction as the “erection, installation, or assembly of a new facility.” This would also include any “related site preparation, excavation, filling, landscaping, or other land improvements” needed to effectuate the erection of a new facility. *Id.*

<sup>98</sup> See *id.* at 492. Army Regulation 420-1 defines an improvement as

Alterations, conversions, modernizations, revitalizations, additions, expansions, and extensions for the purpose of enhancing rather than repairing a facility or system associated with established housing facilities or area(s).

*Id.* An improvement could be any construction short of the complete replacement of an existing facility. Put another way, as long as the “improvement” does not fundamentally alter the designated functional purpose of the RPF it is likely permissible, such as building a new wing on a public library. However, converting a library to a police station would likely qualify as a “build,” because the designated functional purpose of the RPF has been changed.

<sup>99</sup> See OFFICE OF FED. PROCUREMENT POL’Y, FEDERAL ACQUISITION REGULATION (FAR), 48 C.F.R. ch. 1 (21 Jan. 2010) [hereinafter FAR] (The FAR provides approximately 1900 pages of regulatory guidance for the government procurement process. But for the SECDEF waiver, the provisions under the FAR would be applicable for the CERP procurement process.).

DoDFMR is an authoritative regulation and none of its provisions may be waived without OUSD(C) approval. It is also a regulation grounded heavily in statute and many of its provisions are designed to keep commanders from committing statutory violations such as those related to the Antideficiency Act (ADA). For example, using the CERP to build a road on a U.S.-controlled installation or to support intelligence gathering efforts is prohibited under the DoDFMR and may also constitute an ADA purpose violation. Put another way, the specific permissible uses and prohibitions outlined in the DoDFMR help to properly frame the purpose of the CERP. Any deviations from these well established guidelines may expose the command to unnecessary legal risk and frustrate DoD intent.

## B. Money as a Weapons System (MAAWS)

United States Forces–Iraq (USF–I) and United States Forces–Afghanistan (USFOR–A) are responsible for providing the tactical vision for the CERP in Iraq and Afghanistan, respectively. Relying on the DoDFMR, each command issues guidance for the selection and use of funds in the publication of the MAAWS.<sup>100</sup> The MAAWS includes CERP SOP for proposing projects, awarding contracts, and managing CERP-related activities. But the MAAWS is more than just an SOP. It is a day-to-day reference that combines regulatory standards with cradle-to-grave processes for initiating and closing out CERP projects. The procedural emphasis of the MAAWS is what distinguishes it from the DoDFMR. Whereas the DoDFMR sets the strategic tone, the MAAWS provides the mechanisms needed to bring that strategy to life. Unfortunately, in the operational arena, many commanders see the MAAWS as a bureaucratic impediment that can only be understood by lawyers.<sup>101</sup> It should not be viewed that way. The MAAWS is supposed to be a user-friendly guide designed to help commanders get from point A to point Z in the CERP implementation and management process. The MAAWS as a CERP SOP seeks to integrate and provide guidance in the following areas:

- **Fiscal Law:** Some portions of the MAAWS directly correspond to the fiscal law principles of purpose, time and amount (PTA). In most instances, the fiscal law analysis is straightforward, and amounts to determining whether a given project falls under an authorized CERP category.

<sup>100</sup> As used in this paragraph, MAAWS refers to both MAAWS & MAAWS-A, *supra* note 9.

<sup>101</sup> CERP Conference Insights, *supra* note 7. Although many commanders refer to the MAAWS as a tool created to keep lawyers employed, for the MAAWS and MAAWS-A, the J8 is the proponent of the both documents.

- **The Acquisition Process:** Normally the government procurement process is governed by the Federal Acquisition Regulation (FAR).<sup>102</sup> In the CERP world, the FAR has been waived and replaced with the streamlined contracting rules encapsulated in the MAAWS.<sup>103</sup> The MAAWS generally describes how a commander must identify a need, specify the requirement, procure the good or service, and manage the acquisition process.

- **Financial Management:** This is the portion of the MAAWS that details how a commander obtains funding, pays for his project, accounts for those funds and closes out a completed CERP project.

- **Reporting Requirements:** Lastly, the MAAWS provides the administrative steps that commanders and program managers must take to satisfy congressionally mandated reporting requirements.

Despite its embrace of a user-friendly focus, the MAAWS is not written with the precision of a cookbook. It is mostly aspirational and provides few hard and fast rules. At its best, it provides a streamlined version of the government procurement process, designed to meet the intent of the DoDFMR, while providing commanders with maximal flexibility. At its worst, it is a cumbersome text written with a degree of generality that borders on the directionless. The MAAWS is strongest when dealing with low-dollar (less than 50k), low-complexity projects that take fewer than ninety days from need identification to close-out.<sup>104</sup> The MAAWS is at its worst when it is consulted for structuring complex, long-term endeavors.<sup>105</sup> Despite its imperfections, the MAAWS, as a CERP SOP, is the primary reference resource for CERP practitioners and advising JAs, who should be intimately familiar with it.<sup>106</sup> With this last point in mind, the rest of this article highlights legal issues that can arise in employing CERP funding in today's operational setting.

<sup>102</sup> FAR, *supra* note 99.

<sup>103</sup> Waiver Memo, *supra* note 24.

<sup>104</sup> See Martins, *supra* note 10, at 9 (discussing how \$9600 in CERP funds was used to help repair the pediatric wing of a remote rural hospital).

<sup>105</sup> See SIGIR-10-013, *supra* note 74, at 27, 30–31 (finding that the pre-2008 MAAWS, which governed the BEZ project, provided inadequate controls for large-scale projects, so that only twenty-two of the forty-six individual projects, accounting for 54% of the funds spent, were successful).

<sup>106</sup> See GAO-09-615, *supra* note 6, at 10 (discussing a deployed attorney who was unprepared for fiscal law duties).

#### IV. CERP and Nonlethal Targeting: Practice Issues and Ways Forward

Generally, stability operations require a greater emphasis on nonlethal actions. Nonlethal actions expand the options available to commanders to achieve their objectives. . . . Nonlethal actions range from constructive activities focused on building institutional capacity and social well-being to coercive activities intended to compel certain behaviors. . . . By using nonlethal actions, forces can shape the broader situation to maintain or reestablish a safe and secure environment.<sup>107</sup>

The CERP has become an indispensable tool in the planning regimen of the nonlethal targeteer. In most cases, the targeteer seeks to focus CERP funding on projects that complement stability operations. However, the manner in which the targeteer employs these resources must be nuanced, focused, and, above all, legally permissible. In this regard, the role of the JA can be a difficult one. The advising JA must help to balance the can-do attitude of the modern day warfighter with the statutory and regulatory constraints described in this article. This, at times, is easier said than done, especially when a commander wishes to integrate the unit's lethal and nonlethal capabilities into rapidly responsive synchronic actions. As suggested earlier in this article, there is a slight disconnect between the humanitarian emphasis of the CERP and how that emphasis fits with other aspects of a stability operation. This "disconnect" is mostly borne out of the regulatory constraints applied to the CERP process. Although most commanders view these constraints as impediments, they need not be considered as such. They define the DoD's intent and help protect a commander from unwittingly violating the law. This part focuses on these constraints.

##### A. Defining Direct and Indirect Benefits

The DoDFMR and the MAAWS explicitly preclude using CERP funds in a manner that provides a direct or indirect benefit to "U.S., coalition or other supporting personnel."<sup>108</sup> The comprehensive terms "direct and indirect benefits" must not be read too broadly. The nature of our missions in Iraq and Afghanistan is such that anything we do for the indigenous population provides some sort of benefit to U.S. Forces and our allies.<sup>109</sup> So the terms "direct" and

"indirect" must carry a more nuanced distinction that captures the intent of the DoDFMR without divorcing common sense from the CERP implementation process.

The term "direct benefit" is fairly straightforward. It necessarily applies to anything procured directly for the benefit of U.S. Forces. For instance, it would be impermissible to buy food, bullets or medical supplies for U.S. Forces or our allies with CERP funds. It would also be impermissible to use CERP funds to hire an Iraqi or Afghan contractor to perform janitorial services on a U.S.-controlled installation. Unfortunately, not all direct benefits are so easily discernable. In Iraq, the command sometimes hired Iraqi firms ("Red Zone Engineers") to perform routine quality assessment/quality control (QA/QC) on CERP-funded projects. Commanders thought it would be permissible to pay these contractors with CERP funds. However, QA/QC inspections are typically done by U.S. personnel,<sup>110</sup> and are generally understood to be for the benefit of U.S. Forces. Put another way, if the command failed to procure Red Zone Engineering support, QA/QC would be done by a command representative. So, as a practical matter, any person hired to assist the project purchasing officers provides a direct benefit to U.S. Forces by saving labor. Thus, use of CERP funding for the described purpose is legally impermissible. Keep in mind, this does not mean that such support cannot be used; it simply means that it must be paid for with the proper funding source.<sup>111</sup> In any event, a direct benefit should be understood as anything purchased for or providing a service for U.S. or allied forces, or accomplishing a task these forces are ultimately responsible for doing.

The term "indirect benefit" is more elusive, and neither the DoDFMR nor the MAAWS provides much insight concerning its meaning. Taken literally, it refers to "any" benefit that inures to U.S. or allied forces, but such an interpretation, if followed, would render the CERP useless. For instance, suppose the command wants to repair a sewer system in Ramadi, Iraq, but a U.S. installation near Ramadi is also connected to that sewer system. Can an indirect benefit be avoided? The short answer is "yes," but only with a sensible understanding of the term "indirect benefit." This understanding should be grounded in the *purpose* of the project. By way of analogy, the relationship between a direct versus an indirect benefit is akin to the difference between direct and indirect fire. Direct fire, such as the bullet fired from an M4 Rifle, relies on a direct line of sight to engage a visible target. Indirect fire, on the other hand, means aiming and firing a gun without relying on a direct

<sup>107</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS ¶ 2-13 (6 Oct. 2008) [hereinafter FM 3-07].

<sup>108</sup> See DoDFMR, *supra* note 9, ¶ 270301A.

<sup>109</sup> See FM 3-24, *supra* note 1, ¶ 2-5 ("COIN programs for political, social, and economic well-being are essential. . . ." to achieve "durable policy success.").

<sup>110</sup> See DoDFMR, *supra* note 9, ¶ 270314 (progress may be monitored with the aid of "organic engineers or another unit's engineers"); MAAWS-A, *supra* note 9, annex E, § 8J (project manager, a command representative, is responsible for conducting periodic quality assurance inspections).

<sup>111</sup> In Iraq in 2010, the 1st Armored Division Office of the Staff Judge Advocate opined that an operation and maintenance-funded contract was a more suitable means to fund this type of endeavor.

line of sight between the gun and its target. The difference between the two is the difference between engaging a visible versus a nonvisible target. However, they are similar in that both acts are laden with a common purpose—hitting a specific target. For example, if the sewer systems in Ramadi are in need of repair, a commander could initiate a CERP project if his purpose is to benefit the Iraqi people. Purpose, in this case, has a subjective and objective component. Subjectively, the commander *must* identify a local need that he surmises is urgent.<sup>112</sup> Objectively, the commander must also:

- Coordinate the need through the local government (i.e., establish that the indigenous population actually wants the project—local buy-in).<sup>113</sup>
- Affirmatively determine that no other funding is available and that the governing body lacks the funds or ability to accomplish the task.<sup>114</sup>
- Establish that the indigenous population has the ability and intent to sustain the project after U.S. Forces have completed the effort.<sup>115</sup>

If both the subjective and objective components have been satisfied, any benefit to U.S. Forces should be treated as an “incidental” or “unintended” benefit.

Put another way, an indirect benefit occurs when U.S. Forces are the intended “target” of a particular project without directly receiving the good or service. An “incidental” benefit, on the other hand, occurs as the natural consequence of a project principally undertaken for the benefit of the indigenous population. For instance, if a commander authorizes a civic clean-up project in the streets of Baghdad without satisfying the two-part purpose test *and* he believes that clean streets will make it easier for U.S. Forces to spot improvised explosive devices (IEDs), the benefit to U.S. Forces is indirect and impermissible. However, if a commander satisfies the purpose test and orders a civic cleanup project to meet a preexisting need, any

<sup>112</sup> DoDFMR, *supra* note 9, ¶ 270102. The “subjective” component does contain a degree of objectivity, in that a need **cannot** be urgent (or subjectively reasonable) if it does not fall under a permissible CERP category.

<sup>113</sup> *Id.* ¶ 270204B (requiring coordination with PRT for projects exceeding 50k); MAAWS, *supra* note 9, app. B, § 4B; MAAWS-A, *supra* note 9, § 4B (requiring commanders to coordinate with the local government prior to project execution to determine project needs).

<sup>114</sup> MAAWS, *supra* note 9, app. B, § 3A; MAAWS-A, *supra* note 9, § 2A (requiring the command to ensure that no other funding source is reasonably available; this is especially relevant in Iraq, where DoS, USAID, and host nation funds are generally available).

<sup>115</sup> DoDFMR, *supra* note 9, ¶ 270102; MAAWS, *supra* note 9, app. B § 4B3; MAAWS-A, *supra* note 9, § 4A(5), 5a (for projects costing over \$50,000, requiring written documents from host nation officials, indicating their intent to accept and sustain the projects).

improvement in IED spotting would be merely “incidental.” The goal is not to rid the project of all non-altruistic consequences, but rather to demonstrate a thought process that principally concerns the needs of the Iraqi or Afghan people.

## B. CERP and IOs

According to the DoDFMR, using CERP funds to conduct IO and psychological operations (PSYOP) is prohibited.<sup>116</sup> Unfortunately, neither the DoDFMR nor the MAAWS specifies the exact scope of this prohibition or the types of infractions it seeks to thwart. This is especially problematic when one considers the scope of IO in today’s operational environment.<sup>117</sup> In Iraq and Afghanistan, IO is central to the military’s operational posture, with the explicit focus of moving millions of “undecided” Iraqi and Afghan onlookers closer to the U.S. viewpoint.<sup>118</sup> At its most rudimentary level, IO refers to:

The integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception and operations security, in concert with specified supporting and related capabilities, to influence, disrupt, corrupt or usurp adversarial human and automated decision making while protecting our own.<sup>119</sup>

Psychological operations (or Military Information Support) is a species of IO, focusing on planned activities meant “to convey selected information and indicators to foreign audiences to influence their emotions, motives,

<sup>116</sup> DoDFMR, *supra* note 9, ¶ 270301J.

<sup>117</sup> 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

Soon after taking command of my brigade, I quickly discovered that IO 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.*

<sup>118</sup> See Renea Merle, *Pentagon Funds Diplomacy Effort Contracts Aim to Improve Foreign Opinion of United States*, WASH. POST, June 11, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/10/AR2005061001910.html> (The Pentagon awarded three contracts potentially worth up to \$300 million over five years to companies it hopes will inject more creativity into its psychological operations efforts.).

<sup>119</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS glossary, at GL-9 (Feb. 13, 2006).

objective reasoning, and behavior.”<sup>120</sup> The purpose of PSYOP “is to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.”<sup>121</sup> Much of what a commander does under the CERP is meant to influence the attitude and behavior of the local populace. When a commander rebuilds a road, repairs a mosque, or delivers medicine to a local clinic, he is hoping to shift the affections of the local populace toward U.S. Forces and the host government and away from its adversaries. However, there is a significant difference between using CERP funds to “conduct” IO activities, and funding a CERP project that incidentally produces an “IO effect.” With that said, a commander can avoid infringing on this prohibition by following the two-part (subjective/objective) purpose test discussed above, but must also satisfy a fourth objective element:

- Avoid the use of pro-U.S. or Iraqi/Afghan messaging.

The concept of messaging lies at the heart of the IO mandate. So, the inclusion of messages that have a pro U.S. or Iraqi/Afghan emphasis could turn a permissible CERP project into an impermissible “IO product.” For instance, handing out clothing to the local populace in response to a humanitarian need fits within a recognizable CERP category. However, the inclusion of words like “I Love U.S. Forces” or “I Love the ANA” on the clothing is an impermissible IO product that could undermine the legal sufficiency of the entire effort (and could also be counterproductive to the broader mission).

Explicit IO messaging is a clear prohibition, but a commander can also unwittingly violate the spirit of the rules by pushing projects that provide a short term boost in popular support but no meaningful evidence of long term survivability.<sup>122</sup> Building a school in a neglected urban area

might provide a short term boost in employment and an immediate IO advantage for the sponsoring command, but if the GOI does not have teachers to fill it, its overall impact is negligible at best.

### C. Support to Private Businesses and Individuals

The DoDFMR and the MAAWS explicitly prohibit using CERP funds to provide “support to individuals and private businesses.”<sup>123</sup> Neither more specifically describes the type of support that is prohibited, but both list several exceptions. Each publication states that CERP funds **may** be used to fund “condolence payments, Iraqi hero payments, battle damage payments, former detainee release payments, and micro-grants.”<sup>124</sup> Each of the exceptions permits a direct benefit to an otherwise impermissible class of recipients. This impermissible class includes Iraqi and Afghan persons in their private capacity, to include religious figures and sheiks. The prohibition also pertains to non-state business enterprises, such as NGOs and charities. In other words, a commander **may not** authorize the release of CERP funding to any entity acting in an “unofficial capacity,” unless an exception applies. This exclusion applies to both cash and in-kind payments. For instance, a commander could use CERP funds to repair or restore the roof of a mosque controlled and funded by the local Qada council,<sup>125</sup> but he could not use those same funds to repair the roof of a mosque owned and operated by a local, but influential, religious group.

This distinction becomes problematic when quasi-official entities, such as sheiks and religious leaders, serve as local power brokers.<sup>126</sup> In Iraq and Afghanistan, these unofficial local leaders may play a pivotal role in directing economic and social life in a given area. It is often unwise and impractical to ignore their influence.<sup>127</sup> This may also

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<sup>120</sup> *Id.* at GL-11.

<sup>121</sup> *Id.*

<sup>122</sup> See Jones Testimony, *supra* note 12, at 4. Mr. Jones notes,

In general, 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. Indeed, the U.S. Agency for International Development has established a framework to identify, prioritize, and mitigate the causes of instability—and to serve as a baseline for development aid—called the Tactical Conflict Assessment and Planning Framework (TCAPF). It includes a range of questions to ask villagers, such as: Have there been changes in the village population in the last year? What are the most important problems facing the village? Who do you believe can solve your problems? What should be done first to help the village?

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*Id.*

<sup>123</sup> DoDFMR, *supra* note 9, at 270301K; MAAWS, *supra* note 9, app. B, § E.10; MAAWS-A, *supra* note 9, § 2.E.11.

<sup>124</sup> DoDFMR, *supra* note 9, at 270301K; MAAWS, *supra* note 9, app. B, § E.10; MAAWS-A, *supra* note 9, § 2.E.11.

<sup>125</sup> Qada (literally, “jurisdiction”) is a term for a sub-national entity in the Arab world and formerly throughout the Ottoman Empire. In Iraq, the term “Qada council” is loosely used to describe a local governing body similar to a county board.

<sup>126</sup> See HUSSEIN D HASSAN, CONG. RES. REP., RS22626, IRAQ: TRIBAL STRUCTURE, SOCIAL, AND POLITICAL ACTIVITIES, at CRS-2 to 3 (7 Apr. 2008). Sheiks are the principal tribal leaders in Iraq, where the tribal system plays a critical role. In the 19th century, some experts assert, the “tribal sheikh was at once a political leader, military general, chief educator, and manager of foreign affairs.” Thus, while in Western terms a sheik may be a private individual (because he does not hold a government office or act in a governmental “official capacity”), practically, his importance may equal or exceed that of an actual officeholder.

<sup>127</sup> See Montgomery McFate, *Iraq: The Social Context of IEDs*, MIL. REV., May–June 2005, at 37, 40. McFate asserts that

be the case with NGOs and local charity organizations. In some parts of Iraq and Afghanistan, the local government may be so inept and corrupt that an international NGO provides the only meaningful assurance that much-needed humanitarian aid reaches the local populace instead of the storehouse of a corrupt politician or local strongman. Despite this problem, there are ways for a commander to integrate private parties into his planning regimen.

In most regards, the CERP is about capacity building and legitimizing the host government and its security forces.<sup>128</sup> This is one reason the CERP is focused on restoring governmental institutions rather than developing the private sector. The hope is that once the host government is empowered, it will be able to foster civil society on its own terms. Further, by focusing on governing institutions, commanders can use CERP funds to encourage sympathetic outliers to join the governance-building process. If outliers are permitted to benefit from CERP dollars without being a part of the institution-building process, they could threaten it. Thus, each CERP project must have a tangible relationship to a governing entity. This means satisfying the two-part purpose test described earlier. But it also means ensuring the following:

- For Construction Projects – that the Iraqi or Afghan government has a legal proprietary interest in the land that the construction takes place either through lease or deed. In Iraq, USF-I has provided formal guidance shifting focus away from facility (brick and mortar) projects to “building GoI’s civil capacity through quickly implementable, small scale projects.”<sup>129</sup>

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[b]ecause the insurgency was connected to the Sunni tribal system, certain sheiks probably knew exactly where these explosives were stored. the sheiks are vulnerable in two ways: through their love of honor and through their love of money. Although they cannot be pressured to divulge the whereabouts of explosives through appeals to honor, because they see us as infidel adversaries, they are vulnerable to financial rewards. In Iraq, there is an old saying that you cannot buy a tribe, but you can certainly hire one.

*Id.*

<sup>128</sup> See SETH G. JONES, RAND COUNTERINSURGENCY STUDY VOL. 4: COUNTERINSURGENCY IN AFGHANISTAN 10 (2008). The study notes that:

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

*Id.*

<sup>129</sup> See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM FOR

- For Supplies or Equipment—that the Iraqi or Afghan government retains an ownership interest in the CERP funded supply item or equipment purchase.
- For Projects valued above \$50,000—that the Iraqi or Afghan government formally agrees to sustain the project after project completion. The governing body should also provide a detailed sustainment budget describing these costs.<sup>130</sup>

Satisfying the purpose test, establishing a proprietary interest, and determining the existence of an adequate sustainment budget are critical components to developing a legally sound CERP effort. And although each component requires direct government buy-in, private actors can play a critical role in the following ways:

- As Contractors—NGOs or private persons may serve as prime contractors. In fact, a unit could require the host government to use certain contractors as a condition for initiating a project. For instance, in cases where corruption is a concern, a commander would coordinate the project through the local government, but could insist that a local NGO manage the distribution or construction effort.<sup>131</sup>
- Through Use Agreements—Rather than being the direct beneficiary of a CERP-funded contract, private actors can indirectly benefit from a CERP project through a use agreement. For example, a unit could purchase tractors for the Ministry of Agriculture. The Ministry would maintain ownership of the tractors but agree to let private farmers or members of a local cooperative obtain the right to use the tractors. The key here is that the local government would maintain “ownership” and the “sustainment” obligation. But private citizens could make use of the purchase.

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2011 SHOWS INCREASED FOCUS ON CAPACITY DEVELOPMENT, SIGIR-11-020, at 4 (July 29, 2011) [hereinafter SIGIR-11-020].

<sup>130</sup> MAAWS, *supra* note 9, app. B § 4B3; MAAWS-A, *supra* note 9, §§ 4A(5), 5a (for projects costing over \$50,000, requiring written documents from host nation officials, indicating their intent to accept and sustain the projects).

<sup>131</sup> See CERP Conference Insights, *supra* note 7. Commanders and CERP program managers spoke of instances where local leaders and corrupt citizens learned to manipulate the CERP funding process to serve personal interest. Participants routinely suggested a need to continue to work through international organizations as a means of ensuring that projects were done properly and equitably.

The key to promoting private actor involvement is to ensure government buy-in and accountability. If the government wants a project and agrees to and has the ability to sustain it, the project will normally have the proper indicia of government involvement to survive external scrutiny. If it does not, the advising JA should help the command facilitate a different course of action.

## V. Providing Sound Legal Advice and a Way Forward

This article opened with a hypothetical scenario that pitted a commander's desire to protect his Soldiers and quell an insurgency against the regulatory mandates of the CERP. When Soldiers' lives and mission accomplishment are at stake, it is generally not enough to simply tell a commander that his actions might violate some Army rule. An advising JA must be able to explain to that commander why his actions are impermissible and, if at all possible, offer another way forward. In the instant matter, our hypothetical commander made an initial determination that a need existed. After making that determination, he attained "buy-in" from the local government. The local government verified that they had no other means to initiate the project but they agreed to sustain the project once completed. After the project was started, local contractors broke ground and began to bring the concept to fruition. Unfortunately, several violent events occurred in the unit's area of operation, tempting the commander to withdraw humanitarian funding until the local population provided some useful intelligence to the BCT.

The commander's decision to initiate these CERP projects was mostly discretionary. However, once a project is initiated, it becomes a cooperative effort between the unit and the indigenous population. The commander, functioning as a quasi-sovereign entity, assumes the responsibility of a governmental body. In this instance, the commander is at a crossroads and views CERP funding as possible leverage. Unfortunately, if the commander moves forward with his proposed threat, he exposes his command to at least three legal pitfalls:<sup>132</sup>

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<sup>132</sup> In the fiscal law universe, there are very few instances where a commander will be exposed to an explicit statutory violation, but that should not be the end-all-be-all of the legal analysis. For the fiscal law attorney, the term "legal" should not be limited to a statutory analysis. Instead, when an attorney says that a proposed course of action is "legally objectionable," he or she is saying, "I, as the command legal advisor, object to this course of action for the following reason(s). . . ." Those reasons could be constitutional, statutory, regulatory or policy-related. In most cases, regulatory and policy-related violations are not *per se* illegal, but that does not mean they are exempt from the "legally objectionable" tag. Judge Advocates (JAs), in addition to being attorneys, are also staff officers, and the advice we render to the command should be structured in a manner that exemplifies that point. Put another way, the term "legal" encompasses both the current state of the law and its future trajectory. As such, sound legal advice should be timely and accurate, but it should also anticipate the collateral consequences of a proposed course of action.

- **Violation of DoDFMR and MAAWS:** By making project funding contingent on operational support, the command is seeking a benefit to U.S. Forces, and is using CERP to fund a rewards program. Both of these purposes are expressly forbidden by the DoDFMR and the MAAWS. Put another way, the "quid pro quo" nature of this request muddies the humanitarian intent and exposes the command to unnecessary legal risk.<sup>133</sup>

- **Possible Purpose Statute violation:** Under the above scenario, the command has essentially transformed the CERP into a rewards-based program,<sup>134</sup> and therefore spent funds appropriated for one purpose (humanitarian relief projects) for another (rewards in exchange for intelligence), in violation of the Purpose Statute.<sup>135</sup>

- **Funds available from another appropriation:** The rewards program already established under 10 U.S.C. § 127b provides that:

The Secretary of Defense may pay rewards to persons for providing U.S. Government personnel or government personnel of allied forces participating in a combined operation with U.S. armed forces with information or non-lethal assistance that is beneficial to: (1) an operation or activity of the armed forces or of allied forces participating in a combined operation with allied forces conducted outside of the United States against international terrorism; or (2) force protection of the armed forces or allied forces participating in a combined operation with U.S. armed forces. This authority is useful to encourage the local citizens of foreign countries to provide information and other assistance, including the delivery of dangerous personnel and weapons, to U.S.

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<sup>133</sup> DoDFMR, *supra* note 9, ¶ 270301A, E (forbidding use of CERP funds to benefit U.S. personnel, or for rewards programs); MAAWS, *supra* note 9, app. B, § 2.E.5; MAAWS-A, *supra* note 9, § 2.E.5.

<sup>134</sup> 10 U.S.C. § 127b (2006); MAAWS, *supra* note 9, at 8 (describing USCENCOM rewards program).

<sup>135</sup> The Purpose Statute, 31 U.S.C. § 1301, "provides that appropriations shall be 'applied' only to the objects for which the appropriations were made, except as otherwise authorized by law." Colonel James W. McBride, *Avoiding Anti-Deficiency Act Violations on Fixed-Price Incentive Contracts: The Hunt for Red Ink*, ARMY LAW., June 1994, at 3, 21.

Government personnel or government personnel of allied forces. The DoD Rewards Program makes available incentives that U.S. Government personnel of allied forces can use to encourage cooperation.<sup>136</sup>

Put more succinctly, the DoD rewards program provides our hypothetical commander the funding leverage he seeks. This also means that if the command uses the CERP as a tool for exacting intelligence, it has essentially violated the third prong of the necessary expense doctrine. The third prong provides that an expense is necessary “if it is not provided for by another appropriation.”<sup>137</sup> Here, the command’s purpose is explicitly provided for by 10 U.S.C. § 127b, the DoD Rewards Program,<sup>138</sup> and therefore cannot be a legally permissible “necessary expense.”<sup>139</sup>

With these limitations in mind, the role of the advising JA is critical. As noted at the outset, it is usually not enough for an advising JA to tell a commander what he cannot do. Instead, a JA must effectively explain why the commander’s proposed course of conduct is prohibited and if there are other options to accomplish his desired end state. In this instance, the commander may not directly or indirectly leverage CERP funding as an intelligence-gathering tool, but he is not without viable options. He could use the DoD Rewards Program to supplement his efforts, perhaps by approaching the tribal leaders and offering “communal or individual rewards projects” in exchange for useful intelligence.<sup>140</sup> Unlike CERP projects, these projects would not require need, urgency, or government coordination. Instead, the command could use this incentive-based approach to pay for things like a new mosque or new housing for private citizens. Rather than punishing the indigenous population by withdrawing CERP-funded support, the command could offer “additional” but “contingent” support in the form of communal or individual rewards.

The command could also tailor the acquisition process to favor only those contractors favorable to U.S. security interests. This means that any contractor with a history of

collaboration with insurgent forces could be effectively blacklisted by the command. In some ways, by controlling who can contract, the command is able to “incidentally” encourage local buy-in and potential cooperation. For instance, if contractors understand that the price of doing business with U.S. forces means “staying clean,” contractors will be less likely to support insurgent activity and more likely to report misdeeds.<sup>141</sup> In any event, the command has options.

## VI. Conclusion

The CERP is first and foremost a commander’s tool, but its contribution to the DoD’s mission is not commander-specific. Its successes and failures are felt from deployment to deployment—from one commander to the next. Consequently, the program’s aims cannot and are not wholly defined by the immediate desires of any particular commander. In testimony before the U.S. Senate, General David H. Petraeus, Commander, U.S. Central Command, called the CERP “a vital counter-insurgency tool for our commanders in Afghanistan and Iraq.”<sup>142</sup> He added, “[s]mall CERP projects can be the most efficient and effective means to address a local community’s needs, and where security is lacking, it is often the only immediate means for addressing those needs.”<sup>143</sup> However, the manner in which we address those needs can be as important as addressing the needs themselves.

As previously discussed, the CERP is subject to more DoD-imposed restraints today than it has been in the past, but those restraints are often rooted in a history of trial and error and the military’s evolving needs. Today’s constraints are not aimed at frustrating a commander’s intent, but to maximize the effectiveness and long-term survivability of the program for current and future commanders. In fact, the DoD has consistently pushed for a “global CERP” that could be used to support stability operations beyond Iraq and Afghanistan.<sup>144</sup> However, the best way to increase the

<sup>136</sup> U.S. DEP’T OF DEF. REG. 7000.14-R., vol. 12, ch. 17, ¶ 170102 (July 2011) [hereinafter DODFMR Rewards].

<sup>137</sup> See The Honorable Bill Alexander, 63 Comp. Gen. 422, 427–28 (1984) (establishing three-part test for necessary expenses).

<sup>138</sup> See DODFMR Rewards, *supra* note 136; MAAWS, *supra* note 9, at 8 (describing USCENTCOM rewards program).

<sup>139</sup> While the MAAWS is more detailed than the DoDFMR, both contain useful specifics setting the left and right limits of CERP spending, and both should be studied by advising JAs.

<sup>140</sup> See DODFMR Rewards, *supra* note 136, § 170309 (In-kind payments, including “communal rewards,” are allowed under the DoD rewards program. Thus, rather than rewarding specific individuals, commanders could tailor a rewards program to incentivize specific communities or groups of people.).

<sup>141</sup> See Bronowski & Fisher, *supra* note 10, at 57 (noting that contract competition requirements under the Federal Acquisition Regulation do not apply to CERP contracts).

<sup>142</sup> *Hearing Before the U.S. Senate Armed Services Committee on the Afghanistan-Pakistan Strategic Review and the Posture of U.S. Central Command*, 2009 WLNR 6098361 (Apr. 1, 2009) (statement of David H. Petraeus, commander, USCENTCOM), available at <http://www.centcom.mil/from-the-commander/commanders-statement-to-senate-armed-services-committee-april-1-2009>.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* note 72 (discussion of CERP in the Philippines); Furin, *supra* note 44, at 23 (in 2007, DoD requested “Global CERP” from Congress, but Congress declined); Major Jose A. Cora, *Appendix A Department of Defense Legislation for Fiscal Year 2008 FY 2008 Department of Defense Appropriations Act*, ARMY LAW, Jan. 2008, at 114, 115 (Global CERP one of three top priorities for Secretary of Defense); see also OFFICE OF THE UNDER SEC’Y OF DEFENSE FOR POL’Y, INTERIM PROGRESS REPORT ON DOD DIRECTIVE 3000.05 MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS 23 (Aug. 2006).

possibility of such expansion is to ensure that the authority we have today is used responsibly, intelligently, and within the spirit and letter of the law.

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The report states that “CERP has proven to be a key tool in addressing near-term stabilization, reconstruction, and humanitarian requirements in Iraq and Afghanistan. The military needs a global CERP so it can meet urgent local needs and positively assist and influence the populace. OSD Policy and Legislative Affairs continue to push for this authority.” *Id.*

**Appendix**

<b>CERP Projects in Iraq</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>Total</b>
Number of projects	771	7423	3886	6301	18381
Percentage of projects costing \$500,000 or more	<1	2.5	3.8	2.8	2.8
Percentage of total obligations for projects costing \$500,000 or more	8	26.9	48.1	40.1	36.8

Table 1. Obligations Associated w/ Large Dollar-Value CERP Projects (2004–2007)<sup>145</sup>

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<sup>145</sup> SIGIR-08-006, *supra* note 19, at 6; *see also* Fields testimony, *supra* note 35, at 6 (noting that as of third quarter FY2009, large scale CERP projects accounted for 67 percent of obligated funds).