THE IRAQ DEBACLE: THE RISE AND FALL OF PROCUREMENT-AIDED UNILATERALISM AS A PARADIGM OF FOREIGN WAR

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1. INTRODUCTION

What underlies the debacle of the American mishandling in 2003–2007 of the Iraq insurgency, as that grew and spawned civil strife? Adequate discussion has already gone to the administration's failed political paradigm initially going into Iraq: the neoconservative unilateralism, along with a bungled military approach to early occupation, that proceeded without United Nations support; this elicited shunning internationally and particularly from neighboring countries, and exacerbated antagonism within Iraq. What deserves deeper analysis is the administration's supporting or "how-to" paradigm as the effort continued: the rise and fall of its paradigm as to the policy and law

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of procurement and funding that sought to aid in, but failed at, sustaining, with capped American troop levels, that unilateral commitment in Iraq.

Press coverage, and the belatedly revived congressional oversight in 2006–2007 revealed how waste, abuse, and failure of American contracting in Iraq swelled overall costs and undermined effectiveness. However, such oversight still requires analysis to reveal the rise and fall of an elaborate, if largely unspoken, legal and policy paradigm for supporting a unilateral war in the absence of international and local support. The paradigm in 2003–2007 of unilateral war aided by procurement and by unaccountable funding not only helps explain the long-term fate of the unpropitious effort in Iraq, but also has serious implications for future wars.

So, after an introductory section, this Article analyzes, in three parts, the rise and fall of the administration’s procurement-aided unilateralism as its “how-to” paradigm for supporting the Iraq war in 2003–2007.

1.1. The Various Aspects of the Failure

First, an administration led by Secretary of Defense Donald Rumsfeld (through 2006) and Vice President Cheney followed what it called “military transformation” in a procurement-fueled

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5 Then-Governor Bush had put it in his speech at the Citadel, in South Carolina, in 1998. GORDON & TRAINOR, supra note 1, at 497. About military
risky combination with diplomatic unilateralism. “Military transformation” relies upon America’s particular strength as the one high-tech superpower of the post-Cold War world—its capacity to shatter virtually any regular opposing forces by its procured sophisticated weaponry, from stealth craft and information technology-based combat gear to missile defense—a capacity that does not depend upon the legitimation of multilateral institutions like the United Nations and NATO. It transpired that such “military transformation” procurement, for all its effectiveness in shattering the regular organized forces of Saddam Hussein, crowded out what the United States really would need for a unilateralist effort in Iraq—“boots on the ground,” i.e., the quantity of American and supporting ground forces to hold down irregular opponents. The United States’ approach of unilateralism shaped by military transformation rendered the Iraq effort especially vulnerable to the withholding of hoped-for large transformation itself, see Christopher B. Puckett, Comment, In this Era of “Smart Weapons,” Is a State Under an International Legal Obligation to Use Precision-Guided Technology in Armed Conflict?, 18 EMORY INT’L L. REV. 645, 652 n.46 (2004) and accompanying text (giving examples of new combat methods that allow for greater precision and flexibility); Peter J. Boyer, A Different War: Is the Army Becoming Irrelevant?, NEW YORKER, July 1, 2002, at 54 (delineating then-Army Chief of Staff General Eric K. Shinseki’s plans to drastically reform the military); James Kitfield, About-Face: Stymied in Its Efforts to “Transform” the Military Before 9/11, the Rumsfeld Team is Using the Wars in Iraq and Afghanistan to Push a Radical Makeover of U.S. Forces, NAT. J., Jan. 31, 2004, at 308 (describing then-Secretary of Defense Donald Rumsfeld’s efforts to reform U.S. forces after the wars in Iraq and Afghanistan).


7 See generally Frederick W. Kagan, The Art of War, NEW CRITERION, Nov. 2003, at 4 (giving examples to support the proposition that the American military is in many respects at the height of its power). For background on missile defense, see Emily K. Penney, Is That Legal? The United States’ Unilateral Withdrawal from the Anti-Ballistic Missile Treaty, 51 CATH. U. L. REV. 1287 (2002) (detailing the history and development of the Anti-Ballistic Missile Treaty and the legal implications of the unilateral withdrawal of the United States).

8 James Kitfield, The General’s Case, NAT. J., May 6, 2006, at 20 (noting the opinions of some in the army and DOD that the utilization of a smaller invasion force put too few troops on the ground during the initial invasion of Iraq).

9 See, e.g., Sandra I. Erwin, Army: War Duties Should Warrant a Bigger Budget, NAT’L DEFENSE, Dec. 2005, at 16 (noting the complaints of the army acquisition chief about DOD’s “top 20” research, development, and acquisition programs, only three of which were for new army hardware (and two for helicopter upgrades), when the other three-quarters were for the other services, even though the army’s units “are the heavy lifters”).
peacekeeping forces from Turkey, India, and Egypt, as well as to the lack of help from Iraq’s influential neighbors such as Saudi Arabia, Syria, and Iran.10

This was the United States’s approach, coupled with a radical “acquisition reform”11 approach, especially as to outsourcing,12 for procurement of both military support (logistics, security, and training) and reconstruction. In practice, the administration used acquisition reform and outsourcing to select and indulge contractors who would serve loyally; the administration did not necessarily reach out to competitive contractors nor to those who would help expand the Iraq commitment’s base of practical support to allied and neighboring countries and locally within Iraq itself.13 This administration approach minimized the roles of the shrinking acquisition workforce, of competition, and of scrutiny of performance.14 Among the ensuing scandals from “acquisition

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10 See JAMES A. BAKER III ET AL., THE IRAQ STUDY GROUP REPORT 24 (2006) [hereinafter IRAQ STUDY GROUP REPORT] (“Iraq’s neighbors are doing little to help it, and some are undercutting its stability.”).

11 Charles Tiefer & Ron Stroman, Congressional Intent and Commercial Products, PROCUREMENT LAW., Spring 1997, at 22 (analyzing acquisition reform legislation).


13 About the owner of the private security contractor Blackwater, Erik Prince: “Prince’s political connections may well have helped his company win these crucial contracts from the Bush administration . . . . And Blackwater has hired . . . Joseph Schmitz, a former Pentagon inspector general whose duties included investigating contractual agreements with firms like Blackwater.” Brian Bennett, Outsourcing the War, TIME, March 26, 2007, at 38. For a book-length account, see JEREMY SCAHILL, BLACKWATER: THE RISE OF THE WORLD’S MOST POWERFUL MERCENARY ARMY (2007).

14 See, e.g., Shelley Roberts Econom, Confronting the Looming Crisis in the Federal Acquisition Workforce, 35 PUB. CONT. L.J. 174 (2006) (exploring “legal, policy, and contracting issues raised by the Government’s increased reliance on contractors to perform its work and the simultaneous abandonment of contract administration and oversight”); Dawn Kopecki, When Outsourcing Turns Outrageous; Contractors May Be Saving the Army Money, But Fraud Changes the Equation, BUS. WK., July 31, 2006, at 54 (reporting of the proliferation of contractor fraud in Iraq. “[t]he volume of sole-source and other noncompetitive contracts awarded by the military has soared 54% since 2000, from $65 billion to $100 billion”).
reform and outsourcing was the implication of contractors in "Abu Ghraib" tactics which disdained international law such as the Geneva Convention. In turn, such dependence upon large administration-loyal American contractors rather than local Iraqi contractors and employees further angered both a Sunni insurgency stung by its loss of influence and work, and, particularly in 2006–2007, Shiite militias swollen with out-of-work ex-soldiers ready to resort to civil strife.

Second, the administration brought a unilateralist approach to procurement-related aspects of Iraqi civil affairs, especially the

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15 See, e.g., Martha Minow, Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 B.C. L. REV. 989 (2005) (explaining that the lack of transparency in the use of private contractors has often led to high-profile scandals); Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STAN. L. & POL’Y REV. 549 (2005) (describing the allegations that contractor personnel were involved in the Abu Ghraib abuses, and raising concerns with regard to the outsourcing trend in the military).


18 The Armed Forces Journal published a persuasive criticism: “Poverty, coupled with a breakdown of civil society, forces the population to develop security along ethnic and sectarian lines,” as occurred when “[e]conomically, the U.S. failed to provide meaningful employment or opportunities for investment to individual Iraqis,” while “the U.S. was spending billions of dollars on logistical contracting.” Richard May, Opportunity Missed; Logistics Support Contracts with Locals Would Help Stabilize Iraq, ARMED FORCES J., June 2007, at 36.

19 The reconstruction effort was touted as “the most ambitious [such] program . . . since the Marshall Plan in 1947.” Robert Nichols, Introductory
critical aspect of reconstruction. From the outset, the administration scorned as “nation-building” the past multilateral approach of the State Department though reconstruction that had succeeded in the Bosnia occupation and could obtain multilateral support again. Rather, the White House shifted power to a Defense Department (“DOD”) necessarily over-dependent upon contractor-paid exiles and the United States’ contractor industry.


20 As for the relation of nation-building to what has occurred in the Iraq occupation, see, for example, Melissa Patterson, Note, Who’s Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq, 47 HARV. INT’L L.J. 467 (2006) (arguing that a modern doctrine of nation-building is more applicable to post-invasion Iraq than the currently employed occupation law); Stephen Townley, Perspectives on Nation-Building, 30 YALE J. INT’L L. 357 (2005) (discussing the various facets of nation-building with regard to the situation of Iraq under foreign occupation).


President Bush famously jibed, when the press asked him about squaring—with international law—his ban against French or German contract bids, “International law? I better call my lawyer. He didn’t bring that up to me.” The administration’s belated and grudging efforts at multilateralizing the Iraq occupation failed to spread the burdens much, even as to reconstruction.

Third, the administration’s approach of intense evasion of accountability disabled “power of the purse” checks on misdirected procurement and other spending. This approach

(2005) (proposing a more exact definition of “mercenary” as a means of controlling unwanted non-military behavior).


28 See Richard D. Rosen, Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1 (1998) (rebuiting the assertion that there is presidential spending power absent congressional approval on matters deemed necessary for national security); Louis Fisher, How Tightly Can Congress Draw the Purse Strings?, 83 AM. J. INT’L L. 758 (1989) (illustrating the impact of the President’s ability to draw money from sources outside the United States treasury); Michael J. Glennon, Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions, 60 MINN. L. REV. 1 (1975) (arguing that Congress should have more power to regulate presidential behavior and proposing changes to the War Powers Resolution for such a result); Raoul Berger, War-Making by the President, 121 U. PA. L. REV. 29, 78-79 (1972) (discussing the possibility of returning, through a statutory framework, to the originally intended balance of power between the executive and legislative branches).

29 See Philip J. Candreva & L. R. Jones, Congressional Control over Defense and Delegation of Authority in the Case of the Defense Emergency Response Fund, 32 ARMED FORCES & SOC., Oct. 2005, at 105 (illustrating how supplemental appropriations for the War on Terror have influenced the civilian-military relationship); Tom Campbell, Responsibility and War: Constitutional Separation of Powers Concerns, 57
abused annual "emergency" supplemental appropriations\(^{30}\) to fund military spending without accountability. In a telling episode, international authorities criticized\(^{31}\) the United States for inadequate accountability for Iraqi funds ("Development Fund for Iraq," or "DFI").\(^ {32}\)

For seeking an understanding of the paradigm of procurement-aided unilateralism, there are diverse invaluable sources: the extensive journalistic coverage, the late 2006 report of the bipartisan Iraq Study Group, and the renewal of congressional oversight in 2007.\(^ {33}\) Two background elements brought the Author into this: interests in implementation of war powers, dating to the Author's serving as General Counsel of the House\(^ {34}\) in the

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\(^ {30}\) See David Baumann, War, Off the Books, NAT'L J., April 22, 2006, at 40 (explaining the dissent against funding the Iraq war largely through "emergency" spending bills).

\(^ {31}\) See Joy Gordon, Accountability and Global Governance: The Case of Iraq, ETHICS & INT'L AFF. J., April 24, 2006, at 79 (providing three Iraq-based case studies of what Gordon labels failures of international entities to hold governments accountable for their foreign operations).


\(^ {33}\) See IRAQ STUDY GROUP REPORT, supra note 10 (assessing potential strategies for U.S. action in Iraq, and suggesting increased international cooperation and strengthened Iraqi self-governance); DOLLARS, NOT SENSE, supra note 4 (documenting what the authors define as wasteful and corrupt contracting for post-war Iraq).

\(^ {34}\) As Solicitor and Deputy General Counsel of the House of Representatives, the Author filed the amicus brief for the House Leadership Group. Brief for the House Leadership Group as Amici Curiae, Am. Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) (No. 87-2127). The brief addressed the constitutionality of the appropriation rider in that case, while also arguing the mootness issue, which the Court accepted. The issues were nicely treated in Michael J. Glennon, Publish and Perish: Congress's Effort to Snip Snepp (Before and AFSA), 10 MICH. J. INT'L L. 163 (1989).
The Conclusion seeks to go beyond simply resolving not to "do Iraq again," i.e., to repeat how the United States went in. Recalling the vital justification for some interventions, the Conclusion looks to legislative reforms, particularly in procurement, for successfully aiding a valid military intervention potentially faced with irregular opposition. The United States should employ its procurement law, by facilitating the cancellation of unneeded high-tech weaponry, over what it takes to encourage and support a combination of U.S. and foreign peacekeeping forces. This includes encouraging and supporting a more flexible, efficient, and diverse multinational reconstruction capacity.


Before analyzing the underlying paradigm of procurement-aided unilateralism in Iraq, it is useful to recount summarily the missteps in rough chronological phases.

The first phase went from 2002 to early 2003: from the pre-invasion preparations and the invasion, through the brief start of the occupation headed by retired General Jay Garner. In this phase, Secretary Rumsfeld insisted on “military transformation,” which fostered a unilateral Iraq invasion but overrode the army’s warnings that this meant too few troops to control Iraq afterwards. Meanwhile, the Bush administration’s unilateralism alienated potential support from other nations and from locals in Iraq. Unrealistic expectations collapsed in the chaos that launched the insurgency in early 2003.

The second phase went from spring 2003 through 2004: the insurgency’s mushrooming that came during the time of the Coalition Provisional Authority (“CPA”) under Ambassador L. Paul Bremer and the start of the joint military contracting command, both run largely on Secretary Rumsfeld’s orders. With the adoption of the Security Council Resolution 1546 in 2004, the administration managed a minimalist legitimation of its effort to transition to a sovereign Iraq government. But, the United States

40 See generally GORDON & TRAINOR, supra note 1 (laying out Rumsfeld’s commitment to transforming the military); Kitfield, supra note 5, at 310.

41 This particularly included Turkey, to which it had offered billions in procurement and oil, but whose public could not abide an invasion without acceptable justification.

42 This included refusing to see the wartime Fedayeen as a serious insurgency potential, unleashing the post-invasion looting, leaving the borders unsealed, and being unprepared for civil administration.


45 For discussion of the legal challenges in legitimating the American occupation’s approach, see Steven Wheatley, The Security Council, Democratic Legitimacy and Regime Change in Iraq, 17 EUR. J. INT’L L. 531 (2006); Andrea Carcano, End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government, 11 J. CONFLICT & SECURITY L.
still stood virtually alone, alienating international and local support and depending upon administration-loyal U.S. contractors. Then came the manipulation of contracts and grants, initially for the exile figure Ahmed Chalabi, and later for logistics and security support from large American contractors. This period included the disbanding of the Iraqi army; the subsequent dependence upon private military contractors ("PMCs") (which failed disastrously at training a new one); fatally slow reconstruction initiatives; the abuse of Iraqi DFI funds; and contractor violations of international law at Abu Ghraib.

The third, mature phase of the debacle of procurement-aided unilateralism came after 2005. A hand-off of sovereignty to an interim Iraqi government came in June 2004, with constitutional and legislative elections in 2005, and a national unity government in May 2006; meanwhile, Robert Gates, less ideologically encumbered, took over as Secretary of Defense. Yet, U.S. ground forces remained hobbled at levels capped by "military transformation," little affected by the so-called "surge" of 2007, with minimal help from the alienated international community. This left them unable to halt the slide of Iraqi violence from insurgency to civil strife. Rather, the United States funded astonishing levels of contractor employees, and purchased weaponry for Iraqi forces—with "[m]ore than 180,000 civilians . . .


48 The Congressional Budget Office estimated that “[t]he Bush administration’s decision earlier this year to temporarily send thousands of additional troops to Iraq will cost $10 billion if this so-called surge lasts four months, $22 billion if extended a year, and $40 billion for two years . . . .” Scully, War Costs, supra note 4.
working in Iraq under U.S. contracts" and 110,000 assault rifles and 80,000 pistols gone missing.

In this phase, the evading of accountability takes center stage. The administration had bitten off in Iraq far more than it proved able to chew unilaterally, and to hold off the domestic political repercussions the administration had to relentlessly hide the full ongoing anticipated scale of the war's cost, now estimated by economists at as much as $2 trillion. So, the administration dodged serious budgeting, including any discipline of military procurement costs by canceling superfluous high-tech weaponry, and by abuse of outside-the-budget annual “emergency” supplemental appropriations. The administration largely escaped serious congressional oversight until a Democratic majority took Congress in 2007.

Additionally, this phase was shaped by the belatedly revealed abuses of contractors like Halliburton, long the monopoly logistics contractor to the military in Iraq. Acquisition reform,

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50 See Glenn Kessler, Weapons Given to Iraq are Missing, WASH. POST, Aug. 6, 2007, at A1 (describing the missing weaponry); see also Christopher Dickey, Iraq’s Arms Bazaar, NEWSWEEK, Aug. 20, 2007, at 32 (reporting the findings of the Pentagon).


52 See William Matthews, Shadow Budget: Why Congress Complains About, But Won’t End, Supplemental Appropriations, ARMED FORCES J., Apr. 2006, at 10 (explaining the tactical approach of supplementary budgeting).


55 See Michael J. Davidson, Ruck Up: An Introduction to the Legal Issues
with diminished competition and oversight of contractors, had opened the way for ineffective and unduly expensive military support, as well as straining the law of contractor participation in hostilities. Meanwhile, the reconstruction contractors used or abused funding without adequate results, leading to a "reconstruction gap" that afflicted the Iraqi economy as a whole and the key oil sector in particular.

2. MILITARY TRANSFORMATION, ACQUISITION REFORM, AND OUTSOURCING: THE RISE AND FALL OF UNILATERALISM AIDED BY PRIVATE MILITARY COMPANIES

2.1. The Rise of PMCs to Reduce the Need for U.S. "Boots on the Ground"

2.1.1. Military Transformation

"Military transformation" means the shift in military funding and focus that started in the 1990s, championed by President Bush as a candidate and then by the Defense Department under Rumsfeld and Gates. The shift is away from high levels of ground troops, deemed a "sponge that soaked up much of the funding" otherwise usable to procure high-tech weaponry. After 9/11, associated with Civilian Contractors on the Battlefield, 29 PUB. CONT. L.J. 233, 237–38 (2000) (explaining the logistics of a contracting vehicle).


57 See DOLLARS, NOT SENSE, supra note 4, at 29 (discussing the inadequacy of contract oversight).


59 Tellingly, the Iraq Study Group at the end of 2006 pleaded for more reconstruction funds. Its plea went unheeded, not from lack of merit, but from alienation of public and international willingness after years of procurement-aided unilateralism.

60 GORDON & TRAINOR, supra note 1, at 8.

61 This included very high-cost air and sea vehicles, space-based radar and
the Bush administration gladdened the procurement industry by directing the national shock into spending lavishly on high-tech, high-profit military transformation contracting.\textsuperscript{63}

This administration dogma of "military transformation" served as part of its larger unilateralism. A unilateralist United States could disdain collective security with the Security Council, and even with NATO, that had worked during the Persian Gulf War, Bosnia, Kosovo, and even post-9/11 Afghanistan. Instead, the administration trusted an American military with high-tech procurement to defeat, acting alone, centrally-organized regular opposing military forces—but even victory left inadequate "boots on the ground" for subsequent peacekeeping.

The contracting law aspects of this rising paradigm deserve note. To create room in the budget either for what was of value in "military transformation" procurement, and, more importantly, for expanding American ground forces, involved canceling buys of the less valued high-tech weapons.\textsuperscript{64} But, after 9/11, the administration would not use its contracting law powers for canceling those less valued multiyear weapon buys, even as cost overruns mushroomed.\textsuperscript{65} Right down through the proposed FY2008 budget, the administration stood firm in not canceling any weapons.\textsuperscript{66}

\textsuperscript{62} See RICKS, supra note 1, at 69 (citing Lt. Gen. Johnny Riggs' recollections regarding the Bush administration's outset in 2001, in order to afford military transformation: "Rumsfeld's subordinates were hinting to the Army that it might need to be cut from ten active-duty divisions to eight.").

\textsuperscript{63} See GORDON & TRAINOR, supra note 1, at 26–29, 48, 53, 91–104 (discussing the Rumsfeld Department relentlessly talking down the size of the army for Iraq as not really needing those "boots on the ground").

\textsuperscript{64} The Rumsfeld Department did start this before 9/11, canceling the Crusader cannon. See Steven Lee Myers, Pentagon Panel Urges Scuttling Howitzer System, N.Y. TIMES, Apr. 23, 2001, at A1 (discussing an advisory panel's recommendation to cancel production of several new weapon systems).

\textsuperscript{65} See DoD Acquisitions No Better As Problems Grow, GAO Says, AEROSPACE DAILY & DEF. REP., April 17, 2006, at 3 (concerning underestimated and expanding costs of weapons).

\textsuperscript{66} See Editorial, The Other Defense Budget, N.Y. TIMES, Feb. 6, 2007, at A20 (commenting that the FY2008 budget gave examples of weapons that "can be canceled outright," such as nuclear attack submarines and a new-generation stealth fighter both designed for combat with long-gone Soviet enemies, and a stealth destroyer ill-adapted for foreseeable naval operations, not to mention "much of the $15.9 billion going to space weapons and missile defense").
A superb account, *Cobra II*,\(^\text{67}\) has shed light on how Secretary Rumsfeld arranged the disastrously low levels of troops for Iraq—about 140,000, compared to the 400,000 used for the Gulf War that did not even involve an occupation.\(^\text{68}\) In late 2001, Secretary Rumsfeld’s military leadership outlined OPLAN 1003-98, “Desert Crossing,” soberly planning for 385,000 troops and an occupation that might last ten years.\(^\text{69}\) *Cobra II* quoted the response: “[t]he defense secretary said in exasperation that he did not see why more than 125,000 troops would be required and even that was probably too many.”\(^\text{70}\)

As the military devised a variety of plans in 2002-03, Secretary Rumsfeld clashed head-on with the top military planner who “wanted the forces for the postwar period,”\(^\text{71}\) relentlessly bringing down the troop number.\(^\text{72}\) At a 2003 hearing, Army Chief of Staff Eric Shinseki publicly testified to a need for several hundred thousand troops, based on an expert army study seeking 260,000.\(^\text{73}\) This was the army’s most public rebellion against Secretary

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\(^{\text{67}}\) Gordon & Trainor, *supra* note 1.

\(^{\text{68}}\) After 9/11, President Bush’s White House had taken potent legal steps to handle its planning to invade Iraq in deepest secrecy. Specifically, he initiated the process with a National Security Presidential Directive, more suited to quiet, unnoticed, covert action work than to an invasion the whole world would know was coming.

\(^{\text{69}}\) See Gordon & Trainor, *supra* note 1, at 26 (describing a military plan to secure northern Iraq which was later dismissed by Rumsfeld). This represented the thinking—ironically dubbed the “Powell Doctrine”—from back when Colin Powell was Chairman of the Joint Chiefs of Staff. See, e.g., The Powell Doctrine Revisited, *The Economist*, Feb. 1, 2003, at 31 (citing the Powell Doctrine as the principle that “force should be used only in defense of America’s vital national interests and, when applied, should be decisive”).

\(^{\text{70}}\) Gordon & Trainor, *supra* note 1, at 4.

\(^{\text{71}}\) Id. at 98. When the planners told Secretary Rumsfeld in December 2002 they wanted to put aside such optimistic plans to prepare a realistic plan to handle occupation duties as well, “[t]he defense secretary suggested recruiting Arab nations to do peacekeeping duty in Iraq after Saddam was toppled.” Id. at 93.

\(^{\text{72}}\) It took a year for Secretary Rumsfeld to beat down the warnings of his career army officers that too-low troop levels in occupied Iraq would be disastrous. By December 2001, he had gotten the number to 385,000, then 300,000, then 275,000, then (by April 2002) a force to end at 250,000 but start off at 145,000. Id. at 28–29.

\(^{\text{73}}\) See Ricks, *supra* note 1, at 96–97 (discussing Shinseki’s appearance at Capitol Hill to argue against the war plan being devised under Rumsfeld’s supervision).
Rumsfeld’s reducing the number of troops, and he punished it harshly.\textsuperscript{74}

By the Bush administration’s unilateralism, it grossly failed at gaining international support, especially support from crucial neighboring states, notably Turkey,\textsuperscript{75} and it “poisoned the prospect of Turkish help with stability operations after the war.”\textsuperscript{76} U.S. intelligence missed the significance of armed Iraqi paramilitary forces necessitating big occupying forces,\textsuperscript{77} from over-reliance on satellite, overhead, and electronic reconnaissance, the “military transformation” ways of obtaining intelligence.\textsuperscript{78}

The Rumsfeld-arranged absence of more American\textsuperscript{79} and international forces for occupation brought disaster: disorder in the cities, unsealed borders, and an insurgency starting in the region with the smallest local American troop presence, the Anbar Province, in late April 2003.\textsuperscript{80} As this grew,\textsuperscript{81} climaxes came in the

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  \item \textsuperscript{74} First, Secretary Rumsfeld indicated that he deemed Shinseki’s explanation ludicrous, and on his instruction, Deputy Secretary Wolfowitz spread the complaint that Shinseki was off base. Second, the DOD soon announced Shinseki’s successor’s name, many months ahead of schedule, prematurely rendering him a lame duck, and direly warning anyone else against such frank testimony to Congress. The DOD thereby gave a major example of its approach of evasion of accountability. GORDON & TRAINOR, supra note 1, at 102-03.
  \item \textsuperscript{75} See id. at 306, 344 (discussing how tensions with foreign states created significant barriers to the army’s objectives).
  \item \textsuperscript{76} PHILLIPS, supra note 3, at 120.
  \item \textsuperscript{77} \textit{Id.} at 155 (“Bremer’s decree banning the Iraqi armed forces was a tactical miscalculation with serious strategic consequences.”).
  \item \textsuperscript{78} See GORDON & TRAINOR, supra note 1, at 61-62 (discussing the breadth of the Iraqi military forces).
  \item \textsuperscript{79} With the fall-off of centrally directed Iraqi combat, Rumsfeld employed his power to “off-ramp” units the army had planned to bring in for the occupation. At Secretary Rumsfeld’s directions, the “deployment of the sixteen-thousand-strong 1st Cavalry Division was officially canceled on April 21.” \textit{Id.} at 461. Secretary Rumsfeld’s spokesman pronounced his vision of withdrawing the vast majority of the American forces in three to four months. See \textit{id.} at 464 (stating Rumsfeld’s desire to avoid an indefinite stay in Iraq). Wolfowitz indicated that “within a few months of the invasion the U.S. troop level in Iraq would be thirty-four thousand . . . .” RICKS, supra note 1, at 97.
  \item \textsuperscript{80} See GORDON & TRAINOR, supra note 1, at 462 (discussing the death of 17 Iraqis in Fallujah which led to a grenade attack against the 3rd Armored Cavalry Regiment).
  \item \textsuperscript{81} Bomb explosions aimed at Americans and other foreigners began, culminating in the terrible August 2003 terrorist truck-bombing of the United Nations compound that killed the highly-regarded senior troubleshooter Sérgio Vieira de Mello, which “essentially drove the international body out of Iraq.” DIAMOND, supra note 1, at 57.
\end{itemize}
army battle to occupy Falluja in April 2004 and a confrontation with Shiite militia in Najaf.

The all-important tradeoff by Secretary Rumsfeld of troop strength for the "military transformation" procurement of high-profit, high-tech gear raises other legal issues. In the wake of scandals of the 1980s and 1990s, a whole system of development testing, and other legally controlled requirements for procurement, grew up to avoid military agencies spending lavishly in a "rush to failure." The Bush administration had to undercut the law of testing, to let contractors sell dubious "military transformation."

From 2004 on, the low American troop levels resulting from the high-tech weaponry contracts of "military transformation" became the subject of repeated congressional debates and votes. Congressional leaders of an unimpeachable "hawkish" stance, such as Sen. John McCain, led the fight to enlarge the army. On

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82 This fell under its own vital if obscure corner of the government contracting law. See R. E. Besal & Steven K. Whitehead, Operational Testing: Redefining Industry Role, NAT'L DEF., Sept. 2001, at 38, available at http://www.nationaldefensemagazine.org/issues/2001/Sep/Operational_Testing.htm (agreeing that contractors and operational testers should work together more closely and directly, but refuting the contention that providing contractors with greater access to program documentation would lead to a more efficient and effective acquisition process).

83 See Eric Umansky, Studs and Duds, WASH. MONTHLY, Dec. 2001, at 15 (noting the shift toward earlier operational testing of weapons by the military and the need for such testing considering the costly failure of some weapons that were not tested early enough).

84 See Philip E. Coyle III, Evolutionary Acquisition: Seven Ways to Know If You Are Placing Your Program at Unnecessary Risk, PROGRAM MANAGER, Nov.-Dec. 2000, at 2 (noting that a rush for new technology in the army has led to delays and problems).

85 Leading the way was the outright dismantling of the law of development testing as to missile defense, necessary because of how embarrassingly it failed so many tests. Similarly, Secretary Rumsfeld's beloved "Future Combat Systems" drew scorn from how the law of development testing had to be watered down to keep it in receipt of its massive payments. The dilution of the law of testing allowed each of these to wastefully soak up as much precious defense funding as an extra army division that could have pacified half a Sunni province at a crucial juncture.

86 They could point to the overwhelming reasons that the military struggling in the Iraq war could ill afford to spend so much, on so many expensive defense contracts for weapons that are of no use in the war instead of on troops. See William Matthews, "Right-Sizing" the Force: Capitol Hill, Pentagon Parry Over Army End Strength, ARMED FORCES J., Sept. 2003, at 8 (noting that there is an asset and requirement mismatch in Iraq, as the troops are overburdened and in need more people, but the administration is instead concentrating on improving weaponry
the other side, the administration successfully resisted, saying more troops were too expensive, and imagining the absence of a long-term need for troops in Iraq.\footnote{See George C. Wilson, \textit{Army Stuck in a New Catch-22}, \textit{Nat'l J.}, Oct. 11, 2003, at 3134 (noting that the government is overworking the troops stationed in Iraq because to increase the troop size there would be an acknowledgement by the Bush administration of its commitment to keep troops there for more years to come).}

2.1.2. Acquisition Reform and Outsourcing

“Acquisition reform”\footnote{See, e.g., Steve Kelman, \textit{The Procurement System: Backwards to Bureaucracy?}, \textit{Pub. Manager.}, Sept. 22, 2004, at 9 (stating that the primary goal of acquisition reform should be attaining the best value rather than transparency, competition or integrity).} started in the 1990s, in its milder and more benign form under the Clinton administration.\footnote{Vice President Gore initially championed it, and an intensification of it found favor with the Republican Congress. \textit{See} Tiefer \& Stroman, supra note 11.} It included less formal checks upon awarding and supervising government contracts, like full and open competition, in those contexts when market-like mechanisms assuredly would take their place in controlling costs. With the invasion and occupation of Iraq, it took on a radical form. Radical acquisition reform makes wide use of loose diverse contractual “vehicles” to fill needs, and attempts extreme contracting-out of services.\footnote{These enable Defense Department contracting officers to place purchase orders by using loose contractual “vehicles” in civilian agencies, and to contract-out such services as the training and operational support of Iraqi police and military units. \textit{See} Major Michael C. Wong, \textit{Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer}, \textit{Army Law.}, Sept. 2006, at 17 (describing the process by which the army contracts out to multiple vendors in order to increase flexibility).} During contract administration, radical acquisition reform replaces relatively more serious oversight by contract managers, with much looser checks. Radical acquisition reform means abandoning the traditional formal checks notwithstanding the lack of market-like control mechanisms to take their place.\footnote{During award, it replaces full and open competition with diminished or no competition, most notably with loose awards of indefinite quantity contracts followed by uncompleted task or delivery orders.}
Such radical acquisition reform operates with a much-reduced acquisition workforce, giving political appointees and administration-loyal contractors almost a free hand to use the taxpayer’s funds to prop up, or at least to appear to prop up, a unilateral war. Infamous examples include the sole-source award to Halliburton to handle the Iraqi oil field reconstruction, and the interrogation services at Abu Ghraib brought on by a contractual vehicle set up by the Interior Department.\textsuperscript{92}

2.2. The Failure of PMCs to Replace International and Local Military Support

2.2.1. Contractor Training’s Failure to Replace the Disbanded Local Army

In the early occupation, the administration’s worst mistake was its decree disbanding the Iraqi army.\textsuperscript{93} It erred so plainly\textsuperscript{94} that several months later, Bremer reversed course, and, too late, tried to re-recruit the now long-gone former Iraqi army.\textsuperscript{95} The disbanding forfeited the United States’ potential influence over the officers and soldiers of the old Iraqi army.\textsuperscript{96} Instead, disgruntled officers,

\textsuperscript{92} See Schooner, supra note 15, at 549 (suggesting that the lack of army oversight over the contractors that it hires has led to serious ethical concerns).

\textsuperscript{93} Some think Chalabi maneuvered Bremer into this, and while Deputy Secretary Wolfowitz cleared this in advance, Secretary Rumsfeld may have been surprised. See Ricks, supra note 1, at 163–64 (discussing various reactions to the dissolution of the Iraqi army). Bremer’s order even went so far as to refuse some Iraqi army retirees their retirement pay. See id. at 162–63 (noting Bremer’s order “clarified his de-Baathification standard” in refusing pension payments to those deemed a Senior Party Member under the former regime).

\textsuperscript{94} This went against contrary military advice and the policy established, pre-invasion, apparently at the presidential level. An Iraq conference at the National Defense University in November 2002 “strongly recommended against a swift, uncoordinated dissolution of the Iraqi military. ‘There should be a phased downsizing to avoiddumping 1.4 million men into a shattered economy.’” Id. at 72.

\textsuperscript{95} Bremer’s subsequent defensive comments have not been to try to claim that the dissolution of the Iraqi army was good. Rather, the administration’s lame excuse has been that the army had already dissolved after defeat, so the disbanding order was just a formality. That is unpersuasive. Officers and soldiers alike were highly dependent upon their pay, and the weak Iraqi economy offered them little wholesome in the way of alternatives. The Iraqi army did not disband itself; Bremer did it.

\textsuperscript{96} Iraqi soldiers and retirees did not receive that much pay—it was no great economy to cut them off—but, until they were cut off, their pay served as the basis of controlling the army’s hundreds of thousands of fighting men with their easy access to arms.
soldiers, and retirees created a large pool for the growth of both the Sunni insurgency and the Shiite militias. What made the mistake possible—and worsened its consequences—was the administration’s excessive reliance on procurement to aid its unilateralism. The consultative requirements of multilateral action might have avoided this capital blunder. Bush administration officials, effectively acting alone, apparently felt contractors stood ready to provide adequate support.

The government has its own trainers and equipment-buyers, both in the CIA and in military Special Forces. They can do a superb job, as shown in their speedy, effective building up of the Northern Alliance to take on the Taliban in the post-9/11 Afghan campaign. However, contractors sold DOD in Iraq on another alternative. The Rumsfeld Department, to keep down the number of troops in Iraq, naturally placed reliance in disbanding the Iraqi army to procure contractor “equip and train” services to create a new Iraqi army. The administration awarded contracts to Military Professional Resources Incorporated (“MPRI”) and the Vinnell Corporation, which is a subsidiary of Northrop Grumman and which has the major training contract for the Saudi Arabian

97 They were not crushed or dishonorable in their own eyes; they felt they had given a decent account of themselves in dealing with such redoubtable foes as Iran (1980–88) and the United States (1991, 2003).

98 An entire niche of the privatized military industry provides the military consulting services of equipping and training army units, led by MPRI. Leading scholar Peter W. Singer devotes a book chapter—chapter 8 in Corporate Warriors—to the poster child of the new military consulting, MPRI. MPRI is run by former senior United States military officers, with offices near the Pentagon, and does much military training, at home and abroad, for the DOD. During the crucial mid-to-late-1990s in the former Yugoslavia, the United States used this leading firm in Croatian, Bosnian, and Kosovar endeavors. See SINGER, supra note 24, at 119–35; see also sources cited supra note 37 (analyzing the decision by the Clinton administration, with which a Republican Congress grudgingly went along, to send troops to Bosnia in 1995 and noting a very key part of the arrangement for the Republican Congress was precisely this equip-and-train mission that MPRI performed).

99 “'The feeling was manpower—why waste precious Special Forces manpower when you can get pretty much the same thing with Vinnell and MPRI? . . . [T]he Sec Def [Rumsfeld] told us, ‘These precious Special Forces guys have been busy . . . and didn’t need to be wasting their time training Iraqis . . . .’” RICKS, supra note 1, at 328 (quoting Col. Gregory Gardner, in turn quoting Secretary Rumsfeld).

military. Also, it awarded a contract to Erinys, another big private military company, which between 2003 and 2004 trained and mobilized a 16,000-man "guard force" to protect oil pipelines.

Another contract to do the equipping—the buying of arms—went to Nour USA. This award was a striking example of one type of procurement unilateralism—harmfully excluding companies abroad while foreign inclusion in competition would broaden the support for a multilateral action. As the facts about Nour USA emerged, in March 2004 the DOD decided to cancel Nour's contract and re-award it. Nour USA had just been set up under a longtime close friend of Ahmed Chalabi, who will be discussed later. At the time, NBC-TV's investigative unit did a study of the Nour USA award, and the author, when asked, commented that "[y]ou can't justify taking a company that was just created last May and say that they have the past experience that's required."

As to the training contracts to MPRI and Vinnell, they turned out to be disastrous failures. When DOD put the new Iraqi army to the test in spring 2004 by sending units out to deal with insurgents, the units would not fight, especially against insurgents of their own sect (Sunni or Shiite). Army Special Forces disagreed with

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101 For a description of Vinnell's background, see Center for Public Integrity's website, http://www.publicintegrity.org/wow.

102 See Jeremy Grant, US Bill for Iraq Private Security Soars, FIN. TIMES, Aug. 13, 2007, at 8 (discussing the increase in funds awarded to Erinys from its original contract).

103 Particularly important competitors were a Polish outfit, since, among other matters, Poland supported the invasion and expected a fair chance at such a contract.


105 Nour USA contended that it had extensive past experience and had made a credible bid of $330 million. However, NBC found that the company had been created the previous spring, and that its bid was viewed by competitors as low-balling—getting a contract by an unsupportable underbid with the expectation of charging more later. Peter W. Singer commented that the Nour USA contract re-award resulted "in months of delay in the vital task of readying an Iraqi army." Singer, supra note 100.

106 The contractors' training approach prepared trainees only for an improbable external problem like an Iranian invasion and not at all for the immediate actual problem of the internal insurgency. Maj. Gen. Paul D. Eaton, of such stature that his post before Iraq was commander of all army infantry training at Fort Benning, Georgia, "found that a civilian contractor hired to conduct
Secretary Rumsfeld's position that it was better to use consultants rather than Special Forces for the training, and "heavily criticized" the contractor training.\textsuperscript{107} The army's Central Command terminated the contracts\textsuperscript{108} and replaced the private contractors with government trainers, notably including—years too late—a contribution from NATO. Meanwhile, a $1.8 billion contract for DynCorp (a subsidiary of the procurement giant L-3 Communications) to train the Iraqi police was cancelled in 2004, but payment continued until 2006, with the Special Inspector General giving a harsh report in 2007.\textsuperscript{109} It is hard to overstate this disaster of disbanding the Iraqi army in part from a procurement-aided unilateralism paradigm of relying upon contractors to equip and train a new army. This situation provides lessons about not basing security on PMC-aided unilateralism.\textsuperscript{110}

2.2.2. Contractors' "Abu Ghraib" Alienation from International and Local Support

Another horrific subject—the "Abu Ghraib" tactics—also illustrated the abuses possible from radical "acquisition reform." In explaining the abuses of law underlying Abu Ghraib, some legal observers have emphasized the lines of legal reasoning approved training would be incapable of imparting military skills and discipline—what he called "soldierization." Thom Shanker, \textit{General Says Training of Iraqi Troops Suffered from Poor Planning and Staffing}, N.Y. TIMES, Feb. 11, 2006, at A6.

\textsuperscript{107} RICKS, supra note 1, at 368 (citing criticism from Special Forces officers who felt the Special Forces were used improperly at the expense of leaving the training of Iraqis to contractors).

\textsuperscript{108} A Special Forces expert in counterinsurgency told a congressional committee that "American observers from U.S. Central Command headquarters assessed the military basic training conducted under contract by the Vinnell Corporation to be unsatisfactory, and the contract was terminated." RICKS, supra note 1, at 372.


\textsuperscript{110} Yet, remarkably little congressional oversight occurred about this procurement failure. The lack of funding accountability is discussed \textit{infra}. 
by the Bush White House\textsuperscript{111} that minimized the applicability to American forces of the Geneva Convention and other prohibitions against detainee abuse in Iraq.\textsuperscript{112} But, procurement was key, too. As one observer sums up, "\textquoteleft\textquoteleft[t]he Army relied upon two relevant contractual agreements for operations at the Abu Ghraib prison: CACI International provided more than half of the interrogators employed at the facility, while Titan supplied linguistics personnel. . . . [M]ore than a third of the improper incidents involved contractor personnel."\textsuperscript{113} The outsourcing for the Abu Ghraib interrogations\textsuperscript{114} accorded particularly with "employee augmentation,"\textsuperscript{115} that is, contracting to make up for the shortage of army personnel in Iraq.\textsuperscript{116}

Abu Ghraib tactics were more than just the abuse of detainees; they were the center of an array of ill-advised military tactics, like cordon-and-sweep operations that were a particularly dysfunctional side of procurement-aided unilateralism.\textsuperscript{117} These


\textsuperscript{112} See Brower, supra note 16 (examining the function and importance of legal personality and the United States' need to commit to the rule of law in light of the interrogation procedures in Iraq and the inhumane treatment of prisoners in Abu Ghraib).

\textsuperscript{113} Schooner, supra note 15, at 555.

\textsuperscript{114} The outsourcing represented the overcoming by the Bush administration of a long-standing congressional prohibition against personal services contracting.

\textsuperscript{115} See Schooner, supra note 15, at 561 (defining employee augmentation, which is "an increasingly common form of personal services contract").

\textsuperscript{116} Among other troubling aspects, there was a gross inadequacy of training, as well as an absence of guidance, by either army personnel or contractor personnel to deal with this situation. See id. at 562–64 (illustrating the problems with using contractual personnel to augment the government work force, especially the lack of appropriate training and supervision for these personnel and the lack of understanding of the appropriate relationship between the various government personnel).

\textsuperscript{117} These tactics compensated for the insufficient number of U.S. ground troops, the lack of human intelligence (not replaceable by "military transformation" methods), and related problems caused by massive cordon-and-sweep operations in which thousands of Iraqis were detained. From the heartland of the Sunni insurgency, a substantial fraction of the detainees got dumped in one overcrowded facility: Abu Ghraib.
tactics “aided the insurgency it was aiming to crush by alienating large segments of the Iraqi population.” They also alienated world public opinion, boxing the United States’ effort in Iraq into a unilateral status that seemed increasingly condemned and isolated.

While the military proceeded in legal action against scores of soldiers implicated in abusing Iraqis, in 2005 no contractor employees had been charged for such offenses, and by late 2006, only one contractor employee had been charged. The exposure of Abu Ghraib hardly changed the army’s dependence upon this kind of “employee augmentation.” A five-year contract begun in March 2007 arranged for DynCorp to provide up to $4.6 billion in translators and interpreters for U.S. forces in Iraq.

2.2.3. Depending Upon Outsourcing to Halliburton and Private Security

The subject of the failure in Iraq of the procurement law and policy stance, characterized by diminished competition and oversight of contractors, is one that the Author has commented on in the broadcast and print press. Outsourcing to Halliburton

118 RICKS, supra note 1, at 200.
122 The Author quoted in the Washington Post: Charles R. Babcock & Renae Merle, U.S. Accuses Pair of Rigging Iraq Contracts, WASH. POST, Nov. 18, 2005, at A1 (quoting the Author on complaints at home and abroad that the United States was not “protecting the integrity of Iraqi money” from contractor fraud and noting that recent indictments were an important step); Dana Hedgpeth, Judge Clears Contractor of Fraud in Iraq, WASH. POST, Feb. 9, 2007, at D1 (noting that the high level of proof required by the Fourth Circuit in contractor fraud cases would result in difficulty for taxpayers to recover money lost to contracting abuses); Ellen McCarthy, CACI Contracts Blocked: Current Work in Iraq Can Continue, WASH. POST, May 26, 2004, at A18 (questioning the role of Department of Interior contractors in Iraq and warning of the potential for abuse); Jackie Spinner, Contracts to Rebuild Iraq Go to Chosen Few, WASH. POST, Mar. 28, 2003, at E1 (noting
and private security represented an enduring feature of the problem.

To briefly note the relevant history, Halliburton (via its former subsidiary Kellogg, Brown & Root, or "KBR") had long been a major military construction contractor. In the 1990s, it took over the new business of troop logistics outsourcing, or Logistics Civil Augmentation Program ("LOGCAP"). In Iraq, Halliburton held that contract ("LOGCAP III") on a monopoly basis, a virtual "fifth

the administration’s lack of credibility in citing tight deadlines and security concerns as the reasoning for no-bid contracts that favor political allies); Jackie Spinner, Halliburton Unit Loses Out on Rebuilding Iraq, WASH. POST, Mar. 30, 2003, at A13 (linking non-competitive bidding with political influence and campaign contributions); Karen DeYoung & Jackie Spinner, Contract for Rebuilding of Iraq Awarded to Bechtel: U.S. Firm 1 of 6 Invited to Bid for $680 Million Project, WASH. POST, Apr. 18, 2003, at A23 (commenting on broad indemnification authority granted to bidders for Iraq reconstruction contracts); Renae Merle, Air Force Erred With No-Bid Iraq Contract, GAO Says, WASH. POST, Feb. 29, 2005, at A17 (commenting on a no-bid contract awarded to a company employing Iraqi exiles as political agents).


Notably, during the Vietnam War, the company was part of a construction consortium that Halliburton chronicler, Dan Briody, says “did 97 percent of the construction work in the country during the seven years they operated there.” BRIODY, supra note 54, at 165.

This is an indefinite quantity contractual vehicle for providing the military—particularly at overseas bases—with food, laundry, cleaning, and other basic services. For details, see Davidson, supra note 55, at 237–38; Karen DaPonte Thornton, Fine Tuning Acquisition Reform’s Favorite Procurement Vehicle, the Indefinite Delivery Contract, 31 PUB. CONT. L.J. 383 (2002) (offering suggestions on reform of the “indefinite delivery” system and the role of government contractors). In 2001, Halliburton held the pertinent LOGCAP contract, and with the invasion of Iraq, it automatically became the logistics supplier to the occupation and subsequent effort.
service” in the military until 2007 when DOD awarded a set of contracts (“LOGCAP IV”) to divide the Iraq LOGCAP among Halliburton and two other suppliers. By then it “had been paid $19.7 billion for its work under the contract,” and going forward, the overall contract covering Iraq, Afghanistan, and Kuwait was, for each supplier, “worth up to $5 billion a year and could be extended for up to nine more years.”

The LOGCAP contract lets Halliburton bill, for being logistics supplier to the American effort in Iraq, on a cost-reimbursement plus award fee basis, i.e., a cost-plus-profit-plus-bonus basis. This gave Halliburton a negative incentive to hold down costs in a very high-cost environment. The LOGCAP contract proved extremely expensive for the United States. As noted elsewhere, Halliburton also obtained, in a very dubious sole-source way, the contract to restore the oil fields in Iraq, which was worth billions. When the successor contract was divided in two, Halliburton dubiously won the award of the lucrative southern half. Between 2001 and 2006, Halliburton subsidiary Kellogg, Brown & Root received $15 billion from the Pentagon.

The problem was not one of flaws attributable to the Halliburton employees. In fact, Halliburton employees kept convoys of supplies moving without bottlenecks and did work to repair the oil facilities as a part of reconstruction efforts. They did not run away during crises. Individual Halliburton employees exhibited impressive bravery and patriotism.

On the other hand, Halliburton’s corporate role raised major

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126 See Davidson, supra note 55, at 238 (“LOGCAP suffers from a major shortcoming—utilization of expensive cost-plus-award-fee contracts.”).


128 Kopecki, supra note 14, at 55.

129 See Faleh al-Khayat, Iraq’s Southern Oil Output Resumes, at a Reduced Level, PLATT’S OILGRAM PRICE REP., Jan. 4, 2006, at 1 (detailing achievements in reconstructing oil fields and increasing oil production).
procurement questions from several angles. First, scandals about inflated costs dogged the company, and were laid out in a series of reports by the investigations staff of the House Committee on Government Reform and countless press reports, including a number quoting the Author criticizing Halliburton overcharging on big contracts and reports in the Los Angeles Times, the Washington Post, and the National Public Radio Marketplace show. The scandals included such performance as providing untreated, highly polluted water right out of the sewage-ridden Euphrates River to an American base.

Second, the administration repeatedly overruled its DOD Defense Contract Audit Agency ("DCAA") to protect Halliburton. For example, out of $263 million in payment for fuel purchases and other equipment in auditor challenges to Halliburton, the Defense Department paid all but $10 million. This combined with the dubious sole-source awarding of Halliburton's contracts to give substantial color to the widespread suspicion of protective favoritism tracing to the powerful ties of Secretary Rumsfeld and Vice President Cheney. For example, the DCAA found that Halliburton incurred unreasonable and unsupported costs of over two hundred million dollars on its oil restoration contract, mostly as to the oil importing. In so doing, DOD gave full credit to the waiver of cost and pricing data requirements on that fuel contract, which it obtained even more unusually by end-running the senior contracting officer, Bunnatine Greenhouse, and getting it from the very head of the army corps himself. Id. at 89–90.

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130 The most famous specific scandal concerned DOD tasking Halliburton to buy gasoline for import for the Iraqis, which it did from a suspicious Kuwaiti intermediary. It turned out that the Pentagon's own fuel supply agency had a contract to import the military's fuel for half the Halliburton charge. MILLER, supra note 3, at 87. Halliburton needed a highly unusual waiver of "certified cost and pricing" data requirements on that fuel contract, which it obtained even more unusually by end-running the senior contracting officer, Bunnatine Greenhouse, and getting it from the very head of the army corps himself. Id. at 89–90.

131 See, e.g., DOLLARS, NOT SENSE, supra note 4.

132 See supra notes 121–22.

133 RASOR & BAUMANN, supra note 1, at 145–56.

134 This combined with the dubious sole-source awarding of Halliburton's contracts to give substantial color to the widespread suspicion of protective favoritism tracing to the powerful ties of Secretary Rumsfeld and Vice President Cheney. For example, the DCAA found that Halliburton incurred unreasonable and unsupported costs of over two hundred million dollars on its oil restoration contract, mostly as to the oil importing. See MILLER, supra note 3, at 89; David Ivanovich, Being Timely Was Key to Halliburton Bonuses: Army Rejected Most Objections About Iraq Bills, HOUS. CHRON., Feb. 28, 2006, at Bus. 1.

135 MILLER, supra note 3, at 89. In so doing, DOD gave full credit to the waiver of cost and pricing data, signed in Greenhouse's place by her deputy, who "described his role as essentially a yes-man to allow top [Army Corps of Engineers] officials to go behind Greenhouse's back." MILLER, supra note 3, at 90. The general law about giving face value to such waivers, many lawyers for government contractors might say, shields Halliburton from the double penalties for severe violations of the defective pricing rules. But the waiver was obtained in circumstances raising so many questions about the appearance of political interference that it should have taken a great deal of further investigation before DOD could rest easy completely overruling the DCAA auditors and letting Halliburton off scot-free for the matter.
indignation of the career DOD contracting officers and auditors, exposed a fundamental reason the Rumsfeld Department made such extensive and indulgent use of Halliburton's LOGCAP. Recall that Secretary Rumsfeld fought hard to post only a low—too low—number of troops to Iraq. In times past, American combat units sustained themselves logistically with help from support units—engineering, transport, labor, and the like—but Secretary Rumsfeld ardently desired not to send these, to keep the illusion of a low number of troops needed, and those temporarily. He continued with this even though the help he expected from other countries, and from a newly trained Iraqi army, did not materialize.

A Congressional Budget Office study\footnote{CONG. BUDGET OFFICE, LOGISTICS SUPPORT FOR DEPLOYED MILITARY FORCES, 30 (2005).} found that the U.S. Army could have used 41,000 additional troops to completely replace Halliburton without added wartime costs.\footnote{See Kopecki, supra note 14, at 55 ("To perform the tasks KBR completed, the U.S. Army would have had to recruit 41,000 additional troops and spend $8.2 billion, or $2.8 billion more than KBR's costs, the CBO found."). The principal cost difference between keeping and replacing Halliburton did not concern the relatively similar wartime costs of the personnel, but rather their peacetime costs after the war. This gave rise to a CBO proposal to establish a logistics reserves corps. See CONG. BUDGET OFFICE, supra note 136, at 60 (proposing a logistical reserve corps).} The wasteful and costly Halliburton contracting served a primarily political function needed to sustain the illusion of procurement-aided unilateralism. The administration balked sharply at other steps—publicly increasing its troop commitment, until the far-too-late 2007 "surge"—that would signify frankly its long-term, high-cost, high-casualty unilateral war in Iraq.\footnote{The administration did not want to acknowledge troop needs of the Iraq counter-insurgency, presenting it as a limited part of the overall global war on terror, and a temporary part that was always just about to turn the corner with the latest development in Iraqi politics. Meanwhile, to maximize the stream of high-profit "military transformation" contracting, the administration must fend off the previously-described congressional demands to expand the army by a minimal but vitally needed 40,000. See generally Michael Kilian, Rumsfeld to Bolster}
Halliburton support services had served before, albeit on a smaller scale, this function of enabling the White House to manage and contain the apparent scale of a major army occupation. Halliburton's LOGCAP role, from its first contract in 1992, had been to help in a series of commitments—Somalia, Rwanda, Haiti, and the former Yugoslavia—where the administrations wanted fewer troops so as not to strain public support. Thus, Halliburton's controversial legal trademarks—not full and open competition, problems with performance, and audits resolved by political help—signified something special. The Bush administration's acceptance of Halliburton, and the pardoning of its flaws, was the price of the appearance of a limited Iraq force commitment, even without international support—i.e., the paradigm of procurement-aided unilateralism.

More broadly, criticism developed of a fundamentally flawed command strategy, dramatically publicized in 2007 when "[a]n active-duty army officer publish[ed] a blistering attack on U.S. generals, saying they have botched the war in Iraq and misled Congress about the situation there." The article, published in the Armed Forces Journal, faulted the command strategy thusly: "Counterinsurgency theory prescribes providing continuous security to the population. However, for most of the war American forces in Iraq have been concentrated on large forward-operating bases, isolated from the Iraqi people and focused on

\footnote{Overtasked Military, CHI. TRIB., Feb. 5, 2004, at C1 (explaining that Secretary Rumsfeld supported only a temporary army expansion, and resisted the congressional call for 40,000 more permanent army troops because, in his view, a "transformed" military need not get bigger).}

\footnote{When the Clinton administration made its single largest ground commitment abroad to Bosnia after the Dayton Accords, Congress capped the troop level at 20,000. Halliburton support services let the army stretch to handle the commitment while President Clinton adhered to that formal cap measuring only the number of regular troops sent, the formal cap by which the American public judged the occupation's scale. See J.T. Mlinarcik, Note, Private Military Contractors & Justice: A Look at the Industry, Blackwater, & The Fallujah Incident, 4 REGENT J. INT'L L. 129, 132 (2006) (commenting on the defense contracting industry, claims that can be made against contractors, and their potential defenses); SINGER, supra note 24, at 143 (outlining the history of Halliburton's military outsourcing contracts from Somalia through the Balkan conflicts).}

\footnote{Since these commitments all received limited public enthusiasm, the first Bush and Clinton administrations used Halliburton to manage and contain the apparent scale of these commitments. See SINGER, supra note 24, at 142-43 (providing an overview of Halliburton's logistical support role in these conflicts).}

\footnote{Thomas E. Ricks, Army Officer Accuses Generals of 'Intellectual and Moral Failures,' WASH. POST, Apr. 27, 2007, at A4.}
capturing or killing insurgents.”\textsuperscript{142} Outside critics had often made this claim, drawing on American military sources, but the message had exceptional impact coming from a named active-duty lieutenant colonel. A number of factors led to the flawed “big base” strategy, but, a pertinent one was the observed reluctance of the “fifth service”—Halliburton, the logistics supplier—to stretch its supply missions beyond the big bases, out to units in the field. In fact, soldiers and officers bitterly complained about how they did without the barest necessities while Halliburton devoted its supply efforts to satisfying the high command at the big bases.\textsuperscript{143} In that regard, Halliburton’s limitations acted as a kind of short leash on the military, keeping troops close to their big bases—and feeding a much-criticized strategy poorly adapted either to counterinsurgency or, for that matter, to countering the growth of destabilizing sectarian militias.

Outsourcing the Iraq logistics to Halliburton had a parallel in outsourcing the task to private security firms, of protecting Iraq installations and reconstruction efforts. By 2007, about 1000 contractors had been killed and another 13,000 wounded; a notorious private military firm frankly termed “a mercenary” had a $293 million contract to provide intelligence services.\textsuperscript{144} In fact, the roles of military support and reconstruction apparently overlapped expensively: Halliburton became a middleman by purchasing security services from subcontractors, sometimes even via a multiple-tier deal, with costly markups accumulated at each tier.\textsuperscript{145}


\textsuperscript{143} See \textsc{Rasor & Baumann}, \textit{supra} note 1, at 51-53 (contrasting frontline troops’ relative deprivation with the fully supplied luxuries of bases housing top officers).


\textsuperscript{145} This meant DOD paid Halliburton a highly inflated price to purchase services, often of its own veterans. These payments might well have provided far more integrated services at far less cost, even paying veterans generous bonuses, had the individuals providing the services been re-enlisted in some flexible way and all the Halliburton middlemen been cut out.

For example, Blackwater USA was the big security contractor involved in the incident that set off the first battle of Fallujah in April 2004. Mlinarcik, \textit{supra} note
The high expenses of private security ate up a large share of amounts nominally expended for purposes such as reconstruction. In that sense, the outsourcing to private security provided another temporary fig leaf for unilateral intervention. But, what the fig leaf covered was not, even temporarily, a successful effort, particularly in the oil industry. Private security was no real substitute for obtaining international and local support.

3. THE FAILURE OF UNILATERALLY PROCURED RECONSTRUCTION

3.1. The Woeful Start, and Failure, of Unilateral Reconstruction

During the George H. W. Bush and Clinton administrations, the United States had enjoyed relative post-Cold War success as a world leader with an approach that used collective and multilateral efforts as a way of looking after national interests. These multilateral efforts included what could be called procurement-related multilateralism, which simply means collective and multilateral roles in financing and supplying military campaigns, occupations, and reconstruction efforts.

139, at 136. Blackwater was allegedly a third-tier subcontractor to Halliburton under the LOGCAP contract. See DOLLARS, NOT SENSE, supra note 4, at 15 (giving examples of middleman contracts in Iraq).

146 The United States, through the purchases of private security, bought help—from its own veterans or veterans of foreign forces—while neither acknowledging an escalated American commitment nor multilaterally organizing help from foreign forces.

147 A classic example is the failure to provide sufficient security for the vital oil industry to develop, as the 2006 Iraq Study Group sadly noted. The Study Group noted the continuing low production “caused by lack of security, lack of investment, and lack of technical capacity,” IRAQ STUDY GROUP REPORT, supra note 10, at 22. Besides public security efforts, it suggested that “[p]rotective measures could include a program to improve pipeline security by paying local tribes solely on the basis of throughput (rather than fixed amounts).” Id. at 56.


149 For example, in 1990–1991, President Bush and the Democratic Congress worked together to obtain multilateral funding for the Gulf War and to spend it accountably. See TIEFER, supra note 36, at 119–36 (discussing the authorization of the Persian Gulf War). In Bosnia, the reconstruction effort involved multilateral donors and multilateral contractors. For all its flaws, it kept faith with other countries and with locals, and it thereby helped produce success.
The Bush administration came in with its trademark overall approach of vocal unilateralism. As the Author has discussed elsewhere, while this had its most visible signs in trashing the United Nations and otherwise playing to the administration's mass political base, it had its less visible signs in playing to the administration's corporate base. Of relevance, the Bush administration implemented a fierce antipathy to what it scorned as "nation-building," as Secretary Rumsfeld himself expressed on the eve of the Iraq invasion in his prominent speech entitled "Beyond Nation-Building." In practice, this meant Deputy Secretary Paul Wolfowitz and Under Secretary Douglas Feith undertook the opposite of the serious compromises required to gain the support of the European and world community's collective institutions; these serious compromises would have sufficiently provided for most of the procurement and some part of the reconstruction financing to be done on a multilateral basis. Instead, on the crucial points of reconstruction contracting and setting up the new Iraq, the United States would only pay large, administration-loyal American contractors rather than small contractors, foreign contractors, or Iraqi locals.

This meant a series of key steps in the year before the invasion. The White House, while spurning the State Department planning effort, instead apparently directed by Vice President Cheney,

150 For example, the administration systematically watered down international tobacco-control efforts, rewarding its key support from Big Tobacco, and it undermined international efforts at a new bioweapons protocol, pleasing its drug industry support. See, e.g., Tiefer, supra note 39, at 166–68 (describing a watered-down international tobacco agreement), at 171 (discussing bioweapons protocol).

151 GORDON & TRAINOR, supra note 1, at 151.

152 See Gilman, supra note 27 (discussing the Bush administration's effect on the possibility of multilateral efforts).

153 In a hopeful but doomed effort, the State Department convened a "Future of Iraq Project" in April 2002. This project, together with the State Department's experience in Bosnia and elsewhere with successful occupation, meant that the department might have guided an occupation on terms relatively acceptable to the international and local Iraqi communities. Under this umbrella, 240 Iraqi exiles convened, and after extensive negotiations across ethnic and ideological lines, produced thirteen volumes of recommendations. See James Fallows, Blind into Baghdad, THE ATLANTIC, Jan.-Feb. 2004, at 51, 56.

154 Tom Warrick, the highly regarded head of the project, and clearly the government's leader on how to handle an occupation of Iraq, was pulled completely off the Pentagon's occupation team; "the order had come from Cheney, who despised Warrick." PACKER, supra note 1, at 124.
turned over control of the occupation planning, and the occupation itself, to the Rumsfeld Department. The administration had to give up any chance of even a tinge of multilateral support in a United Nations Security Council vote. A White House meeting put together an offer for Turkish support, to be obtained for a package including procurement that would be handled, unlike the Bosnia occupation, completely without multilateral support. Turkey rejected the offer.\footnote{\text{155}}

In January 2003, President Bush issued the secret legal instrument shaped by Vice President Cheney that turned occupation planning over to the “Office of Special Plans,” the name given for Iraqi affairs, headed by Under Secretary Feith.\footnote{\text{156}} That office fastened Halliburton onto the occupation reconstruction.\footnote{\text{157}}

\footnote{\text{155} As \textit{Cobra II} recounts:}

[\text{a}]n October meeting chaired by Condoleezza Rice had settled on a package of $3 billion in aid, $3 billion in financing, and a promise to make a concentrated effort to persuade Persian Gulf states to provide $1 billion in free oil and to help Turkish companies secure reconstruction contracts in Iraq and Afghanistan.

\text{GORDON \& TRAINOR, supra note 1, at 343 (emphasis added). The package was effectively rejected only when the Turkish legislature, in line with Turkish public opinion, refused to cooperate with an invasion that had no collection sanction.}

\footnote{\text{156} Secretary Rumsfeld let the Office of Special Plans be staffed and guided by Richard Perle, the highly influential head of the Defense Policy Board, who united there the self-interest of the defense contractors with the unilateralist ideology. \textit{See} \text{PACKER, supra note 1, at 28–38, 105–06 (discussing the pre-2001 background of Perle and neoconservatives as to Iraq and introducing Perle’s protégés and the Office of Special Plans). As Packer comments: “all roads from Special Plans led back to Perle.” \textit{Id.} at 106. The unit within the Pentagon that would administer Iraq immediately after the fall of the regime was called the Office of Reconstruction and Humanitarian Assistance (“ORHA”). \textit{See id.} at 120 (discussing the creation of the ORHA). National Security Presidential Directive No. 24, drafted at the Office of Special Plans, gave control over postwar Iraq to the Department of Defense.}}

\footnote{\text{157} Once Vice President Cheney had empowered and anointed Under Secretary Feith, Feith installed his former law partner, Michael Mobbs, as head of ORHA’s civil administration team. “Mobbs, a political appointee, made the decision to award Halliburton, Cheney’s old company, a secret, seven-billion-dollar, no-bid contract to restore Iraqi oil fields after clearing it with Cheney’s chief of staff, Scooter Libby.” \textit{Id.} at 123. The methods involved in awarding Halliburton the contract, and writing terms so favorable to the company, outraged the responsible contracting officer. When the contract was awarded, Bunnatine Greenhouse, the most senior contracting officer in the entire U.S. Army Corps of Engineers, in “a final act of defiance decided to write her objections directly onto the contract” — which only came out publicly in 2006. \text{MILLER, supra note 3, at 86.}}
Apart from awarding Halliburton that contract, the Office of Special Plans failed to plan for occupation.\footnote{For example, Mobbs, ostensibly head of civil administration, "immediately afterward flew to Iraqi Kurdistan . . . essentially abandoning his duties before he ever assumed them. In the end, civil administration would turn out to be the pillar that mattered most." PACKER, supra note 1, at 123.}

Also, over $2 billion in reconstruction contracts was awarded, technically by the Agency for International Development ("AID").\footnote{See Scott P. Fitzsimmons, First Round of Iraq Reconstruction Contracts Provide Insight Into Agency Authority, Misunderstood Procurement Techniques, 56 ADMIN. L. REV. 219 (2004) (discussing the procedure used to award contracts); Jackie Spinner, USAID to Review Selection Process for Iraq Contracts, WASH. POST, Apr. 25, 2003, at A12 (reporting on White House proposals for $2.4 billion in reconstruction contracts, contracts to be awarded by AID).} When AID announced the process, a media firestorm ensued. An uncommonly large number of print and broadcast outlets interviewed the Author, including an appearance as a live guest on the Lehrer \textit{News Hour}.\footnote{Transcript of \textit{The New Iraq}, ONLINE NEWSHOUR, Apr. 30, 2003, available at http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_4-30.html.} Following White House instructions, AID only allowed bidding by a couple of administration-loyal invitees for each of the dozen or so contracts. Most extraordinarily, this excluded any bidding whatsoever from abroad, even though the contracts would be performed abroad. This was unilateral procurement with a vengeance.\footnote{Even well-qualified bids from America's fighting allies, the British, were refused. Since Iraq had been a British protectorate before independence, the excluded British companies sometimes, such as in the case of shipping lines, had long, actual experience with Iraq which the American bidders did not. See David Teather, Jobs for the Boys: The Reconstruction Billions, THE GUARDIAN, Apr. 15, 2003, at 6 (discussing contracts awarded to American companies).}

As a matter of procurement law, the White House tried to keep its fingerprints off this contracting, saying it was all done by AID, which had more respect in such matters than the Rumsfeld Department.\footnote{Among other matters, the head of AID, Andrew Natsios, rightly enjoyed respect as an effective long-term manager of difficult international procurements. See generally Biography of Andrew S. Natsios, http://www.usaid.gov/about_usaid/bios/bio ASN.html (last visited Oct. 19, 2007).} On this key point, the Author was quoted in the \textit{Washington Post} and pressed at a House hearing:\footnote{Subsequently, when the Author testified at a House committee hearing about procurement, the chair of the committee that oversees contracting irately, but inaccurately, insisted that the Author had been wrong. The Author was testifying about the Revised Services Acquisition Reform Act. See \textit{Better Training, Efficiency and Accountability: Services Acquisition Reform for the 21st Century: Hearing Before the H. Comm. on Gov't Reform}, 108th Cong. 176-77 (2003) (statement of} President Bush...
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had a personal role necessitated by a specific aspect of the procurement.\footnote{See Karen DeYoung & Jackie Spinner, Contract for Rebuilding of Iraq Awarded to Bechtel, WASH. POST, Apr. 18, 2003, at A23 (outlining the effects indemnification had on the contract).}

In February 2003, when Rumsfeld delivered his aforementioned speech “Beyond Nation-Building,” he scorned the Clinton administration handling of the former Yugoslavia, where peace-keeping and reconstruction had led, he said, to a “culture of dependency.” Wolfowitz publicly announced that because Iraq was rich in oil, it could handle reconstruction without such lengthy, costly, sustained American help.\footnote{See RICKS, supra note 1, at 98 (recording Wolfowitz’s statements about Iraq’s ability to fund its own reconstruction).} The author, asked about this on the Lehrer News Hour,\footnote{The New Iraq, supra note 160.} expressed disbelief, stating it would take a great many years for substantial Iraqi oil funding for reconstruction.

There are two other points that warrant noting. On the eve of the looting of government offices that so undermined the occupation,\footnote{Secretary Rumsfeld’s invading force did not have the planning, the orders, or the manpower to control it. Specifically, the combination of military transformation and procurement unilateralism meant that the limited American forces did not include military police or other “garrison”-type forces, and our forces were not supplemented in these regards with other nations’ help as in Bosnia. See generally PACKER, supra note 1, at 135-44 (noting the problems in the background of the looting).} the White House rejected the proposals by career officials to send five thousand law enforcement personnel. Instead, the administration began planning on a contracted-for training mission that might start up six months into the operation.\footnote{See GORDON & TRAINOR, supra note 1, at 467 (discussing the possible training mission).} In other words, the White House followed the creed of acquisition reform, and outsourced the support for law enforcement.\footnote{The looting made Iraqis doubt that the conquering Americans truly intended a meaningful transition, for as bad as Saddam Hussein had been, Iraqis...}
After reluctantly letting go of the dream of being able to withdraw without a real occupation, the administration set up the Coalition Provisional Authority ("CPA") to administer Iraq under Ambassador L. Paul Bremer. In June 2004, the effort received the minimal multilateral legitimation of Security Council Resolution 1546. This slow activity put heavy responsibility on the United States' reconstruction effort. Soon Deputy Secretary Wolfowitz's convenient pre-invasion vision of reconstruction self-funded by Iraqi oil ended. So, the Iraqi population blamed the sluggishness of reconstruction on the American occupation.

What made the American responsibility worse was the CPA's handling of the other main source, besides American appropriations, of reconstruction funding. Pursuant to Security
Council sanction resolutions, the receipts for selling Iraqi oil went into the DFI.\textsuperscript{174} The CPA took control of the expenditure of DFI funds. Apparently the CPA’s contracting procedures were looser—very loose—about funding from DFI, treating it as a slush fund.\textsuperscript{175} Subsequently, a United Nations arm, the International Advisory and Monitoring Board, protested to the United States concerning adverse audit findings about Halliburton payments. Specifically, it recommended Halliburton pay back several hundred million dollars in DFI funds.\textsuperscript{176} In effect, international distrust of the United States hardened as Iraqi money—not American appropriations—was spent with laxity on procurements benefiting the occupation’s own politically favored companies.

This worsened the expected foreign and Iraqi tendency to view America as deserving the fate of a unilateral effort.\textsuperscript{177} The transfer

\textsuperscript{174} See supra note 32 and accompanying text.

\textsuperscript{175} See M\textsc{iller}, supra note 3, at 188 ("Coalition Provisional Authority Memorandum No. 4 set out contracting guidelines that ran for 31 pages, as opposed to the 1,923 page U.S. regulation. Proposals could be posted and awarded in a single day. Contracts did not have to be competitively bid. Protests were limited."). Since the Defense Department dominated CPA contracting, this amounted to a continuation of Rumsfeld’s procurement-aided unilateralism, as his officials could, and apparently did, spend billions outside the rules, treating an Iraqi fund with which they have been multilaterally entrusted as a slush fund, in a way sure to alienate international support.

The guidelines, in short, turned the Iraqi funds into easy money, and the coalition wasted no time spending it . . . . The Development Fund also came to be a petty cash drawer for the CPA . . . . But it didn’t matter: it was Iraqi money, not U.S. funds.

\textit{Id.} at 188–89.

\textsuperscript{176} See \textsc{Iraq Reconstruction: IAMB Calls on U.S. to pay Iraqi Government up to $208M in ‘Questioned’ KBR Charges, 84 FED. CONT. REP. 473 (2005)\textsc{(}discussing IAMB scrutiny of an audit by the Special Inspector General for Iraq Reconstruction, which noted “questioned” expenditures of $208 million involving a no-bid contract awarded to KBR, and IAMB’s recommendation that the United States repay this amount to the Iraqi government\textsc{). For an explanation of DFI funds, see supra text accompanying note 32.\textsc{}}

\textsuperscript{177} The contemporary revelations about foreign leaders’ complicity in the “Oil-for-Food” scandal about the pre-invasion oil funds allowed administration supporters in the Congress to point the fingers of blame right back, but the exchanges did little to mend relations or assuage the Iraqis about American abuses. See, e.g., John R. \textsc{Crook, \textit{Contemporary Practice of the United States Relating to International Law: International Human Rights and Humanitarian Law, 99 AM. J. INT’L L. 479, 495 (2005)\textsc{(discussing audits of the Oil-for-Food program released by the U.N. and the resulting probes of the program by Congress)}; John R. \textsc{Crook, \textit{Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law, 99 AM. J. INT’L L. 691, 704 (2005)\textsc{(same).}}}
by the CPA of approximately $8.8 billion in DFI funds to Iraqi ministries occurred, according to the Special Inspector General, without “sufficient managerial, financial, and contractual controls to ensure DFI funds were used in a transparent manner. Consequently, there was no assurance that funds were used for the purposes mandated by the United Nations Security Council Resolution 1483.”\textsuperscript{178}

President Bush began to acknowledge how far off the mark the pre-invasion optimism had been. However, he held back the initial request to Congress for the additional reconstruction funding until later in 2003,\textsuperscript{179} putting a request for what became the $18.4 billion Iraq Relief and Reconstruction Funds (“IRRF”) into the (effectively off-the-budget) war supplemental appropriation. That, in itself, meant at least half a year of crucial delay, just in terms of time before funding was even initially authorized.\textsuperscript{180} The Iraqis lost patience with the lack of immediate tangible improvements. So the sluggish reconstruction contracting in 2003-2004 fed the sense, played upon by both the armed Iraqi militias and the insurgents, that the occupation was the enemy.\textsuperscript{181}


\textsuperscript{179} As part of the general refusal to submit to regular budget oversight discipline, he did not ask the Congress for even a part of the new reconstruction funding during the regular budget cycle. See generally Richard W. Stevenson, \textit{White House Memo; Delaying Talk About the Cost of War, N.Y. TIMES, Mar. 23, 2003,} at 24 (noting early in the year the significance of Iraq funding outside the regular budget cycle).

\textsuperscript{180} The growing realization of the abuses in the earlier reconstruction funding, coupled with this being appropriated (not DFI) funding, meant a further delay from regular procedures for awarding contracts, as well as additional delays often before task orders occurred and then further delays before performing them. See generally Jonathan Weisman & Ariana Eunjung Cha, \textit{Rebuilding Aid Unspent, Tapped to Pay Expenses,} WASH. POST, Apr. 30, 2004, at A1 (surveying factors in delay of reconstruction contract awards).

\textsuperscript{181} For example, the summer of 2003 was very hot in Baghdad, and with the power supply in such poor shape, people suffered. They craved the near-term improvements denied them by the slow American activity, without taking much solace in dubious assurances that reconstruction along fully planned lines would accomplish more in the long term. To the extent that the United States was perceived to have taken all the power and funding away from Iraqi officials, aggrieved Iraqis did not have the avenue of working through their own authorities or even the outlet of venting their disgruntlement that way. See Patrick Cannon, \textit{The Ruse of Reconstruction,} Z M\textit{AGAZINE ONLINE} (Sept. 2004), available at http://zmagsite.zmag.org/Sept2004/cannon0904.html (examining the
3.2. *From 2007 on: The Reconstruction Gap*

When Congress provided $18 billion in IRRF for reconstruction contracting in late 2003, added to prior appropriations and to Iraqi funding, it expected this to advance the goals of restoring the Iraqi economy and society and bringing tangible improvements in the quality of life for Iraqis. By 2007, the administration obligated and largely expended the $18 billion and turned the reconstruction task over to the Iraqi government, yet the reality of reconstruction contracting had fallen into what the Special Inspector General for Iraq Reconstruction bluntly described as the "reconstruction gap."\(^{182}\) Of course, the insurgency’s attacks produced part of that shortfall, destroying part of the work and imposing heavy spending on security. But the reconstruction gap also reflected failures in procurement policy and law, epitomized by the failures as to Iraqi oil and gas\(^{183}\) despite Iraq’s having the world’s second-largest oil reserves.\(^{184}\) Contracting with Halliburton and other contractors to repair and upgrade the industry’s facilities turned out not to provide all that much value for the billions paid out. One major contracting episode at the key Tigris crossing, uncovered by the *New York Times* in 2006, illustrated a problem as much with procurement as with security.\(^{185}\) In August 2003, Halliburton received a key

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\(^{183}\) See *id.* at 3 ("[B]efore the war, three assumptions were made about the oil and gas sector in Iraq: that oil and gas revenues in post-war Iraq would pay for much of the reconstruction, that foreign private investment in the oil and gas sector would quickly flow into Iraq, after the fall of the Saddam regime that post-war Iraq would be sufficiently secure to allow the development of oil and gas without hostile impediment. To varying degrees, each of these assumptions has proved to be incorrect.").

\(^{184}\) This was both by the actual lack of Iraqi production, and, also, by the geopolitical risk that added a hefty premium to Middle East oil pricing. In fact, the negative impact amounted to a sizable component of the $2 trillion price tag for the Iraq conflict calculated by Professors Stiglitz and Bilmes. See *Bilmes & Stiglitz, supra* note 51, at 30 (estimating the costs of the Iraq war in both direct and macroeconomic costs).

\(^{185}\) See James Glanz, *Rebuilding of Iraqi Oil Pipeline As Disaster Waiting to Happen*, *N.Y. TIMES*, Apr. 25, 2006, at A1 (covering Halliburton’s contract to replace the crucial bridge crossing for pipelines at the Tigris River, which “had been the
geotechnical report alerting against an underground plan because of unstable terrain. But Halliburton did not back off the now-doomed plan, nor did it even share the alarming information with the government. In 2004, it went ahead with underground drilling, wasting the entire $220 million allocated for the job, as well as very precious months. As of that Times report in August 2006, oil was still not flowing.\textsuperscript{186} Halliburton did not suffer the legal penalties for contractor misconduct. It was paid the entire $220 million allocated.\textsuperscript{187} The lack of government oversight and credible penalties sacrificed precious years without progress.\textsuperscript{188}

It was an endemic problem that the government did not use its strong legal tools for dealing with contractors, such as threatening termination for default or other penalties. In a step which drew widespread attention, the Special Inspector General terminated various construction jobs run by Parsons Corp., due to delays in completion.\textsuperscript{189} Business Week cited this as one of "legion" instances "of military outsourcing gone bad in Iraq."\textsuperscript{190} But again, this involved only a gentle separation, not termination for default.

Looked at generally, the administration's contracting methods ill suited the need to counter the isolation of its unilateral effort from international and Iraqi support. To award the $18.4 billion in contracts, the administration set up a shop eventually named the Project and Contracting Office, headed by David Nash, a retired

\begin{itemize}
  \item \textsuperscript{186} The government did not get the facts until a year after the report, in July 2007, whereupon it changed to a different approach and brought to bear new funding. \textit{Id.}
  \item \textsuperscript{187} See \textit{id.} ("[Halliburton] received a slap on the wrist when it got only about 4 percent of its potential bonus fees on the job order . . . there was no other financial penalty.").
  \item \textsuperscript{188} The contractor took abusive advantage of the contract's pricing as cost-based, rather than fixed-price, to pocket a huge amount, whereas, on a fixed-price contract, a contractor which spent so much without results would potentially have faced a huge loss. Close enough government scrutiny would have put Halliburton executives to the choice of turning their cards face up early enough to avoid the fiasco, or participating in a culpable conspiracy to defraud. \textit{See id.}
  \item \textsuperscript{189} \textit{See} Mary Buckner Powers, \textit{Big Changes Loom in Iraq for Reconstruction Forces, ENGINEERING NEWS-RECORD}, July 24, 2006, at 13 (reviewing the termination of several projects run by Parsons Corp. by the Special Inspector General for failing to meet completion dates).
  \item \textsuperscript{190} Kopecki, \textit{supra} note 14, at 54. Frank Camm, the defense contracting expert at Rand Corp., traced the problem to the Pentagon's reduced numbers of contracting officials, as some contractors "exploited the new freedom." \textit{Id.} at 55.
\end{itemize}
rear admiral. As laid out by T. Christian Miller in his insightful book on contracting in Iraq, Nash ruled out “contracting directly with their Iraqi counterparts.”¹⁹¹ So, the contracting policy and law structured the work as mega-projects, like a single project of reconstructing the entire electrical system. Such mega-projects went to multinational engineering companies, such as Bechtel or Parsons, singly or in consortia, without close government direction, as “design-build.”¹⁹² Relatively few of the contracts went to small, foreign, or local Iraqi companies, and even much of the employment for individuals went to Americans or other expatriates rather than to qualified Iraqis. Resort to design-build let giant American companies hog the payments, often with limited results to show. Moreover, as with Halliburton, the administration eschewed the recognized penalty tools of procurement law for breach, strove to mute the discussion of American contractor failure, and left untreated the system’s vices, like the severe shortage of acquisition supervisors.¹⁹³

In a classic example, a joint venture of big American companies

¹⁹¹ MILLER, supra note 3, at 115–16 (reviewing Nash’s early decision making in his Iraq rebuilding plan). Nash had risen in the navy to the head of its construction engineering corps, and then took posts in private engineering firms that wanted government work. Nash “believed that large, multi-national corporations should do the work.” Id. at 115.

¹⁹² Specifically, the administration set the contracts up legally as large-scale “design-build,” meaning that the consortia bidding on these must demonstrate in their proposals the entire range of advanced engineering design and construction. In the construction world, including federal government construction in the past decade, design-build is well-accepted and often represents a sound contractual solution to naturally enormous projects. See, e.g., Frank J. Baltz & J. Russell Morrissey, “Bargaining” in Federal Construction Contracting, THE PROCUREMENT LAWYER, Spring 1998, at 16 (defining the shift from the “design-bid-build” method to the “design/build” method of government contracting); Robert S. Brams, et al., Best Value in Federal Construction Contracting, THE CONSTRUCTION LAWYER, April 1999, at 25 (examining the process of “design-build” bidding for government contracts).

based near the Pentagon got a prime contract early in 2004 to oversee design of the entire Iraqi transportation sector, including roadways, airports, and bridges.194 During that whole crucial year, the joint venture failed to start actually building anything. The government program manager, Professor Charles W. Keller, denounced this, explaining that the joint venture "never started a project" but was "a blocker to getting anything done."195 He criticized turning the whole work over to American rather than Iraqi firms, for "[t]he Iraqis don't have the same overhead as U.S. design-build firms do."196 When asked why the administration only belatedly made public the details of the failed contract, Professor Keller replied, "When you have a bad apple in your family, do you stand up and announce it?"197 In August 2006 the Special Inspector General declared it a disaster to rely upon a "strategy for acquisition management, which used a design-build approach giving contractors oversight over infrastructure sectors."198

By 2007, the United States was failing in its attempt to mitigate the reconstruction gap by a transfer of projects to the Iraq government. The Special Inspector General found that the Iraqi central government refused to take possession of 2,300 completed reconstruction projects. This often meant the projects got turned over to local authorities that might not be able to adequately fund or maintain them, notwithstanding the critical nature of the projects, such as power stations servicing Baghdad.199 In turn, this

194 Note that the work did not require lumping as one giant design-build project; rather, the administration's strategists liked to delegate the whole sector to one overall private contracting venture. See PCO Sends Contrack Team Home from the Front in Iraq, ENGINEERING NEWS-RECORD, Jan. 10, 2005, at 19 (accounting for the relationship between cost accumulation and construction starts).
195 Id. Keller was actually a professor and recognized expert who came to his stint in Baghdad, and returned there afterwards, from his post as Assistant Professor of Engineering Management at the University of Kansas. See id.; see also MILLER, supra note 3, at 193-94 (providing further background on Keller and his criticisms of the CPA's squandering of funds).
196 PCO Sends Contrack Team Home from the Front in Iraq, supra note 194, at 19.
197 Id.
199 See Leslie Hoffecker, Iraq Fails to Take Over U.S. Projects, L.A. TIMES, July 30, 2007, at A4 (covering the Iraqi central government's refusal to take responsibility for over 2,300 completed reconstruction projects); Gordon Lubold, Troubled
raised the possibility that the Shiite-dominated central government did not want to sustain projects for the benefit of Sunni communities, making American procurement a pawn in sectarian conflict.

The alienation of international support by administration unilateralism during the countdown to invasion meant the absence of foreign private investment thereafter. Before the invasion, Russia, Germany, and France had taken part in Iraq trade or in the Iraq oil industry, and could have provided precious direct private investment, continuation of past work, and crucial spare parts; Washington never had a role for them during the occupation. With great fanfare, in 2003 the administration convened a conference of countries in Madrid to forgive Iraq’s debts and to pledge grants or loans for Iraqi projects, particularly relating to water and electricity.\textsuperscript{200} By 2005, of over $13 billion in (non-U.S.) aid pledged (including both grants and loans), less than $4 billion, or only 30 percent\textsuperscript{201} of funds, had been actually forthcoming. Even a donor punctilious about fulfilling pledges, Japan, suspended its loans in 2006.\textsuperscript{202}

When representatives of donor nations met in Jordan in 2005 to discuss the rebuilding efforts in Iraq, officials from Canada, Japan, Iraq, and other countries criticized the American efforts.\textsuperscript{203} Barham Salih, Iraq’s minister of planning and development cooperation, stated that reconstruction by American contractors had proceeded “‘very, very, very slowly so far,’” and that the Iraqi government would do a better job.\textsuperscript{204} Not all nations agreed with this sentiment however. When another such conference occurred in Egypt in May 2007, alienated Sunni neighbors like Saudi Arabia and Kuwait stated that they remained “frustrated with [Iraqi Prime Minister]"
Maliki's failure to deal with Sunni concerns, and it did not look like funding would roll in to make up for the contractor reconstruction gap.

4. THE FAILURE OF THE RESORT TO UNACCOUNTABLE FUNDING TO SUSTAIN UNILATERALISM

Closely tied to procurement is the method of funding the war. A multilateral effort would have drawn from international legitimacy and overseas allies both foreign financial support and the capacity to elicit transparent funding from Congress and the American taxpayer. In contrast, part of the paradigm to sustain a unilateral war in Iraq consisted of funding it non-transparently, so as to keep Congress and the taxpayer tractable. The following is illustrative of that unaccountable funding.

4.1. The Procured Exile (Chalabi) Government That Failed

Apparently, an inner administration plan in 2002-2003 sought to turn over much of governance of Iraq to the well-known exile Ahmed Chalabi. This represented the ultimate indicator of how far the administration’s procurement-aided unilateralism had gone. It seemingly encompassed the outright purchase, as though of a market commodity, of an unsupported government to be illegitimately imposed upon the Iraqis.

This significant episode starts with Chalabi, a figure of importance before and after the invasion, well profiled in a 2004 article in the *New Yorker*. The Defense Department sustained


206 In the 1990s, Chalabi demonstrated such unreliability and duplicity that the CIA washed its hands of him and would deal with him no longer. Thereafter, he cultivated relationships with conservative congressmen and neoconservative figures, and looked for large-scale grant and contract funding through the State Department and especially DOD.

Once the Bush administration took office, and particularly after 9/11, Chalabi was the source of much fabricated intelligence about supposed weapons of mass destruction. Under Secretary Feith and his superiors used this to shore up the push for war despite the solidly grounded skepticism of State Department and CIA analysts. This is to be treated in a forthcoming report from the Senate Intelligence Committee.

207 See Jane Mayer, *The Manipulator*, NEW YORKER, June 7, 2004, at 58 (stating that Chalabi was a fugitive from Jordan, convicted there of massive bank fraud; was, as an Iraqi exile, the leader of an organization called the Iraqi National Congress; and asserting that he sought to get the United States to overthrow...
Chalabi by a flow of American contracts and similar funding vehicles.\footnote{208}{See PHILLIPS, supra note 3, at 72 (“The U.S. government funneled more than $100 million to the Iraqi National Congress between 1992 and 2004 . . . . Corruption was inevitable with so much money kicking around.”).} Despite the CIA having pulled away,\footnote{209}{Ordinarily, funding of an exile organization would occur through CIA payments, and the CIA has its ways to obtain value even from dubious groups, but as noted, the CIA had washed its hands of Chalabi—hence the other federal funding vehicles. Chalabi’s jealousy of alternative Iraqi exile figures led him, acting through political allies, to hold back pre-invasion grants.} the United States still paid “Chalabi’s organization substantial amounts, totaling more than $36 million from 2000–2003.”\footnote{210}{RICKS, supra note 1, at 57 (discussing how Chalabi attempted to influence the United States government through information, the media, and political connections, and how the government in turn was paying money to Chalabi’s organization).}

Two months before the invasion, DOD began pouring funds into Chalabi’s pocket by giving his group a formal status as the Iraqi Reconstruction and Development Council (“IRDC”). Apparently DOD paid for them to be the nucleus of its Iraqi advising-governing body during the expected occupation. DOD did this funding by a contract with the Science Applications International Corporation (“SAIC”).\footnote{211}{SAIC is a very well-connected darling of the administration’s “acquisition reform” system. The lax practices of “acquisition reform” created a niche for contractors such as SAIC to obtain contracts on easy terms from the government and, in return, to serve such functions as being a conduit for the funding of exiles without an actual prospect of support within Iraq.}

DOD had planned that the contracted exiles, led by Chalabi, would take the Iraqi dictatorship’s suddenly-emptied top posts.\footnote{212}{See DIAMOND, supra note 1, at 286 (“The United States could then hand the country over to the pro-American exiles, led by Ahmed Chalabi, and get out within a few months.”). ORHA would not itself govern as an occupying regime, just handle refugee problems, coordinate relations between the soon-withdrawing U.S. military, other nations’ forces, and the Iraqi civil authorities, and supervise contractors: reconstruction contractors, training contractors for police and military, and the rest of the contractors (e.g., Halliburton for the oil).} Soon after Bremer formed the new Iraqi Governing Council, DOD placed Chalabi on it. Deputy Secretary Wolfowitz continued to

Saddam Hussein in ways that would advance him as an exile and, after a regime change, install him as the next leader).
funnel money to him by a very suspicious no-bid successor contract to the one to SAIC, framed misleadingly as one for ordinary translation and similar support services. A *Washington Post* article, by using a GAO opinion, opened a window into DOD contracting with the successors to SAIC and Chalabi. As the Author told the *Post*: ""Our Defense Department has continued to pay, through pliant contractors, for a flock of Iraqi political exiles as our paid political agents in Iraq.""

The IRDC members were officially employed by SAIC and held Iraqi ministry positions during the occupation, making SAIC, with its own contracting agenda, the paymaster of Iraqi officials of dubious legitimacy. Subsequently, the DOD Inspector General published a highly critical report regarding corruption in SAIC’s contracts related to the Iraqi media. Meanwhile, SAIC was becoming notorious as a fast-growing contractor that obtained funds through revolving-door political connections. Chalabi’s role reflected the improvident uses DOD could make of the flexibility of radical "acquisition reform." 

4.2. Unaccountable $2 Trillion Price Tag

The Gulf War and the post-1995 Bosnia occupation occurred

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213 See Worldwide Language Resources, Inc., File No. B-296984 U.S. Gov’t Accountability Office (Nov. 14, 2005) (upholding a protest against the award of an air force department contract from commercial companies that wished to compete to provide such services legitimately).


217 To end this particular story, in 2005 the government accused Chalabi of leaking intelligence to Iran, which was a matter of debate, although he certainly wanted to cozy up to Iran without detailed American knowledge. Authorities raided his headquarters to investigate. Chalabi was nimble enough later to reinvent himself yet again, as a Shiite leader, and to occupy high posts in Iraq’s government.
with relative accountability, from straightforward congressional budget and procurement oversight to the strengthened checks on contractor waste and abuse dating to the mid-to-late 1980s.\(^{218}\) In contrast, the Bush administration evaded accountability for Iraq, never coming to terms with the implications of its enormous price tag. By undermining congressional budgeting, such as by use of “emergency” supplemental appropriations, the administration shielded how the massive unnecessary “military transformation” contracting continued even while the largely unmet need for “boots on the ground” and other Iraq-war-related costs mushroomed. Weakened checks on waste and abuse meant that when the reconstruction money ran out, in late 2006, big contractors had never completed what was needed to win support in Iraq.

The administration relentlessly downplayed the scale of the war’s cost. A Nobel laureate economist, Professor Joseph E. Stiglitz, coauthored a study estimating the war’s costs at well over $1 trillion and closer to $2 trillion.\(^{219}\) Much of the costs simply consisted of projecting the war’s operational expenses in the long run, such as care for disabled veterans of the armed forces and of contractors.\(^{220}\) Focusing on just direct costs, the Congressional Budget Office figured similarly to Professor Stiglitz.\(^{221}\)

The vivid yet ironic contrast to this unilateral Iraq war sustained by such monumentally costly funding consisted of the successful war against Iraq to expel it from Kuwait, a war led by President George H. W. Bush in 1991. The 1991 war was conducted both militarily and financially on a multilateral basis.\(^{222}\)

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\(^{218}\) A powerful contributing factor was simply the effect of divided government in each instance. The Democratic Congress of the Gulf War would not let that Bush administration, nor would the Republican Congress of the Bosnia occupation let the Clinton administration, hide much of the costs.

\(^{219}\) Bilmes & Stiglitz, supra note 51, at 30 (concluding that the Iraq war will cost between $1026 and $2239 billion).

\(^{220}\) Economists who were more sympathetic to the administration came up with lower figures. See Paying for Iraq: Blood and Treasure, ECONOMIST, Apr. 8, 2006, at 33 (providing an accessible guide to the economic debate).


\(^{222}\) In 1990, the senior President Bush accepted the challenge and the discipline to conduct the war on a multilateral basis, with full Security Council
so it did not need deficit financing. In contrast, the country must carry the Iraq debt load from this war, by itself, through the fiscal challenges of the 2010s.\textsuperscript{223}

4.3. "Emergency" Supplementals as a Failed Unilateralist Funding Structure

Ordinarily, the enormous Iraq commitment shouldered unilaterally would elicit a great deal of budgetary and legislative scrutiny, including cutbacks on unsustainable "military transformation" unrelated to the war. Scrutiny would force the administration to maintain an adequate army size and bolster the reserves, rather than overspending on the war-unrelated, high-tech, high-profit military weaponry described above.\textsuperscript{224}

For years, Secretary Rumsfeld fought effectively against congressional critics who complained about inadequate ground force size. One congressional proposal in spring 2004, would have added 40,000 troops to the army, and 15,000 to the marine corps.\textsuperscript{225} The administration evaded such serious budgeting accountability through such legal abuses as the annual outside-the-budget Iraq "emergency" supplemental bill.\textsuperscript{226}

From 2004 on, the administration obtained over $50 billion a year, largely for Iraq, through the so-called "emergency" authorization, and tangible support from world and regional powers. Notably, those supporting countries, particularly Saudi Arabia, picked up the tab for the military operation itself.

\textsuperscript{223} Then, too, the oil-producing regional nations supporting the multilateral 1991 effort pledged to keep oil prices within reason, making it easier for the American economy in the 1990s in a way that contrasted with the spike in oil prices of the 2000s.

\textsuperscript{224} This includes nuclear attack submarines, stealth destroyers, unneeded additional stealth fighters, "Future Combat Systems," and expenditures on questionable crusades for antimissile and space warfare.

\textsuperscript{225} See William Matthews, $402B Doesn't Count Iraq: Pentagon, Capitol Hill at Odds Over '05 Spending Plan, ARMED FORCES J., Mar. 2004, at 8 (discussing the tension between Rumsfeld and Congress, where Congress wanted to significantly increase troop numbers in order to decrease the strain on the military, and Rumsfeld wanted to avoid end-strength increases).

supplemental appropriation to pay war costs. That is, Congress currently approves about $450 billion in defense expenditures through a budget process and a pair of laws.\textsuperscript{227} These processes allow some tough-minded scrutiny without a contractor-convenient suppression of accountability.

However, the Iraq (and Afghanistan) supplemental appropriation moves outside the regular annual budget act process, that is, the annual budget resolution did not set a figure for the supplemental.\textsuperscript{228} Moreover, the administration deviously merged the Iraq and Afghanistan expenditures as one “war on terror,” so the 9/11 attack provided cover for the Iraq war.\textsuperscript{229} And, the Iraq supplemental did not require prior enactment of legislative authorization provisions, the way weapons programs regularly do.\textsuperscript{220}

The administration abused “emergency” supplementals to combine its foot-dragging as to the inadequacy of ground and reserve forces with its free-spending profligacy for high-profit “military transformation” weaponry unrelated to the Iraq war. For example, the administration gamed Congress into Secretary

\textsuperscript{227} This means that the whole House and the whole Senate debate and vote on the numbers in a concurrent budget resolution. Then, the specific expenditures must receive authorization, in a defense authorization law, before they receive appropriation, in a defense appropriation law. The overall defense figure, and a breakdown by budget functions, gets set through the regular annual budget act process, then parceled out in detail by the authorization-appropriation process. This means express sanction for the specific programs must get through the defense authorization written by the defense authorization committees and debated and voted upon, again, by the whole House and the whole Senate.

\textsuperscript{228} See Baumann, supra note 30, at 40 (summarizing the supplemental funding measures used to finance the Iraq war). This method of funding was criticized even by administration-sympathetic commentators. See Tom Donnelly & Vance Serchuk, A Bigger, Badder, Better Army: The Military Needed for the Bush Doctrine, WKLY. STANDARD, Nov. 29, 2004, at 16, 17 (“The additional costs associated with reliance on reservists have been masked thus far by the budgetary games used to pay for the war through ‘emergency’ supplemental appropriations. But the costs are nonetheless real and great.”). The authors are defense policy analysts at the American Enterprise Institute.

\textsuperscript{229} Thereby, the administration kept the public in the dark even about the specific figure for just-Iraq operational expenditures; even the Congressional Budget Office could only say for the period 2001-2006 that of the $503 billion in budget authority for operations in both Iraq and Afghanistan, “[a]t least 70 percent of that amount has been allocated for the war in Iraq.” Letter from Peter R. Orszag to Kent Conrad, supra note 221 (summarizing the funding provided for military and diplomatic operations in Iraq and Afghanistan through January 31, 2007).

\textsuperscript{220} Matthews, supra note 52.
Rumsfeld's preferred form of army restructuring by funding it as part of the Iraq supplementals although it had nothing to do with Iraq.\textsuperscript{231} Even hawkish critics could not get a handle,\textsuperscript{232} for the supplemental was uniquely impervious to oversight. The bill never had difficulty with passage no matter how little oversight was allowed. Few had dared hold up to scrutiny or delay passage of the "emergency" supplemental—doing so made one appear unpatriotic and unsupportive of the troops in the field.

Accordingly, Secretary Rumsfeld managed to press ahead with military transformation,\textsuperscript{233} fending off the increasingly intense calls for a truly enlarged army.\textsuperscript{234} It was not until the FY2008 submission that the administration was finally required to include the projected 2008 supplemental request in the annual budget. It then became clear, as President Bush requested $481.4 billion, that the requested budget "push[ed] U.S. defense spending to levels not seen since the Reagan-era buildup of the 1980s."\textsuperscript{235} Meanwhile, the spring 2007 supplemental elicited a veto from President Bush when the newly elected Congress attempted to affect Iraq policy. Ultimately, President Bush triumphed in May 2007 and forced

\footnotesize{\textsuperscript{231} His $69 billion "transformation" of the army to brigade-centered forces, rather than forces centered upon division-sized units, did not mean significantly more troops but did mean many billions more in equipment. Sandra I. Erwin, \textit{Efforts to Reorganize U.S. Army Tied to Emergency War Spending}, NAT'L DEFENSE, Mar. 2005. For example, a force centered on division-size units has artillery at the division level. A force centered on brigade-size units has autonomous artillery to go with each brigade.}

\footnotesize{\textsuperscript{232} Critics of the administration's priorities included strong Iraq war supporters like Sen. John McCain. Such critics expressed outrage at Secretary Rumsfeld using "emergency" war appropriations "to hide the costs of personnel, weapons and vehicles that typically would be included in the Defense Department's yearly budget proposal." \textit{Id.}}

\footnotesize{\textsuperscript{233} He stuck by plans to spend the lion's share of funding only on the contractors' profitable long-range, precision-strike weaponry of little use in Iraq.}

\footnotesize{\textsuperscript{234} These calls came from retired generals, congressional defense hawks, and others with credentials of support and experience in military affairs as good or better than Secretary Rumsfeld's own. As early as late 2003, a conservative critic, Tom Donnelly, grumbled that "[t]he secretary's mulish opposition to increasing the number of American soldiers in Iraq and the narrow understanding of military 'transformation' used to justify that stance" would lead the administration to "go begging" for "Turkish, Indian, or Pakistani troops." Tom Donnelly, \textit{Secretary of Stubbornness: Donald Rumsfeld's Idée Fixe Endangers Success in Iraq}, WKLY. STANDARD, Sept. 15, 2003, at 16.}

Congress to send him a supplemental stripped of troop deadlines.\textsuperscript{236}

In 2003–2006, the war's spending and directing proceeded with little or no oversight by a Congress of the same party as the administration.\textsuperscript{237} As journalist Thomas Ricks wrote, the brief flurry of Abu Ghraib hearings produced "little follow-up investigation or oversight . . . . In retrospect, the hearings [following the Abu Ghraib revelations] of May and June 2004 were a spasm before the election season. They made it appear that Congress was paying attention, but they did little to . . . produce more information."\textsuperscript{238} The administration escaped serious congressional oversight by such means as stonewalling the most vigorous efforts, led by the senior minority member on the House's chief oversight committee, Rep. Henry Waxman.\textsuperscript{239}

Evasion of accountability means the absence of reform. As Gen. Barry R. McCaffrey wrote in 2005, "[t]here is an impression among our nation's warriors that the armed forces are at war, but the country isn't. Resources, people and equipment are inadequate . . . [but Secretary] Rumsfeld refuses to expand the active force, stating that we have no troop shortage."\textsuperscript{240} An


\textsuperscript{237} "The Republican Congress has specialized in Potemkin hearings. . . . Since 1997, the House Government Reform committee has issued over 1000 subpoenas related to allegations of misconduct involving the Clinton administration or the Democratic party—compared to just 15 related to Bush administration or Republican abuses." Zachary Roth, Investi-gate: What's Really at Stake in the November Elections, WASH. MONTHLY, June 2006, at 31, 32-33.

\textsuperscript{238} Ricks, supra note 1, at 387. Although the Senate had figures such as Senator McCain, who insisted scrutiny, the House Armed Services Committee boasted that it did not hold hearings even over Abu Ghraib.

\textsuperscript{239} While his staff's report on Iraq contracting, DOLLARS, NOT SENSE, supra note 4, is a treasure trove of revelations about Iraq contracting, it is also replete with instances in which the Department of Defense fended off accountability. The exception that proved the rule was the flow of hearings and reports on Iraq problems in general, and Iraq procurement problems in particular, from the only body in the Congress where Democrats could hold hearings before 2007, the Senate Democratic Policy Committee. For an example, see An Oversight Hearing on Waste, Fraud, and Abuse in U.S. Government Contracting in Iraq: Hearing Before the S. Democratic Policy Comm., 109th Cong. (2005), available at http://democrats .senate.gov/dpc/dpc-hearing.cfm?A=22. However, the policy committee lacked power, in holding hearings, either to subpoena documents or witnesses, or to act on nominations or legislation, so it could not force information out of a recalcitrant administration.

example is the rosy reporting about training that buried the contractors' failures to make the picture cheerier before the 2004 election.\footnote{241} One oversight mechanism, however, did work—the Special Inspector General for Iraq Reconstruction.\footnote{242} But his writ did not extend generally to military services contracting and other big policy issues, such as President Bush's unilateral restrictions on bidders. Moreover, as late as 2006–2007, Halliburton refused to disclose basic information even to the Inspector General, claiming the data were proprietary.\footnote{243}

Finally, in 2007, the newly elected Congress resumed efforts towards vigorous oversight over matters including contracting failures. The armed services committees now conducted sharp probes into whether contractors served the needs of the troops in Iraq, both uncovering body armor failures and reorienting spending from missile defense and other irrelevancies to vitally needed armored vehicles.\footnote{244} Foreign affairs committees dragged out of a reluctant administration the admission that of the aid commitments made by donors at the October 2004 Madrid conference, "the European Union, Saudi Arabia, Kuwait and the

\footnote{241} Its reporting grossly exaggerated the training level of Iraqi army and security forces, at a time when, as discussed, internally, senior army officials were castigating the training contractors for their failure. See ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUDIES, INEXCUSABLE FAILURE: PROGRESS IN TRAINING THE IRAQI ARMY AND SECURITY FORCES AS OF MID-JULY 2004 (2004), available at http://www.csis.org/media/csis/pubs/iraq_inexcusablefailure.pdf.

\footnote{242} This was a post created with the December 2003 $18.4 billion IRRF appropriation and held by Stuart Bowen. The Special Inspector General's reports served to hint at what full oversight in Iraq would have revealed. For example, he concluded that the administration could not account for nearly $9 billion shipped from the DFI (the oil revenue fund, ostensibly Iraq's own money under United Nations supervision but actually controlled by the CPA) to Iraq's ministries. See MILLER, supra note 3, at 197 (noting Bowen's conclusion that the United States had violated its "duty to hold the Iraqis' money in trust").

\footnote{243} James Glanz & Floyd Norris, Report Says Iraq Contractor Is Hiding Data from U.S., N.Y. TIMES, Oct. 28, 2006, at A8 (reporting that a Halliburton subsidiary is alleged to have withheld information on its practices from U.S. officials).

United Arab Emirates [were] providing less than 10 percent of aid promised.\footnote{245} Congress elicited GAO criticism of contractors on matters from military supply chain logistics to oil industry reconstruction.\footnote{246}

Late as this was, though, the administration still fought back against accountability. For example, at a number of congressional briefings for the House armed services' oversight subcommittee in 2007 about failures in training Iraqi forces (covering issues previously discussed above), the administration blocked either high-level military officers from testifying from Iraq via video, or middle-level military officers from giving recorded evidence in person.\footnote{247} Congress was not to know.

5. CONCLUSION

5.1. Beyond Just “Let’s Not Do Iraq Again”

As to the future, some may satisfy themselves that just trying to avoid another intervention like the Iraq invasion answers completely the problems revealed by the war’s toll. This Article has deliberately skipped the separate topic of the original decision to invade. Regardless of whether this was an occasion to intervene, there will be occasions in the future in which the United States should and will intervene. It requires only a look back at the last decade, at instances like Rwanda, to see the dangers of reacting against one problematic intervention by refusing the next one.\footnote{248}


\footnote{248}{The U.S. public reacted against what happened in the 1992–93 intervention in Somalia, which was epitomized by killings and mistreatment of U.S. soldiers in Mogadishu. The reaction against this intervention meant that}
Sometimes the United States must go in where it must again face the problems of how to avoid an occupation going as badly as Iraq.

5.2. Legislative Reform

First, the nation must counter-balance the excessive influence of the defense contracting industry, particularly the high-tech, high-profit systems that divert—to unilateral wars against regular forces—the resources needed for multilateral peacekeeping in the face of irregular forces. Stronger revolving door rules should limit the industry's tendency to take over the top ranks of the national security establishment. Also, the nation needs rules to limit contributions out of contractors' PACs and from its top-earning executives and stockholders.\(^{249}\)

Each aspect of the paradigm discussed in this Article that traces back, in whole or in part, to a common root of contractor industry indulgence deserves scrutiny for its natural counterbalance or antidote. Starting with military transformation, the political process must constrain the military contractor industry from drawing too much of the military budget off to high-profit hardware and services, and leaving such small portions for troops. The army and its reserves need a countervailing voice on behalf of troop levels. With the greater importance of the reserves in contemporary deployments, the reserves in particular need a political voice. Reserve and retired officers need a clear mandate to speak, especially to speak in criticism of an overstraining administration. The congressional armed services committees should elevate and give special status to personnel subcommittees that would stand up for the significance of manpower reserves vis-à-vis those interested in procurement.

As to unilateralism, much has already been written about the missteps in the Iraq invasion that mobilized and hardened world sentiment against the United States. Focusing just on the concrete procurement-related aspects of unilateralism, the United States might actively engage, with potential logistical support and reconstruction businesses in the regions such as the Middle East in

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\(^{249}\) Most especially, such contributions must stop going to members of the congressional committees of jurisdiction, the armed services and appropriation committees.
particular, where conflict is most likely. The United States could pre-qualify such businesses in potentially supportive countries such as Turkey, Pakistan, India, Egypt, and Jordan with the same attention it gives to pre-positioning equipment.

Indeed, as much as possible, it might bring such foreign businesses more into the LOGCAP system for its overseas forces so that they are already pre-qualified and pre-competed when the need arises. A similar or lesser-scale network in Africa would both facilitate and demonstrate American willingness to assist humanitarian interventions. This would openly draw contractual needs in case of occupations from these other countries. The United States could not engage readily in wars that alienate all international support, but when engaged in a war and occupation with at least some international support, it would gain the helpful productive capacity of allies contractually on board in that effort. Such support would in effect permit the United States to attain a more promising multilateral approach.

The problems of the Iraq war have brought forth a number of sound practical proposals, not relating to high-profit “military transformation” hardware, for preparing for future similar deployments. Several address the nature of military contingencies, looking for new legal arrangements to help handle them. One is to have a logistics reserve corps and a contingency-contracting article in the Federal Acquisition Regulation. Faced with a contingency, the military would not just stretch the regular contracting officers and rules further, and largely turn matters over to contractors. Instead, it would bring back trained personnel in the reserves to work with and to supervise contractors, and to apply special and well-adapted rules for those contractors. This

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250 This would work much like the military’s dependence upon its reserves, the so-called “Abrams Doctrine” (which stated that, after Vietnam, the army should depend upon reserves, which would mean it could only get deeply committed with the awareness of the public that has personal ties to the called-up reservists).

251 The navy not only has a logistics reserve corps, it has used it in Iraq. Greg Johnson, Inaugural Deployment of NAVELSF Contingency Contracting, NAV. SUP. CORPS NEWSLETTER, July 1, 2005, at 4.

would relate both to the combat support and to the reconstruction sides. The services are already moving ahead on this.\textsuperscript{253}

Looking at the nature of reconstruction contracting, the Special Inspector General drew this sound lesson for the future:

Avoid using expensive design-build contracts to execute small scale projects. While the use of large construction consortia may be appropriate for very extensive projects, most projects in Iraq were smaller and could have been executed through fixed-price direct contracting.\textsuperscript{254}

Moreover, the United States needs to change direction from the radical version of acquisition reform that brought the contractors participating at Abu Ghraib, the failure of MPRI and Vinnell to train the new Iraqi army, and the scandals of Halliburton. The treatment for that is well recognized and includes the following: restoring the levels and strength of the federal acquisition workforce;\textsuperscript{255} bringing back full and open competition and contracting officer supervision; reining in use, for nonroutine purchases, of poorly overseen contracts like interagency vehicles; and creating some transparency so that it becomes hard for political officials to take contractors' sides against auditors, as with Halliburton. Logistical contracts need treatment as highly important parts of defense policy.\textsuperscript{256}

The military will be revising their counterinsurgency strategy to learn the lessons of Iraq much as they revised it to learn the lessons of Vietnam. Much of that revision is an issue beyond this Article. However, a logistics approach must develop that can deal


\textsuperscript{255} E.g., Econom, supra note 14, at 174, 181–87 (describing ways in which the federal acquisition workforce may be bolstered).

\textsuperscript{256} They need splitting into pieces, and/or formal requirements as to subcontract planning, to allow more competition, more inclusion of small and foreign businesses, and some degree of fixed unit pricing rather than all aspects being cost-reimbursement.
better with the supporting of a counterinsurgency effort than dependence upon LOGCAP and Blackwater-type private security. The answer may lie in a logistics reserve that can share logistics and security efforts with private companies. Just as the reserve would hold regular exercises, the companies could well participate in these exercises as a form of contracted-for readiness.

Furthermore, the system of oversight of procurement and related expenditure, from congressional hearings to internal audits, has been so blocked and damaged during the Iraq occupation as to require a major effort at restoration. There needs to be a backlash against the overuse of doctrines related to executive privilege by which the failings of the Iraq effort, particularly those of its contractors, were swept under the rug from 2003 on. Military appropriations require a strengthened, disciplined place in the budget system so that “emergency” supplementals cannot serve as slush funds for unscrutinized, undisciplined policies. The country can only have the civilian “contractors on the battlefield” like Halliburton on the current scale with “auditors on the battlefield” to keep them honest.257

It is very hard for the United States to look at the awful waste—in blood and treasure—of the Iraq occupation’s failures. But by studying the missteps, it can understand the paradigm that rose and fell in Iraq, and can do better. The nation learned from the Vietnam War to develop a variety of reforms.258 Those Vietnam War lessons served the nation fairly well for thirty years, notably in the Gulf War. Learning the right lessons from the Iraq occupation would be the best hope for a similarly long interval of less disastrous interventions ahead.

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257 That is, both the Department of Defense Inspector General and the Government Accounting Office should have high-visibility arms expected to follow the military during wars and occupations.

258 These ranged from a larger role for Congress in making considered decisions on commitments and wars, to the “Powell Doctrine” of going in only when ready to use overwhelming military force, based upon reserves.