Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed

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Abstract

Promoting the rule of law in Afghanistan has been a major U.S. foreign policy objective since the collapse of the Taliban regime in late 2001. Policymakers invested heavily in building a modern democratic state bound by the rule of law as a means to consolidate a liberal post-conflict order. Eventually, justice-sector support also became a cornerstone of counterinsurgency efforts against the reconstituted Taliban. Yet a systematic analysis of the major U.S.-backed initiatives from 2004 to 2014 finds that assistance was consistently based on dubious assumptions and questionable strategic choices. These programs failed to advance the rule of law even as spending increased dramatically during President Barack Obama's administration. Aid helped enable rent seeking and a culture of impunity among Afghan state officials. Despite widespread claims to the contrary, rule-of-law initiatives did not bolster counterinsurgency efforts. The U.S. experience in Afghanistan highlights that effective rule-of-law aid cannot be merely technocratic. To have a reasonable prospect of success, rule-of-law promotion efforts must engage with the local foundations of legitimate legal order, which are often rooted in nonstate authority, and enjoy the support of credible domestic partners, including high-level state officials.

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Upon assuming office in January 2009, U.S. President Barack Obama demanded a dramatic policy shift in Afghanistan. Government corruption and lawlessness were fueling the Taliban insurgency. State courts sought rents rather than justice. Obama promised a new approach to halt the steadily deteriorating security situation, bolster the state's failing legitimacy, and reverse the Taliban's striking resurgence. Promoting the rule of law and ending the justice vacuum would be at the center of U.S. policy, along with military force.[1]

Advancing the rule of law constituted a hallmark of U.S. counterinsurgency. The official policy declared, "Justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited."[2] In one sense, the Obama administration had identified a central truth; post-conflict state-building constitutes a major domestic and international endeavor with profound transnational security implications.[3] Establishing a viable state justice sector is vital to the overall success or failure of state-building efforts.[4]

The Obama administration failed to understand the consequences of legal pluralism, in which "two or more legal systems coexist in the same social field," in its approach to advancing the rule of law, however.[5] There never was a justice vacuum in Afghanistan.[6] Nonstate justice, particularly the local community dispute resolution mechanisms known as jirgas and shuras, maintained legal order in most of the country.[7] Simultaneously, Taliban justice began successfully asserting itself against the state in many places, not merely filling a void.

The state-building endeavor in Afghanistan has constituted a major U.S. foreign policy and national security priority for more than a decade.[8] The rebuilding effort received an extraordinarily high-level of international support. In fact, the Afghan state depended on U.S. support to undertake even its most basic of functions, such as maintaining police, courts, and the military.[9] In the justice sector, roughly 90 percent of funding came from foreign sources, most notably Western donor-states and international institutions such as the United Nations Development Program (UNDP).[10] The Obama administration not only continued the George W. Bush administration's efforts to bolster Afghanistan's state justice system, but dramatically increased funding to judicial

institutions. This funding increase ignored that similar initiatives had achieved little in the past. Despite spending billions, decades of experience with post-conflict state-building, and a comprehensive review of the U.S. approach to Afghanistan, decisionmakers still failed to craft a policy response that accurately conceptualized the complex legal landscape as well as reflected the long-standing cultural and religious foundations of legitimate state legal order.[11] At the same time, U.S. policymakers rationalized or remained in denial about Hamid Karzai regime's disinterest in promoting the rule of law.[12] These decisions had major consequences for state-building in Afghanistan. The Taliban's legal system continues to gain ground even as the Obama administration has drawn to a close and President Donald Trump has taken office.[13] President Trump and the larger international community will be forced to grapple with the challenges posed by the conflict in Afghanistan and by conflict-prone states worldwide, such as Syria, Libya, and South Sudan.

This article argues that U.S. assistance to Afghanistan has done little to advance the rule of law and in certain instances has even been counterproductive.[14] It fills an important gap in the literature by examining what was done programmatically and by analyzing the assumptions and theories behind those programs.[15] The article also offers insights for current and future efforts to advance the rule of law after conflict and investigates whether promoting the rule of law can offer a credible avenue for counterinsurgency.

U.S. engagement from the intervention in late 2001 through to the election of President Karzai's successor in 2014 and the drawdown of international forces in Afghanistan forms a compelling case study because the shortcomings of U.S. efforts were real, not merely a product of the environment. Therefore, this article looks at U.S. rule-of-law initiatives systematically over the arch of large-scale U.S. engagement. It also surveys the Afghan justice sector holistically through a focused, structured comparison of major U.S. rule-of-law programming over time.[16] The research presented here draws upon extensive primary and secondary sources, as well as in-country fieldwork conducted in 2009 and 2014 along with numerous telephone interviews. It examines U.S. engagement with Afghanistan's state justice sector, which has received the bulk of scholarly attention so far, but also with the nonstate legal systems that settle the vast

majority of legal disputes.[17] Afghanistan constitutes a crucial test case for international state-building efforts as well as a rich source of "lessons learned" for policymakers.[18]

The article is divided into four major sections. The first section examines the complex, highly pluralistic legal landscape before and during U.S. judicial state-building endeavors in Afghanistan. Although the state legal sector has been the primary recipient of U.S. assistance, most disputes in the country are still settled outside the state courts.[19] Nonstate justice is essential for understanding the overarching structure of Afghanistan's legal order. The second section examines the major U.S. rule-of-law programs funded by the U.S. Agency for International Development (USAID), the Department of State, and the Department of Defense from 2004 to 2014. The third section analyzes the strategy, assumptions, and theory that underpinned U.S.-funded judicial state-building projects. It argues that, examined comprehensively, U.S. efforts to advance the rule of law during both the George W. Bush and Barack Obama administrations failed to achieve meaningful progress because their initiatives consistently reflected a deeply flawed set of assumptions. The fourth section examines the insights from U.S. efforts to promote for rule of law both for Afghanistan itself and for post-conflict judicial state-building more broadly. It highlights the need for swift action after conflict, reforms to the U.S. assistance oversight and implementation process, and policy approaches that address the justice sector holistically and maintain an overarching commitment to democracy and the rule of law.

A Crowded Legal Landscape

Afghanistan's origin is conventionally dated to 1747. Judicial state-building had formed a major state priority from the late nineteenth century, but state power hinged upon relationships with religious and tribal authority.[20] The most effective form of legal order was not state law. Rather it was Pashtunwali,[21] a nonstate legal code that served as both "an ideology and a body of common law which has evolved its own sanctions and institutions" implemented by Pashtuns through jirgas and shuras for non-Pashtuns.[22] All legitimate state-sponsored legal orders in Afghan history have been grounded in a combination of state performance, Islam, and tribal approval. Slowly but surely, the

central government's state-building made progress and the country enjoyed domestic tranquility, albeit against a backdrop of low levels of economic development, until a communist coup toppled the regime in 1978, plunging the country into decades of civil strife under communist and then mujahideen rule.[23] Eventually the Taliban seized control. During the mid-1990s, the Taliban imposed a harsh, but effective state legal order based on religious authority with acquiescence from tribal justice authorities.[24] Although the Taliban enjoyed firm control domestically, foreign policy decisions proved the regime's undoing. Most notoriously, the Taliban regime harbored the perpetrators of the September 11, 2001, terrorist attacks against the United States. Shortly thereafter, a major international effort in support of the Northern Alliance, a preexisting domestic military front that opposed the regime, toppled the Taliban in late 2001.

The Afghan people were ready for a fresh start that promised law and order coupled with democratic accountability.[25] From the beginning, however, the institutional arrangements of governance were not particularly conducive to the rule of law. Karzai and his allies stressed the importance of a strong, independently elected executive to bring order, peace, and stability—a vision institutionalized in the 2004 constitution. Establishing a presidential system does not necessarily preclude democratization or development of a state bound by the rule of law.[26] Executed in accordance with the law and subject to legal and democratic accountability mechanisms, concentrated state authority can "allow the community to deploy that power to enforce laws, keep the peace, defend itself against outside enemies, and provide necessary public goods."[27] Excessive consolidation of state power in one person, however, can facilitate authoritarianism, undercut democratic pluralism, and circumvent legal accountability.[28]

The international community, and particularly the U.S., bears significant responsibility for these poor institutional choices. U.S. policymakers strongly backed Karzai as Afghanistan's interim leader and then president based on the flawed assumption that doing so would ensure stability and smooth bilateral relations.[29] They also agreed to deny any meaningful power for provincial governors and allowed the president plenary power over their appointment.[30] U.S. decisionmakers acquiesced to Karzai's selection of a convoluted and unrepresentative system for parliamentary elections that offered strong disincentives for the creation of political parties so vital for

the representation of diverse social groups in a democratic polity.[31]

After the Taliban's collapse in late 2001, the state legal system was in shambles. Although there was some progress in rebuilding the justice system's formal components, the Karzai regime, which was dominated by Northern Alliance warlords, did not seek to institutionalize the rule of law. In contrast, it behaved like a "vertically integrated criminal organization . . . whose core activity was not in fact exercising the functions of a state but rather extracting resources for personal gain."[32] The regime prevented rivals from seizing control of the state and its lucrative patronage networks by bending the Afghan state's pliant institutions to serve their interests. In theory, state legal order was based on codes and legislation, and rooted in the civil law tradition. The reality was quite different. Although the constitution proclaimed judicial independence, the courts were firmly under the executive's control; highly susceptible to outside influences; and widely seen as corrupt, predatory, and rent seeking.[33]

The dismal performance of Afghanistan's state courts bolstered nonstate justice systems' appeal.[34] Hard data are rare, but it is estimated that 80 to 90 percent of legal disputes were addressed by nonstate justice systems, most often rooted in tribal law.[35] Most Afghans overwhelmingly preferred the nonstate justice offered by shuras and jirgas over that meted out by the new regime.[36] Nonstate actors derive their authority largely from sources beyond the state, which often allows them to maintain a significant degree of autonomy.[37] When powerful enough, as in Afghanistan, they can function as state-building spoilers.[38]

Although jirgas and shuras remain the default dominant forms of dispute resolution for many Afghans, tribal law codes, such as Pashtunwali, should not be idealized. Pashtunwali remains a harsh system of justice with few human rights protections.[39] Reflecting a long history of weak central rule, it relies on the legal principle of self-help to remedy violations. Self-enforced remedies for tribal law violations are notoriously difficult to extract proportionately and frequently spur further violence. Tribal law in Afghanistan is also systematically biased against women. As a matter of law, women are regulated to an intrinsically subordinate position, and forced marriage can even be used as compensation.[40]

The post-2001 era also saw challenges to the state legal order from warlords and the

Taliban. Both the Bonn Agreement, which outlined the parameters of the post-conflict transition, and the political party law, which regulated the structure of organized political completion, envisioned the disarmament of warlords who had been largely suppressed by the Taliban. In reality, the Karzai government and international forces relied on "pro-government or more accurately 'anti-Taliban' warlords to maintain order at the local and regional level."[41] In many cases, these were the same strongmen whose previous rule had sparked such widespread anger that the Taliban became a comparatively appealing alternative in the 1990s. Under the post-2001 regime, warlords reemerged and focused on structuring the political and legal order in their areas.[42] Shortly thereafter, a network of warlords became a long-term, destructive fixture of the Afghan political scene.[43]

Despite losing power in 2001, the reconstituted Taliban quickly established itself as the state's fiercest judicial rival as early as 2003. Taliban justice became a centerpiece of a full-blown insurgency by 2006.[44] Effective legal order constituted the core of the Taliban's political program, underpinned their claim to be Afghanistan's legitimate rulers, and highlighted the state justice system's failures. Taliban insurgents actively contended with the state legal system, especially outside the capital. The Taliban operated "a parallel legal system that is acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring."[45] Moreover, their justice system was "easily one of the most popular and respected elements of the Taliban insurgency by local communities, especially in southern Afghanistan."[46] Taliban justice sought to provide what the state justice system did not: predictable, effective, legitimate, and accessible dispute resolution.

In short, U.S. efforts to promote the rule of law in Afghanistan never occurred in a justice vacuum but rather in an ever-more crowded, highly contested and violent space. Efforts to promote the rule of law would have to convince a skeptical population, engage with entrenched tribal justice mechanisms, and ultimately defeat armed actors overseeing a parallel legal system. Although certainly not impossible, this task was serious challenge. The U.S. policy response, however, was strikingly simplistic.

Promoting the Rule of Law in Practice

The U.S. espoused an interest in advancing the rule of law, but this goal was secondary to bolstering the Karzai regime, which lacked a commitment to either democracy or the rule of law. Karzai's administration prioritized retaining power, collecting rents, and exercising authority unconstrained by legal requirements.[47] U.S. policymakers were so fearful that the Taliban might return to power that they were not prepared to meaningfully challenge the regime's ever increasingly anti-democratic tendencies, corruption, and lawlessness.

Paradoxically, despite the justice sector's extreme dependence on foreign aid, international actors' ability to promote the rule of law in Afghanistan was heavily circumscribed. In theory, aid dependence should increase the state's reliance on the continued aid flows and, therefore, on donors. This dynamic would seem to provide major donors with meaningful influence over recipient state's decisions and actions. Donors, however, dislike being seen as dictating state behavior.[48] Program implementers in Afghanistan faced structural constraints that hindered their ability to promote the rule of law. Donors assess implementers based on their ability to execute stipulated programming deliverables, which almost always involves working with state institutions. This dynamic demands state consent regardless of whether officials are committed to programmatic principles. Programs that fail to execute are viewed poorly by donors and endanger future contracts.[49] Program implementers have strong incentives to collaborate with deeply corrupt states institutions, provided their leaders are willing to at least pay lip service to rule-of-law ideals. These problems were further compounded by Afghanistan's steadily deteriorating security situation, which limited the areas and types of work that could be done at an acceptable level of risk.

Even when Italy was technically the justice sector "lead nation" from 2002 to 2006, the United States was the most influential international actor.[50] As is shown below, the United States funded a multitude of major initiatives through USAID, the State Department, and later the Defense Department totaling more than $1 billion on more than sixty programs.[51] Not dissimilar to the broader U.S. engagement in Afghanistan, each agency pursued its own programmatic priorities that were not necessarily coordinated with other agencies' goals or even broadly consistent.[52]

USAID - AFGHANISTAN RULE-OF-LAW PROJECT, (2004-09)

USAID became the first major provider of rule-of-law assistance with the creation of the $44 million Afghanistan Rule-of Law (AROLP) program. Checchi Consulting operated AROLP from October 2004 to July 2009. The initiative focused on (1.) "strengthening court systems and the education of legal personnel," (2.) reforming the legislature, (3.) improving access to justice, and eventually (4.) engaging with the informal sector. Reform of the commercial court as well as the promotion of human rights and women's rights under Islam were also prioritized.[53] Capacity building formed the cornerstone of programming. The program instructed more than 100 judges as well as approximately 60 law professors and 100 university administrators.[54] AROLP produced legal materials and sought to improve the courts' administrative capacities. As with the vast majority of rule of law assistance, it was highly technocratic and state-centric. In its later years, as state-focused initiatives were already beginning to fall short of expectations, AROLP displayed some interest in the nonstate justice sector. Programmers believed that "the linkage between the formal and informal justice sectors [is] essential to improving the rule of law in Afghanistan."[55] AROLP sponsored research on nonstate justice and tried to increase citizens' awareness of the state justice system along with "their legal rights and responsibilities under the Constitution of Afghanistan."[56] AROLP also advocated for "a national policy on state relations with informal justice mechanisms."[57]

While AROLP worked with various justice-sector institutions, the Supreme Court was its most important partner. The Supreme Court's consent was essential for most programming, but the judiciary was not independent in practice.[58] As a result, Supreme Courts judges had little incentive or ability to foster the rule of law, particularly if it involved challenging executive power. The Supreme Court consistently upheld executive authority regardless of how dubious the exercise of that power, including in conflicts over the scope of executive power, election administration, and the removal of presidential appointees.[59] AROLP did little to address structural problems in the Afghan justice sector or constructively engage the nonstate sector. This dynamic is evident based on its chosen evaluation criteria: (1.) Creation of a "national policy on the informal justice sector" and (2.) Usage of state courts as reflected in survey results.[60] A nonstate justice policy was

developed by domestic and international actors, marking the first official recognition of nonstate justice authorities. Despite formal agreement at the ministerial level, the policy did not reflect a real consensus because it relied on ambiguous language to paper over major differences and did not involve any serious engagement with nonstate judicial actors.

The second evaluation criterion was equally problematic. First, projects were predicated on the simplistic and inaccurate belief common to rule-of-law programs that informing people about the state courts and their rights will improve the rule of law.[61] Second, the program sought to channel people to state courts regardless of the consequences. Courts were initially underresourced, both financially and in terms of human resources. They were also slow, expensive, and possessed limited enforcement capacity. Worse, they were often corrupt, predatory, and rent seeking.[62] It made little sense to channel cases into the state justice system regardless of the quality and capacity of its courts. The first major USAID rule-of-law program did next to nothing to advance the rule of law.

USAID RULE-OF-LAW SUCCESSOR PROGRAMS, (2010-14)

By 2009, promoting a just, viable legal order was increasingly seen as a potent weapon in the fight against an increasingly powerful Taliban insurgency that drew strength from the Afghan state's immense corruption.[63] USAID funded two related rule-of-law programs. Rule of Law Stabilization-Formal Component (RLS-Formal) sought to "develop[] a justice system that is both effective and enjoys wide respect among Afghan citizens is critical to stabilizing democracy and bringing peace." [64] Rule of Law Stabilization-Informal Component (RLS-Informal) shared a similar premise as it aimed "to 'promote and support the informal justice system in key post-conflict areas' as a way of improving stabilization."[65]

Despite AROLP's inability to advance the rule of law, international development contractor Tetra Tech DPK was chosen to implement a successor program, RLS-Formal from May 2010 to September 2014 at a cost of more than $47,500,000. The program's goals were strikingly similar to AROLP. RLS-Formal emphasized "capacity building" of

judicial actors and administrators as well as improving legal education and raising "public awareness of legal rights and the broader legal system."[66] RLS-Formal supported extensive training and technical assistance along with the development of educational materials and strategic plans. There were also public information campaigns and attempts to strengthen public outreach capacity of the Supreme Court and the Ministry of Justice. Most participants viewed the trainings positively,[67] but RLS-Formal faced chronic difficulties. The program emphasized "improve[ing] the public image and use of the formal judiciary,"[68] but improving public perception risked enabling rent seeking rather than improving the judiciary. RLS-Formal ignored structural issues with the underlying political economy of the Afghan justice system, including the lack of judicial independence and endemic corruption. As before, public service announcements encouraging more people to use a highly corrupt justice system did little to improve the rule of law and threatened to further undermine Afghans' faith in the judicial system.

Programming, again, depended on consent from the institutional actors responsible for many of these problems. These intuitional actors had little incentive to facilitate changes that threatened the larger political and legal order. Tetra Tech's final report is strikingly forthright. After noting major challenges with corruption and "weak political support for rule of law reforms," the report explains "The most difficult barriers to overcome during project implementation, and the barriers that threaten the sustainability of project initiatives, are a lack of willingness among counterpart institutions to support and adopt reforms, and a failure to allocate sufficient funds to maintain quality trainings for current and future justice sector personnel. Leadership at counterpart institutions continues to demonstrate a lack of commitment to justice sector reforms by delaying the approval of tools and technologies that will increase the efficiency and transparency of courts."[69]

The Supreme Court was particularly problematic because it received and oversaw external aid but lacked a commitment to the rule of law. Frequently, "when the Supreme Court was asked to approve new initiatives or reforms, the institution tended to make approval contingent on future events that never happened."[70] Tetra Tech determined that the Supreme Court's attitude reflected a clear "reluctance to embrace new processes and procedures that increase the efficiency, transparency, accountability, and fairness in the

justice sector."[71] Thus, RLS-Formal initiatives had little prospect for sustainability or fostering meaningful institutional change.

Although Tetra Tech implemented the program, USAID deserves the most strident criticism. It designed the program and continually displayed almost willful blindness to political reality. As the Office of the Special Inspector General for Afghanistan Reconstruction (SIGAR) notes, "USAID nearly doubled funding, even though it knew the Afghan Supreme Court was not interested in funding or otherwise sustaining those activities."[72] Programming never meaningfully engaged with the long-standing pillars of legitimacy in Afghanistan: religion, cultural norms, and provision of public goods. Instead, the focus was on public relations. RLS-Formal sought to improve the judiciary's image based on the mistaken idea that the potential users lacked sufficient information about state courts, but Afghans already recognized that courts were not credible dispute resolution forums. Neither judicial performance nor public perception of the judiciary improved.[73] Avoidance of the courts was entirely rational. Even if the quality of justice had improved through training or administrative reform, nothing in the program addressed the judicial system's inability to enforce its judgments or prevent outside interference.

By 2010, policymakers increasingly viewed nonstate justice as a more productive avenue for international engagement. This belief was the animating idea behind RLS-Informal. The nearly $40 million Checchi-administered RLS-Informal program operated from 2010 to 2014. RLS-Informal emphasized "access to fair, transparent, and accountable justice for men, women, and children by (1) improving and strengthening the traditional dispute resolution system, (2) bolstering collaboration between the informal and formal justice systems, and (3) supporting cooperation for the resolution of longstanding disputes."[74] It sought to improve the quality of nonstate justice and to strengthen linkages between the state and nonstate justice systems. The program's more pressing goal, however, was to supplement and consolidate U.S.-led counterinsurgency efforts. RLS-Informal envisioned filling the supposed "justice vacuum" in territories that had "been 'cleared and held' by the military and the Taliban 'courts' removed."[75] Localized nonstate justice mechanisms were to be strengthened, or in some instances created, to prevent "'teetering' areas from reverting back to Taliban justice and

influence."[76] RLS-Informal engaged with nonstate judicial actors in targeted areas. Yet, the program largely echoed work done for state actors and drew on the same highly suspect template. Capacity building was a major focus for elders and other informal-justice actors. Trainings addressed state and Sharia law as well as administrative processes. Beyond training, RLS-Informal sought to "encourag[e] women's participation in TDR [traditional dispute resolution] processes, implement[] a program of public outreach, and build[] networks of elders."[77]

RLS-Informal attempted to engage with the long-standing pillars of legal legitimacy by working within the tribal system. It sought to capitalize on the perceived desire of many local actors to increase their social standing through greater knowledge of Islam (and to a lesser extent state law), and the ability to access international assistance to bolster their status in the community. [78] From the donors' perspective, this dynamic could allow them to more effectively provide order. The external evaluation does identify some modest changes in response to outside assistance,[79] but local justice actors certainly did not change their approach to state justice. Although RLS-Informal sought to increase linkages between state and nonstate justice, the flow was one directional. More cases were referred to the nonstate system, but referrals to state courts did not increase.[80] This dynamic reflects the citizenry's continued low regard for state courts.

Strengthening nonstate justice raised even more logistical issues than the state system. A judge may be corrupt or unwilling to engage program implementers, but at least it is clear who is and is not a judge. When engaging tribal or religious authorities, participant selection was an inherently fraught process. Program staff genuinely attempted to understand each locality. Nevertheless, grasping local dynamics and how international assistance would subsequently influence communal relations far exceeded their technical capacity. Although reports cast local participants as motivated solely by a desire to help the broader community, often they were more motivated by international assistance's ability to enhance their influence.[81] Equally troubling, the program lacked a clear, coherent approach for navigating the tensions between state law, including international human rights norms, and Sharia law. Program decisions were inevitably somewhat ad hoc and based on short-term calculations. While RLS-Informal reflected some knowledge of local realities, insurgents almost invariably knew areas better.

International intervention occasionally even made local tensions worse and resolution of long-standing disputes more difficult.[82]

Counterinsurgency was the U.S. government's top priority. RLS-Informal envisioned strengthening the nonstate justice sector to undercut the Taliban's justice system. Simple enough in theory, but it proved deeply challenging and often counterproductive. First, RLS-Informal laid the groundwork for counterinsurgency efforts on the shaky foundation of the local authorities most willing to collaborate with the U.S. rather than the most influential religious and tribal authorities. Therefore, program achievements inherently depended on outside support and quickly evaporated once international support was gone. Second, RLS-Informal's short-term approach generated pressure for quick wins and demonstrable metrics, but even these were often in short supply.[83] Third, the approach assumed a nonexistent justice vacuum were new dispute-resolution efforts could thrive. If there were truly a void, then RLS-Informal's efforts to strengthen or create new nonstate dispute resolution mechanisms would have made sense. In reality, tribal structure, warlords, or the Taliban underpinned order at the local level. RLS-Informal's favored local representatives were often not the most prominent community members. Whatever authority these individuals had largely reflected international assistance rather than local standing. Shuras set up by international actors could be destabilizing by distributing large amounts of external funding as well as empowering individuals through military force that may not enjoy substantial popular support. Interviewers who worked on internationally funded nonstate justice programs even suggested that it was not uncommon for individuals with access to international support using aid and the threat of U.S. military force to pursue personal agendas and vendettas.[84]

RLS-Informal failed to understand that providing an alternative justice venue alone was insufficient to counter the Taliban. In many cases, Taliban justice was comparatively well regarded, particularly in the Pashtun heartland.[85] The Taliban actively sought to prevent local communities from using state courts or U.S.-backed dispute resolution forums. Taliban issued "night letters" threatening to kill all individuals and the entire families of those who collaborated with the international programs or the Afghan government. Where villages were under the protection of international military forces,

the Taliban promised to retaliate once those troops left."[86] RLS-Informal could not counter the Taliban's credible threats of immediate and long-term violence.

USAID INITIATIVES: IMPLEMENTATION VERSUS PROGRAM DESIGN

Thus far this section has criticized program implementation, but these issues reflect more fundamental problems with USAID management and oversight. Invariably, USAID sought to control defining the scope and content of projects as well as their implementation. This tendency to micromanage was reflected in contracts that "specif[ied] precisely what the U.S. contracting partners are to do at every step of the way throughout a project."[87] The level of centralized control in the Afghanistan contracts was stunning, particularly given the fluidity of the situation and the need for a nuanced, localized approach when trying to engage local communities. In addition to USAID's inherent contractual power to modify programming, Tetra Tech and Checchi were required to submit elaborate performance-monitoring plans for approval. USAID's drive toward ever-greater quantification and control stemmed largely from the need to establish to the U.S. Congress exactly how funding was spent and what had been achieved. Yet USAID increasingly micromanaged programs even as its in-house capacities had been largely "hollowed out."[88] This vicious cycle was particularly evident in Afghanistan because the extensive demands of contracting generated a general shortage of qualified contractors.

STATE DEPARTMENT JUSTICE-SECTOR SUPPORT PROGRAM, (2005-14)

The U.S. Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) served as the lead agency tasked with coordinating U.S. rule-of-law assistance in Afghanistan. Largely implemented by Pacific Architects and Engineers (PAE), the State Department Justice Sector Support Program (JSSP) was the "primary capacity building vehicle" for judicial state-building.[89] The JSSP reflected grand ambitions with $241 million in expenditures from 2005 to 2014. It was the largest single rule-of-law program in Afghanistan. JSSP featured three major components.

Component one focused on trainings for regional justice-sector officials, such as judges, prosecutors, and defense attorneys. Component two concentrated on establishing a case management system. The third component emphasized building the administrative and technical capacity of relevant ministries.[90]

The JSSP offered training, capacity building, and technical assistance to the Attorney General's Office, the Ministry of Justice, the Ministry of Women's Affairs, the Interior Ministry, the Independent National Legal Training Center, and the Supreme Court. Staff numbers were significant. In 2011, for example, the JSSP employed "93 Afghan legal experts, 65 American advisors, and over 100 Afghan support staff."[91] Training was undertaken on a massive scale with "a grand total of over 300 JSSP courses training over 13,500 students."[92] Training occurred in all thirty-four provinces for judges, prosecutors, defense attorneys, and other legal personnel. By the end of 2014, the JSSP had developed and implemented a comprehensive case-management system active in eighteen provinces featuring data on 104,000 cases.[93] The program provided assistance with legislative drafting and law implementation. It also created new institutions, notably the Attorney General's Anti-Corruption Unit, the Afghanistan Independent Bar Association, and the Ministry of Justice's Planning Directorate.

Despite the JSSP's broad reach and substantial funding, at its core the JSSP was a straightforward judicial capacity building program that invested heavily in the state justice sector. Although larger in scope, both the means and ends of the JSSP were strikingly similar to those of USAID's AROLP and RLS-Formal programs. In terms of results, comprehensive audits of the JSSP have shown no demonstrable evidence that the program advanced the rule of law or even met its own programmatic objectives.[94] Despite extensive training, no key justice-sector institutions displayed a meaningful commitment to uniform application of the law or a willingness to follow it. New laws were passed but were not consistently enforced. All major justice-sector institutions remained firmly under the control of "one of the most corrupt regimes on the planet."[95] The State Department cast the Afghan state's failure to address corruption as a failure of "political will" rather recognizing that systematic corruption was the system itself. The JSSP consistently faced major management, oversight, and implementation issues, including a series of "poorly designed deliverables," which in turn led to the actual deliverables

produced being "useless."[96]

DEPARTMENT OF DEFENSE RULE-OF-LAW FIELD FORCE-AFGHANISTAN, (2010-14)

The U.S. military became directly involved in efforts to promote the rule of law in Afghanistan through the Rule of Law Field Force-Afghanistan (ROLFF-A) initiative under the auspices of the Combined Joint Interagency Task Force-435. ROLFF-A operated from September 2010 to February 2014. The Department of Defense spent approximately $24 million subsidizing the state justice sector. ROLFF-A sought to "provide essential field capabilities and security to Afghan, coalition and civil-military rule of law project teams in non-permissive areas, in order to build Afghan criminal justice capacity and promote the legitimacy of the Afghan government."[97] The program sought to (1.) enhance human resources, (2.) construct justice infrastructure, (3.) increase public awareness and access to state courts, and (4.) improve physical security for judges and other judicial actors in ten provinces.[98]

Apart from the fourth priority, ROLFF-A's objectives were decidedly conventional. ROLFF-A attempted to strengthen the state justice system by working primarily with the Supreme Court, the Ministries of Justice and Interior, and the High Office of Oversight for Anti-Corruption. The program proclaimed neutrality regarding nonstate justice, "provided that dispute resolution is not administered by the Taliban or other insurgent groups."[99] Although the national government had yet to formalize its relationship with nonstate justice actors, the program sought to engage "Afghan Justice Sector actors to build linkages between the two systems."[100]

ROLFF-A was fully integrated within larger stability and counterinsurgency efforts that stressed "establishing the rule of law is a key goal and end state."[101] As the program's commander, Brig. Gen. Mark Martin, explained, ROLFF-A sought to "establish rule-of-law green zones."[102] Over time a "hub-and-spoke linkage between green zones in key provinces and districts" would emerge, which in turn would help "create a system of justice at the subnational level."[103] In other words, the rule of law was conceptualized as a cornerstone of broader efforts to build the state from the bottom up,

while failing to acknowledge just how ambitious, optimistic, and ahistorical this belief was. After all, why would nonstate actors suddenly embrace the state legal system that showed no sign of improving and at the cost of potential insurgent retaliation? The U.S. military interventions never grappled with the fact that a hub-and-spoke system made little sense if the state justice sector failed to simultaneously improve. Furthermore, as the rule of law takes decades to establish even under favorable circumstances, it was naïve to believe that it could be instituted through a short-term surge in forces.[104]

ROLFF-A faced a multitude of serious issues. Its programming incorrectly assumed that stabilization and rule-of-law programming were functional equivalents. As with the RLS-Informal initiative, ROLFF-A sought to build stability on quick wins and demonstrable outputs to fill a nonexistent justice vacuum. The program's approach was at odds with a legal landscape defined by ongoing, fierce combat and its achievements remain speculative. The Defense Department still does not know how much money was spent.[105] Ironically for a military initiative, insecurity undermined the program. U.S. military forces generally could not protect against Taliban attacks in the short term, let alone once programming ceased. The mere presence of the military could incite violence as local actors scrambled to acquire external resources.

The overt militarization of rule-of-law assistance and its use in counterinsurgency generated additional problems. First, the assumptions underpinning counterinsurgency operations were dubious. There is a "surprisingly weak evidence base for the effectiveness of aid in promoting stabilization and security objectives" in Afghanistan and more generally.[106] The strategy reflected a unilateral decision by U.S. policymakers rather than a cooperative strategy with the Afghan regime.[107] Afghan government officials desired military support to defeat the Taliban but were decidedly disinterested in furthering legal reform.

Second, the program reflected some notable misunderstandings and misperceptions. The Department of Defense consistently stressed that the nonstate actors it engaged were authentic, traditional, and organic. In reality, "authority over life and death was simultaneously located in other institutions and actors, namely external interveners" rather than nonstate justice actors, who largely depended on external forces for their authority.[108] Moreover, the enforcement of "rule of law green zones" hub-and-spoke

system relied on the prospect of external force. State courts had little ability to implement their rulings. Even more troubling, the thoroughly corrupt, deeply compromised state judicial institutions could not provide stability. Even if all areas were cleared and every insurgent defeated, the state would still lack a legitimate legal order. There was no hub to build spokes around. ROLFF-A starkly highlights external actors' limited capacity to advance the rule of law even when overtly backed by military force. Even in the best of circumstances, establishing the rule of law takes time. Thus, a rule-of-law green zone means little unless it exists for years and is linked to powerful domestic constituencies committed to the rule of law.

PROGRAMMATIC PROGRESS AND CHALLENGES

Although the programs detailed above achieved a few tactical gains and helped build some state judicial infrastructure, no U.S. program meaningfully advanced the rule of law in Afghanistan. Each faced significant challenges in a complex, legally pluralist environment with serious security concerns. The biggest problem, however, was that key state actors were not committed to the rule of law, and there was little real demand for the assistance. Without high-level state efforts to reduce corruption, improve judicial performance, and engage constructively with nonstate tribal and religious actors, judicial state-building assistance would always achieve little regardless of expenditure or program design. Indeed, when efforts were made to "investigat[e] corruption, they were rebuked by Karzai's officials for misunderstanding the nature of patronage networks that served to support the government."[109] Yet, U.S. policymakers chose to keep investing in efforts they knew were not working. Policymakers, donors, and implementers embraced wildly optimistic assumptions to rationalize the perpetuation of failing programs and policies. U.S. decisionmakers made clear policy and programmatic choices that had profound consequences.

Conceptualizing International Judicial State-Building in Afghanistan

When the Taliban regime collapsed, the legal system displayed a high degree of legal pluralism. Yet, most disputes were still settled based on tribal codes. Initial security

arrangements outside the capital were predicated on alliances between the state and armed strongmen. U.S. assistance reflected the optimistic and ultimately unrealistic idea that these tacit alliances would become less necessary as state courts gained capacity and authority. While aid focused on bolstering state justice-sector institutions for more than half a decade during the Bush administration, Obama administration policymakers subsequently determined that subsidization alone was insufficient.

In 2009, the United States' policy rhetoric began to shift, but its initiatives remained focused around a litany of highly repetitive trainings and capacity-building projects. Policy reflected a combination of political expediency and security concerns that bore little resemblance to the grandiose claims about ensuring the rule of law and promoting access to justice for ordinary Afghans. The U.S. consistently revamped its official approach. Still, as highlighted above, improvement always remained elusive. Yet while programs were problematic, the overarching issue was strategy and the attempt to build the rule of law in partnership with a regime that was certainly interested in passing regulations for society at large but had no interest in being bound by the law itself, ending impunity, or promoting the rule of law. After all, "even the most formal, minimalist conception of the rule of law requires a normative commitment to the project of the rule of law" by state officials at the highest level.[110] Overall, the Karzai regime did not view itself as bound by its law and or view the law as a meaningful restraint on its behavior.

STRATEGIES FOR ADDRESSING THE NONSTATE JUSTICE SECTOR

The previous section highlighted the most important programmatic initiatives undertaken with a goal of advancing the rule of law in Afghanistan. This section focuses on the overarching strategies employed by U.S. policymakers to further this objective. Even if unstated, there are five main strategies for conceptualizing engagement between the state and nonstate systems in highly legally pluralist settings such as Afghanistan: (1.) Bridging, (2.) Harmonization, (3.) Incorporation, (4.) Subsidization, and (5.) Repression. These strategies are conceptually distinct though by no means mutually exclusive or hermetically sealed in practice.

Success can never be guaranteed by strategy alone, but certain environments favor

certain strategies. Bridging approaches aim to allocate cases between the state and nonstate justice systems as appropriate given relevant state law and participant preferences. Harmonization seeks to transform nonstate justice principles and outputs to be consistent with the state system's stated core values in key areas, most frequently, nonstate actors' treatment of women.[111] Under incorporation, nonstate justice becomes state justice as those venues are placed under the authority of state actors. Incorporation can take the form of religious or customary courts or the designation of nonstate justice actors as courts of first instance. Alternatively, decisions from the nonstate system could be tentative subject to appeal or ratification by state officials. Subsidization seeks to increase the capacity, performance, and popularity of state justice. It can take a variety of forms. Certain core techniques, nevertheless, recur across settings, most notably legislative reform, capacity building, physical infrastructure construction, supporting symbolic representation, and increased public engagement. In contrast, repression aims to eliminate the state's judicial rivals. When the state is strong enough, this can take the form of simply prohibiting nonstate justice forums. Almost invariably, however, repression entails significant violence. Repression can be essential when the state faces an existential threat from nonstate justice actors, particularly when linked to an armed insurgency, but it is invariably fraught with risks of reciprocal violence.

SUBSIDIZATION STRATEGY, 2002-08

Once U.S. rule-of-law promotion efforts in Afghanistan began in earnest in 2005, they focused overwhelmingly on subsidization. The vast majority of the country's judicial infrastructure had been destroyed during the conflict. Qualified legal professionals were scarce, and their training needs were daunting.[112] International assistance was a prerequisite for enabling most justice-sector organizations to function at all. Subsidization thus reflected a clear, compelling rationale: the state justice sector desperately needed improved human resources, training, supplies, and infrastructure. International aid was focused on building modern state institutions that acted in accordance with the rule of law. The subsidization approach was deeply embedded in nearly all judicial state-building efforts. The 2005-10 USAID-Afghanistan Mission's strategic objectives explicitly endorsed subsidization. It focused upon "build[ing]

capacity of the formal justice sector" by (1) "decreas[ing] obstacles to citizens accessing the formal justice sector"; (2) "increas[ing] professionalism of judicial sector personnel"; and (3) "strengthen[ing] the institutional capacity for lawmaking and technical drafting."[113]

The initial international efforts faced substantial criticism for allocating insufficient resources to state reconstruction.[114] Yet, Afghanistan received an immense amount of support relative to other contemporary peacebuilding missions, and its aid absorptive capacity was limited.[115] Merely increasing assistance does not guarantee improvement and often produces significant negative externalities. The rule of law takes decades to establish, and there is no area where more rule-of-law assistance would have clearly translated into better quality of justice or a state more committed to the rule of law.

Subsidization achieved little given its slow start, state disinterest, and poor strategic choices. These choices included failing to establish nationwide security during a period of relative calm, outsourcing security to warlords, and allowing consolidation of authority in the executive and a culture of corruption to flourish.[116] State officials generally cared little for U.S.-backed legal modernization plans. Moreover, the programmatic initiatives were decidedly uninspired. Assistance to Afghanistan exemplified a "breathtakingly mechanistic approach to rule-of-law development" focused on replicating "institutional endpoints" – an approach that has been widely discredited.[117] The pattern described by Thomas Carothers neatly captures Afghanistan's situation where programmers assessed "in what ways selected institutions do not resemble their counterparts in countries that donors believe embody successful rule of law—and then attempting to modify or reshape those institutions to fit the desired model. If a court lacks access to legal materials, then those legal materials should be provided. If case management in the courts is dysfunctional, it should be brought up to Western standards. If a criminal procedure law lacks adequate protections for detainees, it should be rewritten. The basic idea is that if the institutions can be changed to fit the models, the rule of law will emerge."[118] Outside investments in the state justice sector, however, produced no discernible progress towards the rule of law in Afghanistan.

In 2006, international actors began to express growing interest in Afghanistan's nonstate justice sector. Policy suggestions included bridging by the creation of mutually

constitutive institutional links between state and nonstate dispute resolution mechanisms, harmonization through attempts to ensure that nonstate dispute resolution forums act in a manner consistent with state law, and incorporation efforts to establish some sort of overarching system where jirgas and shuras would function akin to courts of first instance.[119] Although it was a growing area of interest intellectually, programming largely left the nonstate justice sector untouched throughout the Bush administration.

A Road Not Taken

By far the most thoughtful and compelling attempt to constructively engage with nonstate justice was not a U.S. initiative at all. Rather it was a major 2007 UNDP report, *Bridging Modernity and Tradition: Rule of Law and the Search for Justice*. The report forcefully advocated for a "hybrid model of Afghan justice" that would include "the creation of cost-effective ADR [alternative dispute resolution] and Human Rights Units alongside the state justice system. ADR Units would be responsible for selecting appropriate mechanisms to settle disputes outside the courtroom. This would include jirgas/shuras, Community Development Councils, and other civil society organizations. ADR mechanisms would handle minor criminal incidents and civil cases, while giving people a choice to have their cases heard at the nearest state court. All serious criminal cases would fall exclusively within the jurisdiction of the formal justice system. When ADR decisions are not satisfactory to the disputants, they can be taken back to the formal, state justice system."[120] The report, however, provoked "an angry and threatening response from Afghan judicial and state justice institutions."[121] Given the opposition of key Afghan political and legal elites, it is no surprise that the hybrid model never became official U.S. policy.

Yet, the report nonetheless proved influential. Ideas from the UNDP report were selectively harnessed by policymakers for numerous initiatives, including a series of U.S. funded pilot programs, the Defense Department backed projects that used nonstate justice mechanisms for counter insurgency discussed above, and the flawed 2010 "Draft Law on Dispute Resolution Shura and Jirga."[122] Each initiative, however, fell short of its goals.[123] The report offered a coherent policy vision, but to be implemented, let alone work effectively, the proposed hybrid model required strong support from the Afghan justice

sector and the regime more generally. There would need to be a serious commitment to building a more constructive relationship between state and nonstate justice actors as well as a broader commitment to reducing corruption and ending impunity. Absent these fundamental shifts, the hybrid model never really had a chance to succeed.

A COMPREHENSIVE, BUT INCHOATE APPROACH, 2009-14

President Obama pledged to defeat the insurgency and stabilize the Afghan state while avoiding an open-ended military commitment. Nearly all U.S. aid, including rule-of-law assistance, emphasized these objectives. The top U.S. military commander in Afghanistan, Gen. Stanley McChrystal, argued that effective counterinsurgency involved bolstering the quality and access to both state and nonstate justice mechanisms "that offer swift and fair resolution of disputes, particularly at the local level" to disrupt the Taliban and their justice system.[124] To achieve these goals, McChrystal believed that the international community had to "work with GIRoA [Government of the Islamic Republic of Afghanistan] to develop a clear mandate and boundaries for local informal justice systems."[125]

After a comprehensive policy review, Obama ordered an "Afghanistan surge" modeled on similar efforts to stabilize Iraq against insurgent advances. The president authorized 30,000 additional ground troops to stabilize the country, but these forces would begin to be withdrawn after eighteen months. Obama likewise dramatically increased civilian engagement efforts, including initiatives to promote the rule of law. In addition to a vast increase in funds, the administration roughly "tripled the total U.S. government civilian presence in Afghanistan from 300 to 1,000, overseeing additional thousands of contracted civilian implementing partners."[126] It also drastically increased subsidization of the state justice sector. Even after the drawdown, funding levels for rule-of-law programs remained well above pre-2009 levels. The administration demonstrated a willingness to try any strategy that might help defeat the Taliban insurgency, however implausible. Despite mounting evidence to contrary, the U.S. remained wedded to the "vacuum" theory of judicial state-building as a foundation of the U.S. government's rule-of-law assistance approach. For instance, the 2010 "Afghanistan and Pakistan Regional Stabilization Strategy" emphasized "Justice and rule of law programs will focus on

creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited with their own brutal form of justice.[127]

The U.S. strategy was largely agonistic whether Afghans sought, justice provided they eschewed Taliban courts. This approach to nonstate justice displayed admirable pragmatism compared to earlier efforts that emphasized replicating a Western-style judiciary. Yet, this agnostic approach was undermined because programs addressing the state justice system were still trying to do exactly that. With so many moving, highly contingent, and largely uncoordinated parts, the strategic end point was never clear. U.S. policymakers viewed nonstate justice mechanisms as instrumentally important to their overarching goals of counterinsurgency and stabilization. There was never a serious attempt, however, to engage with the three main pillars of legitimacy: cultural affinity, Islam, and provision of public goods, including forums for fair and equitable dispute resolution.

SIMULTANEOUS JUDICIAL STATE-BUILDING STRATEGIES

The Obama administration's transformative plans for Afghanistan were crystallized in the unified civil-military U.S. Foreign Assistance plan for 2011 to 2015.[128] The report explains "The principal focus of the U.S. rule of law effort is to reverse the public perception of GIRoA as weak or predatory by helping the Afghan government and local communities develop responsive and predictable dispute resolution mechanisms that offer an alternative to the Taliban shadow justice system. Assistance will be provided in support of Afghan efforts to strengthen the formal state justice system, stabilize the traditional justice system, and build a safe, secure, and humane civilian corrections system."[129]

Informal justice was explicitly linked to counterinsurgency efforts. The U.S. wanted to collaborate with preexisting nonstate actors but also "re-establish[] traditional dispute mechanisms" as part of broader efforts to counter the Taliban's parallel justice system.[130] The U.S. created nonstate dispute resolution forums albeit ones without the long-standing cultural and religious roots. This endeavor involved local research on nonstate systems and how they could be utilized to defeat the Taliban. Thus, each strategy ostensibly promoted goals in the legal sector, but primarily to support

counterinsurgency efforts.

As examined below, U.S. assistance was expanded and diversified to include various strategies and engagement with both state and nonstate justice actors. It did not, however, produce the desired results. Behind the transformative rhetoric, the United States' bold vision for rule-of-law assistance was underpinned by wildly optimistic "critical assumptions": "(1.) The Afghan government will implement its reinvigorated plans to fight corruption, with measures of progress toward greater accountability. (2.) Justice and rule of law programs will focus on creating predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited. (3.) USG [U.S. government] programs will successfully address local officials' lack of education, experience, and limited resources. (4.) GIRoA action will counter obstruction from local powerbrokers whose activities are sometimes inconsistent with the Afghan constitution."[131]

Each of these assumptions was clearly unrealistic. The Karzai administration never sought to eliminate state corruption. The justice system displayed few signs of improvement, lacked a commitment to the rule of law, and remained subject to executive influence. As evidenced by the serious challenges faced by well-funded U.S. programs aimed at Afghan state institutions that placed a major emphasis on capacity building, resource restraints and lack of knowledge were rarely the reason rule-of-law initiatives underperformed. Moreover, the Karzai regime and the U.S. government were in league with powerbrokers who actively opposed to advancing the rule of law. Although they found warlords unsavory, U.S. policymakers partnered with them to try to defeat the Taliban, and there was never a serious attempt at disarmament. Afghanistan's rule-of-law situation saw very little improvement by the time Afghans elected a new president in 2014, in a process marked by even greater fraud and controversy than the 2009 elections.

SUBSIDIZATION. In 2009, the U.S. government renewed its pledge to "support capacity development of the formal state courts."[132] The new strategy's core was, in reality, a super-sized reincarnation of the preexisting subsidization strategy. For example, funding from the State Department INL Bureau for rule-of-law assistance in Afghanistan ballooned from $26.5 million in 2006 to $328 million in 2010.[133] Yet, massive funding

increases failed to transform the Afghan justice sector or even produce notable improvements. Instead, they demonstrated the limits of what subsidization could achieve absent an ideological commitment by the state to the rule of law. The Karzai regime was hostile toward efforts to strengthen the rule of law, which could undermine both its freedom of action and its patronage system. The Supreme Court and other key judicial organs were open to receiving aid, but only on their terms and never in a way that ultimately threatened the overarching system.

HARMONIZATION. A harmonization push sought to make the nonstate justice system in Afghanistan operate on principles akin to the state system or, more accurately, on an idealized conceptualization of state justice that protects human rights and upholds the rule of law. It involved both supply- and demand-side activities. On the supply- side, "tribal elders/religious leaders who conduct shuras would receive training on relevant state and religious law."[134] On the demand- side, U.S. assistance would increase Afghan's awareness regarding their legal rights and how to assert them. Assistance would thus help align the behavior of state and nonstate actors, and bolster nonstate actors' willingness to support the state. There is little to suggest that U.S. initiatives caused Afghans to view state law more favorably or nonstate justice mechanisms to operate more procedurally or substantively like state courts. Neither was there any increase in the "enforcement of the rights of women and other traditionally marginalized groups."[135] Harmonization failed because nonstate justice actors largely remained wary of state courts, and human rights concerns proved readily expendable when they were seen as clashing with security and counterinsurgency goals.

BRIDGING. Bridging between the state and nonstate justice sectors in Afghanistan became a more prominent strategy after 2009. The U.S. sought to "establish[] linkages, as appropriate, between the informal and state systems."[136] This strategy envisioned citizens enjoying free access to both systems as appropriate predicated on a sensible jurisdictional divide. For example, whereas a judge may refer a property theft to a local jirga, state courts would retain exclusive jurisdiction over major crimes such as murder. In reality, however, the state lacked the capacity to compel most nonstate justice actors to use state courts. The quality of state justice remained poor; thus there was no demand. RLS-

Informal witnessed no discernible increase in popular demand for state courts.[137] Although aid likely increased public awareness and perhaps even access, it was a proverbial bridge to nowhere as the public demand for state justice remained sparse.

INCORPORATION. Incorporation envisioned a partnership among U.S rule of law program implementers, the Afghan Ministry of Justice, and other relevant agencies "to formalize links between the two systems [state and nonstate justice] to maximize the benefits of both systems and to reduce the weaknesses."[138] These ambitious ideals were prominent in the 2009 draft nonstate justice policy. The policy was promoted and signed by various state representatives and international backers. Although it recognized the potential benefits of nonstate justice, the policy demanded that "informal dispute resolution decisions need to be consistent with Shariah, the Constitution, other Afghan laws and international human rights standards."[139] The policy consensus was shallow, however. There was minimal consultation with tribal nonstate justice actors, and no clear vision existed as to how to address the de facto authority of warlords in the areas they controlled.

The September 2010 "Draft Law on Dispute Resolution Shuras and Jirgas" imagined nonstate justice actors as part of the state system. Consequently, it heavily regulated their jurisdiction, operations, and decisionmaking as well as their relationship to state courts.[140] As such, the draft law included harmonization and bridging elements alongside incorporation. The law staunchly asserted the state's authority to control and regulate all aspects of nonstate dispute resolution. The law stipulated that jirga participants "and parties of dispute shall be duty bound to observe provisions of this law" or face criminal charges even though jirgas were only empowered to hear civil disputes and petty juvenile crimes on referral.[141] Jirgas and shuras could not "make decisions that violate human rights of parties in dispute, especially of women and children," and all judgments would have been subject to appeal to state courts.[142] The law, however, was not passed as it met fierce opposition from the Ministry of Women's Affairs and the Human Rights Commission, which feared that the law would lend credibility to "traditional" dispute resolution, which they view as antithetical to human rights standards and women's rights.[143] The state was open to engagement with the nonstate justice

sectors but only on its own, stark terms. The central government's internal divisions prevented the law from being promulgated, despite the unrealistic degree of authority for the state system it envisioned. Even if a law had been enacted, it is unlikely to have meaningfully altered the operation of dispute resolution at the local level given the weakness of state authority in many areas.

REPRESSION. Afghan state and international forces sought to disturb and undermine the Taliban justice system. At the same time, these actors realized that the popular appeal of Taliban justice constituted a profound challenge to state authority. While rule-of-law programs were not trying to destroy the Taliban system and eliminate its core personnel, with the partial exception of ROLFF-A, they aimed to undermine the system's appeal. Doing so proved remarkably difficult, however, because the state system remained unappealing. By the end of 2014, it was clear that Taliban justice was a major and growing feature of the Afghan legal landscape.

Learning from Lessons Not Learned

Advancing the rule of law in Afghanistan presented a daunting challenge regardless of policy decisions undertaken by the U.S. but, though seemingly a distant memory, state-building efforts in Afghanistan started optimistically. The Taliban regime wilted away with minimal resistance. The new, multi-ethnic state under President Karzai had a real opportunity to demonstrate it was a legitimate governing entity.[144] That opportunity was squandered, but it was squandered as a result of domestic and international policy choices. The Afghan state now faces a crisis of legitimacy and a powerful insurgency that promises the law and order the state has failed to provide, but to cast that outcome as inevitable serves to excuse bad policy and invites future disasters. Afghanistan is not alone. Advancing the rule of law after conflict will constitute a major foreign policy challenge for the foreseeable future. As a high degree of legal pluralism is the dominant feature of many societies, and particularly conflict-prone ones, future interventions and subsequent efforts to advance the rule of law will almost certainly occur in places marked by a high degree of legal pluralism, such as Yemen or Syria. As a result, Afghanistan offers a rich source of insights for helping to ensure future judicial state-building

endeavors simply replicate the same mistakes as U.S. efforts in Afghanistan.

A STITCH IN TIME…

Afghanistan's own history shows that a viable, legitimate order was certainly a possibility. Before the late 1970s communist coup, the country had enjoyed decades of domestic tranquility, and the Taliban itself had previously established a monopoly on the use of force under even more chaotic conditions in the 1990s. After the end of Taliban rule in 2001, Afghanistan enjoyed relative peace before violence began to rapidly metastasize and fighting constituted "a full-blown insurgency by 2006."[145] Moreover, Afghanistan's population has certainly demonstrated capacity for violence. At the same time, they prize order, as evidenced by the paramount role of Pashtunwali and other nonstate dispute resolution systems, and widespread acceptance of a national state for centuries, albeit a limited one. Thus, rather than bemoan the country's hopelessness, it is important to critically examine how Afghanistan rule-of-law assistance and broader U.S. policy could have been undertaken more effectively.

At the onset of post-conflict reconstruction, international actors have maximum influence and the broadest range of feasible options.[146] The state judicial sector in Afghanistan faced major entrenched challenges, including minimal infrastructure, serious human resources shortfalls, dubious legitimacy, and skepticism from the nonstate authorities that oversaw most local dispute resolution. There was a clear, constructive opportunity for international assistance to help address these issues. As the lead nation, however, Italy did little until 2003 and then achieved little until it was relieved of those duties in 2006. Italy's performance has been rightly criticized, but the loss of this window of opportunity is not solely Italy's fault. The U.S. decided to topple the Taliban and was by far the most dominant international player in determining policy afterwards. Italy's lead-nation status was not inevitable or even particularly logical, but rather a reflection of the U.S. policy of outsourcing to other nations as many aspects of state-building as it could during the crucial early period.

ESTABLISHING THE FOUNDATION

State legitimacy and institutional arrangements are vital for the development of the rule of law. International rule-of-law assistance is almost invariably mediated through state institutions and officials, even when targeting nonstate actors. It matters immensely whether the state is seen as legitimate and whether those entrusted with the state's authority care about promoting a state bound by the rule of law. President Karzai's regime was decidedly disinterested in the rule of law and opposed meaningful efforts to advance it. In general, policymakers should be deeply skeptical of the assurances of corrupt rulers with authoritarian tendencies.

The international community also bears responsibility for aiding and abetting Afghanistan's governance disaster. The rule of law is tightly linked to democratic accountability. The legal order is inexorably interconnected with a state's political institutions.[147] In theory, the "rule of law may exist without democratic forms of political will formation," but on "empirical grounds" the rule of law has been inexorably linked with democratic government.[148] Democratic rule does not inevitably produce the rule of law. Nevertheless, democracy appears to be a functional prerequisite.[149] As Guillermo O'Donnell highlights, "Only under a democratic rule of law will the various agencies of electoral, societal, and horizontal accountability function effectively, without obstruction and intimidation from powerful state actors."[150] In the early years, the international community exercised meaningful influence over the nascent Afghan state's institutional structure. International backing secured the top state post for Karzai initially and encouraged the president's concentration of power. Once entrenched, this institutional arrangement proved resistant to change. Individuals who reach the top spot first have a disproportionate advantage going forward and can even use their position to undermine future democratic competition.[151] International actors need to be cautious with their support as well as push for institutional mechanisms such as free elections, political parties, and political accountability mechanisms to ensure that the people themselves have a real decision regarding who leads their country.

As the U.S. viewed security as its top priority from the start, concern about the rule of law often fell to the background. Thus, the United States' ability to promote the rule of law has been heavily circumscribed by its entrenched commitment to the regime and an emphasis on security over justice. Karzai's administration sought to retain power and

exercise authority unconstrained by law. In contrast, both Obama and Bush administration policymakers wanted an Afghan liberal democratic polity that embraced the rule of law, but consistently compromised that aspiration. The Karzai regime recognized that the U.S. policymakers believed that the state-building project in Afghanistan could not be seen to fail because to admit otherwise would have risked being seen as tacit acceptance of a Taliban victory. Over time, the Afghan state's endemic, profound weakness gave the regime greater ability to operate with independence from its international backers as the prospect of a Taliban victory became increasingly plausible.

Democracy and the rule of law demand more than free-and-fair elections, but electoral integrity is a prerequisite. Although U.S. policymakers expressed concerns about Afghan electoral processes, particularly after the initial presidential election in 2004, they never pushed to ensure credible elections. Fraud was perpetrated on an industrial scale in every election after 2004.[152] Yet each time, U.S. officials expressed concerns only after the event, when it was too late to take serious action. They also did little as Karzai's regime systematically sought to undermine the existence of political parties that could form the institutional bases for aggregating social interests, and methodically compromised the integrity of voting registration, oversight, and administration processes.[153] U.S. commitments to promoting the rule of law cannot be effective or credible when democracy is not a policy priority.

RETHINKING AID DOMESTICALLY AND INTERNATIONALLY

Rule-of-law assistance in Afghanistan was itself problematic both in how it was implemented and how it was structured bureaucratically. In terms of implementation, U.S. efforts reflected fundamental failures of timing, coordination, and strategy. Assistance was scarce during the crucial early interval and then focused on unneeded and unwanted legislative reforms.[154] Once funding began to dramatically increase, there was no plausible strategy as to how the assistance would actually advance the rule of law. Worse, once it became clear that subsidization was facilitating state corruption rather combatting it, aid was not reconsidered, reallocated, or halted. Subsidization efforts continued and expanded with no realistic vision for how assistance could be improved.

Even today, U.S. officials show little interest in changing their approach to dealing with institutions decidedly disinterested in the rule of law. The latest USAID rule-of-law program, known as "Adalat," has a major goal of "combatting corruption by empowering relevant Afghan Government agencies/institutions." [155] The irony is presumably unintentional. Although implementers receive the most scrutiny, this perverse incentive structure is fundamentally a policymaking issue. Most nongovernmental organizations must respond to donor-established incentives to survive.[156]

Operationally, program coordination remained consistently abysmal from 2005 to 2014. Even prior to the dramatic increase in rule-of-law expenditures under Obama's Afghan surge, the U.S. State Department Office of Inspector General admitted there was "no way to readily identify ROL [rule of law] funding and subsequently to identify duplicate programs, overlapping programs, or programs conflicting with each other."[157] Massive funding increases exacerbated these long-standing issues. It was unclear even how many programs there were or how much money had been spent.[158] Throughout the period of U.S. engagement examined here, program strategy, implementation, and coordination problems were always being addressed but were never solved.

These programming issues reflect larger, more profound problems within the U.S. international assistance bureaucracy. Donors, particularly USAID, demand extensive control over projects' scope, content, and implementation to try to prove appropriate funding allocation and demonstrable achievements to its congressional overseers. This level of micromanagement was an especially bad fit for Afghanistan given the fluidity of the situation and the need for a nuanced, localized approach. If programs are supposed to be dynamic, there needs to be flexibility and an understanding that calculated risks are sometimes necessary. There also needs to be a willingness to halt program activities that are not working or end partnerships with interlocutors that lack any meaningful interest in promoting the rule of law. Currently, programs that fail to execute are viewed poorly by donors and endanger future contracts. Program implementers thus have strong incentives to collaborate with deeply corrupt states institutions.

The existing operational structure means that donors can design the program and continually display an almost willful blindness to political reality in the recipient country. The contracting system is not without significant flaws. Nevertheless, by definition the

contractors' job is simply to follow USAID's directives.[159] More generally, this dynamic institutionalizes an unaccountability loop whereby donors can blame contractors when programs go array, while contractors can claim that were simply following donor instructions. Although admittedly a somewhat remote prospect, fixing this dynamic will require that Congress takes a more nuanced understanding of how development assistance works and under what circumstances it can be most effective.

ENGAGING JUSTICE HOLISTICALLY

As with most conflict-prone states, nonstate justice mechanisms still handle the vast majority of disputes in Afghanistan. U.S. policymakers belatedly recognized nonstate justice as a major pillar of Afghanistan's legal order, but they never seriously engaged nonstate justice as a pre-existing structure or an independent source of legitimate authority. Instead, preferred local interlocutors were labeled the key nonstate justice actors, independent of their actual social standing, and then bolstered through military force and outside funds. At minimum, successful policy engagement with the nonstate justice system of Pashtunwali demands "an understanding of the core principles of this cultural value system."[160] While rule-of-law programs researched local areas, outputs were fixed and unrelated to local realities because counterinsurgency was always the paramount goal.

The results in Afghanistan also seriously challenge the dominant U.S. counterinsurgency view that holds "establishing the rule of law is a key goal and end state."[161] Although the rule of law is certainly worthy as both, it takes decades and is invariably rooted in domestic politics.[162] Thus, it is a long-term goal. Moreover, the rule of law cannot be promoted successfully absent powerful domestic constituencies and at least some high-level state officials who take the idea seriously. International rule-of-law efforts, whether geared towards counterinsurgency or simply trying to improve the quality and effectiveness of state courts, have a limited scope absent a state commitment to be bound by the law. Aid can easily become another source of rent extraction for a rentier state.[163]

Conclusion

Despite Afghanistan's immense importance to U.S. foreign policy for more than a decade, rule-of-law aid has often been ad hoc, ineffective, predicated on widely optimistic assumptions and, at worst, has helped enable predatory state practices. The vast majority of aid served to prop up fundamentally compromised institutions, while democracy was jettisoned in pursuit of security and little thought was given to the constructive engagement of the tribal and religious actors who had long formed crucial pillars of legal legitimacy. International actors accepted President Karzai regime's increasing dependence on warlords who lacked any interest in the rule of law. Over time, the Taliban and its justice system grew in strength and popular legitimacy, in large part as a response to the Karzai regime's corruption and reliance on warlords. International interest in engagement with the nonstate justice sector, however, was focused primarily on counterinsurgency rather than justice. U.S. assistance ultimately produced few benefits and, in certain instances, was even counterproductive.

The situation in Afghanistan should not be taken as an invitation to nihilism, however. Afghanistan may be a case study in how many things can go wrong in post-conflict state-building, but it crucially reflects policy decisions. Different decisions may well have produced more positive results. Taking democracy and legitimate governance seriously is a crucial first step. Policymakers and aid implementers need a realistic and compelling strategic vision rooted in a deep understanding of a country's legal culture, politics, and history. Prompt action must then be taken to advance that vision. Finally, realistic expectations are essential as developing the rule of law is a long-term process. Policymakers can benefit from being better able to conceptualize and respond to the challenges posed by judicial state-building in a legally pluralist society, such as Afghanistan. The U.S. never truly sought to engage with nonstate justice as a means to promote a more just legal order, but rather saw nonstate actors as mere cogs in a deeply flawed counterinsurgency approach. Counterfactuals are always fraught. Still, given the widespread desire for a more just legal order and Afghanistan's history of state, tribal, and religious collaboration, a more constructive relationship was certainly possible and likely remains so today. Savvy strategic planning and pragmatic adaptation can improve state-building and rule of law efforts in Afghanistan and elsewhere, but this will require tough choices and occasionally even rethinking the provision of aid.

[1]This article uses the concept of the rule of law in a "thin" rather than "thick" understanding. See Randall Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China," *Michigan Journal of International Law*, Vol. 23, No. 3 (2002), pp. 471–544. At minimum, a "thin" concept, the rule of law requires that "law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone." See Brian Z. Tamanaha, "A Concise Guide to the Rule of Law," St. John's Legal Studies Research Paper No. 07-0082 (New York: St. John's University School of Law, 2007). Although the term "thin" may suggest that this version of the rule of law is relatively simple to achieve, institutionalizing a thin version after conflict constitutes a formidable, prolonged challenge. Thicker conceptualizations include extensive institutional, economic, cultural, and political requirements unrealistic for most post-conflict states to aim for in the short to medium term. See Robin L. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Farnham, U.K.: Ashgate, 2003).

[2] U.S. Mission Afghanistan, "U.S. Foreign Assistance for Afghanistan: Post Performance Management Plan 2011–2015" (Kabul: U.S. Mission Afghanistan, 2010), p. 9.

[3] James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States," *International Security*, Vol 28, No. 4 (Spring 2004), pp. 5–43.

[4] Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2004), pp. 205–206.

[5] Sally Engle Merry, "Legal Pluralism," *Law & Society Review*, Vol. 22, No. 5 (1988), pp. 869–896, at p. 870.

[6] Not all U.S. officials and program implementers necessarily believed that there was a justice vacuum, but it remained a consistent operating principle for policy.

[7] Ali Wardak and John Braithwaite, "Crime and War in Afghanistan, Part II: A Jeffersonian Alternative?" *British Journal of Criminology*, Vol. 53, No. 2 (2013), pp. 197–214.

[8] George W. Bush, "The National Security Strategy of the United States of America" (Washington, D.C.: Executive Office of the President, 2002); George W. Bush, "The National Security Strategy of the United States of America" (Washington, D.C.:

Executive Office of the President, 2006); and Barack Obama, "National Security Strategy" (Washington, D.C.: Executive Office of the President, 2010).

[9] U.S. Government Accountability Office, "Afghanistan: Key Oversight Issues" (Washington, D.C.: U.S. Government Accountability Office, 2013), pp. 25–26.

[10] Astri Suhrke and Kaja Borchgrevink, "Negotiating Justice Sector Reform in Afghanistan," *Crime, Law, and Social Change*, Vol. 51, No. 2 (2009), pp. 211–230, at p. 213.

[11] I use "legitimate" in the sense of having achieved "normative acceptance and expectation by a political community that the cluster of rules and institutions that compose the state ought to be obeyed." See Charles T. Call, "Ending Wars, Building States," in Charles T. Call with Vanessa Wyeth, eds., *Building States to Build Peace* (Boulder, Co.: Lynne Rienner, 2008), pp. 1–19, at p. 14.

[12] For example, see Sarah Chayes, *The Punishment of Virtue: Inside Afghanistan after the Taliban* (New York: Penguin, 2006); and Noah Coburn and Anna Larson, *Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape* (New York: Columbia University Press, 2014).

[13] Azam Ahmed, "Taliban Justice Gains Favor as Official Afghan Courts Fail," *New York Times*, February 1, 2015.

[14] This article defines "success" as having been achieved if individual programs or the overarching strategy have enhanced the prospects for developing and consolidating the rule of law. This criterion follows the logic of Paris' work on international post-conflict state-building, which examines whether state-building efforts have "enhanced the prospects for stable and lasting peace." See Paris, *At War's End*, p. 55.

[15] The broader international effort to promote the rule of law, however, has received a significant amount of scholarly attention. See Ahmed Rashid, *Descent into Chaos: The U.S. and the Disaster in Pakistan, Afghanistan, and Central Asia* (New York: Penguin, 2008); Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, N.Y.: Princeton University Press, 2010); Whit Mason, ed., *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge: Cambridge University Press, 2011); and Astri Suhrke, *When More Is Less: The International Project in Afghanistan* (London: Hurst, 2011).

[16] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Mass.: MIT Press, 2005).

[17] Ali Wardak, "Building a Post-War Justice System in Afghanistan," *Crime, Law and Social Change*, Vol. 41, No. 4 (2004), pp. 319–341; and Thomas Barfield, Neamatollah Nojumi, and J. Alexander Their, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan" (Washington, D.C.: United States Institute of Peace, 2006).

[18] Roland Paris, "Afghanistan: What Went Wrong?" *Perspectives on Politics*, Vol. 11, No. 2 (2013), pp. 538–548.

[19] Wardak and Braithwaite, "Crime and War in Afghanistan, Part II."

[20] Louis Dupree, *Afghanistan* (Princeton, N.J.: Princeton University Press, 1973); and Barnett R. Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven, Conn.: Yale University Press, 2002).

[21] For an overview of *Pashtunwali*'s core legal concepts, see Dupree, *Afghanistan*, p. 126; and Tom Ginsburg, "An Economic Interpretation of the Pashtunwali," *University of Chicago Legal Forum*, No. 89 (2011), p. 104.

[22] Olivier Roy, *Islam and Resistance in Afghanistan*, 2nd ed. (Cambridge: Cambridge University Press, 1990), p. 35.
[23] Larry P. Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (Seattle: University of Washington Press, 2001).
[24] Abdulkader H. Sinno, *Organizations at War in Afghanistan and Beyond* (Ithaca, N.Y.: Cornell University Press, 2008).
[25] Barfield, *Afghanistan*, pp. 300–318; and Rashid, *Descent into Chaos*.
[26] Scott Mainwaring and Matthew S. Shugart, "Juan Linz, Presidentialism, and Democracy: A Critical Appraisal," *Comparative Politics*, Vol. 29, No. 4 (July 1997), pp. 449–471.
[27] Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (London: Profile, 2014), p. 24.
[28] Juan J. Linz, "Presidential or Parliamentary Democracy: Does It Make a Difference?" in Juan J. Linz and Arturo Valenzuela, eds., *The Failure of Presidential Democracy: Comparative Perspectives*, Vol. 1 (Baltimore, Md.: Johns Hopkins University Press, 1994).
[29] Suhrke, *When More Is Less*.
[30] Barfield, *Afghanistan*, pp. 297–299.
[31] Andrew Reynolds, "The Curious Case of Afghanistan," *Journal of Democracy*, Vol. 17, No. 2 (April 2006), pp. 104–117.
[32] Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (New York: W.W. Norton, 2015), p. 62.
[33] Constitution of the Islamic Republic of Afghanistan, Art. 116.
[34] Nonstate justice refers to entities not grounded in state authority that credibly structure behavior and enjoy a significant degree of autonomy from state law.
[35] See Barfield, Nojumi, and Their, "The Clash of Two Goods," p. 9. Afghanistan is not an outlier. In many developing and most post-conflict countries, nonstate justice systems often function as the primary dispute resolution mechanisms, even as the state seeks to develop and assert the dominance of the state legal system. See Peter Albrecht and Helene Maria Kyed, "Justice and Security: When the State Isn't the Main Provider" (Copenhagen: Danish Institute for International Studies, 2010).
[36] Wardak and Braithwaite, "Crime and War in Afghanistan, Part II."
[37] Joel S. Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton, N.J.: Princeton University Press, 1988).
[38] Ken Menkhaus, "Governance without Government in Somalia: Spoilers, State Building, and the Politics of Coping," *International Security*, Vol. 31, No. 3 (Winter 2006/07), pp. 74–106.
[39] Meghan Campbell and Geoffrey Swenson, "Legal Pluralism and Women's Rights after Conflict: The Role of CEDAW," *Columbia Human Rights Law Review*, Vol. 48, No. 1 (2016), pp. 112–146.
[40] Ginsburg, "An Economic Interpretation of the Pashtunwali," p. 106.
[41] Seth G. Jones, *In the Graveyard of Empires: America's War in Afghanistan* (New York: W.W. Norton, 2010), p. 130.
[42] Autonomy should not be confused with isolation. Warlords, such as Atta Mohammad Noor in Balkh, Gul Agha Sherzai of Nangarhar, and Ismail Khan of Herat frequently engage the state and even hold state posts when it suits their interests. See Dipali

Mukhopadhyay, *Warlords, Strongman Governors, and the State in Afghanistan* (Cambridge: Cambridge University Press, 2014).
[43] Kimberly Marten, "Warlordism in Comparative Perspective," *International Security*, Vol. 31, No. 3 (Winter 2006/07), pp. 41–73.
[44] Antonio Giustozzi and Adam Baczko, "The Politics of the Taliban's Shadow Judiciary, 2003–2013," *Central Asian Affairs*, Vol. 1, No. 2 (2014), pp. 199–224.
[45] Thomas H. Johnson, "Taliban Adaptations and Innovations," *Small Wars & Insurgencies*, Vol. 24, No. 1 (2013), p. 9.
[46] Ibid.
[47] Although Karzai tolerated phenomenal amounts of corruption by those affiliated with his regime, there is little evidence to suggest that he was particularly interested in accumulating immense personal wealth. See Joshua Partlow, *A Kingdom of Their Own: The Family Karzai and the Afghan Disaster* (New York: Knopf, 2016).
[48] USAID, "USAID/Afghanistan Strategic Plan, 2005–2010" (Washington, D.C.: USAID, 2005); and U.S. Mission Afghanistan, "U.S. Foreign Assistance for Afghanistan."
[49] Alexander Cooley and James Ron, "The NGO Scramble: Organizational Insecurity and the Political Economy of Transnational Action," *International Security*, Vol. 27, No. 1 (Summer 2002), pp. 5–39.
[50] Italy's performance as lead nation from 2002 to 2006 has been rightly criticized for its initial inaction followed by an ill-conceived, heavy-handed approach focused on legislative reform. As noted by a major RAND study, "Italy simply lacked the expertise, resources, interest, and influence needed to succeed in such an undertaking." James Dobbins et al., *The Beginner's Guide to Nation-Building* (Santa Monica, Calif.: RAND Corporation, 2007), p. 1.
[51] All figures for comprehensive program costs were taken from SIGAR, "SIGAR 15-68 Audit Report: Rule of Law in Afghanistan—U.S. Agencies Lack a Strategy and Cannot Fully Determine the Effectiveness of Programs Costing More Than $1 Billion" (Washington, D.C.: SIGAR, 2015).
[52] Conor Keane and Glenn Diesen, "Divided We Stand: The U.S. Foreign Policy Bureaucracy and Nation-Building in Afghanistan," *International Peacekeeping*, Vol. 22, No. 3 (2015), pp. 205–229.
[53] Checchi and Company Consulting, "Contract No. Dfd-1-00-04-00170-00: Twelfth Quarterly Performance Monitoring Report for the Period July 1 to September 30, 2006" (Kabul: USAID, 2006), p. 3.
[54] Checchi and Company Consulting, "Final Report of the Afghanistan Rule of Law Project" (Kabul: USAID, 2009), p. 3.
[55] Ibid., p. 33.
[56] Ibid.
[57] Ibid., p. 34.
[58] The appointment and retention of Supreme Court justices could itself be legally questionable. Chief Justice Abdul Salam Azimi was confirmed by the Wolsei Jirga in 2006. After Azimi's term expired in 2010, Karzai unilaterally retained him with the extra-constitutional title "acting chief justice," along with two other judges, through "a legally dubious decree." See International Crisis Group, "Afghanistan: The Long, Hard Road to the 2014 Transition" (Kabul: International Crisis Group, 2012), p. 12.

[59] Farid Hamidi and Aruni Jayakody, "Separation of Powers under the Afghan Constitution: A Case Study" (Kabul: Afghanistan Research and Evaluation Unit, 2015).
[60] Checchi and Company Consulting, "Contract No. Dfd-1-00-04-00170-00: Eighteenth Quarterly Performance Monitoring Report for the Period January 1 to March 31, 2009" (Kabul: USAID, 2009), p. 25.
[61] Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge" (Washington, D.C.: Carnegie Endowment for International Peace, 2003).
[62] Antonio De Lauri, "Access to Justice and Human Rights in Afghanistan," *Crime, Law and Social Change*, Vol. 60, No. 3 (2013), pp. 261–285; and Danny Singh, "Explaining Varieties of Corruption in the Afghan Justice Sector," *Journal of Intervention and Statebuilding*, Vol. 9, No. 2 (2015), pp. 231–255.
[63] James F. Amos and David H. Petraeus, *The U.S. Army/Marine Corps Counterinsurgency Field Manual 3-24* (Chicago: University of Chicago Press, 2008), p. 360.
[64] Tetra Tech DPK, "Afghanistan Rule of Law Stabilization Program (Formal Component): Performance Monitoring Plan July 2012 to January 2014" (Kabul: USAID, 2012), p. 1.
[65] See Scope of Work, Annex A in Denis Dunn, Don Chisholm, and Edgar Mason, "Assessment: Afghanistan Rule of Law Stabilization Program (Informal Component)—Final Report" (Kabul: USAID, 2011), p. 34.
[66] The program also undertook activities to promote gender justice and other social goals. See Jack Leeth, Terence Hoverter, and Aman Tajali, "Rule of Law Stabilization—Formal Sector Component Program Evaluation" (Kabul: USAID, 2012); and Tetra Tech DPK, "Rule of Law Stabilization (Formal Component): Final Report" (Kabul: USAID, 2014).
[67] Leeth, Hoverter, and Tajali, "Rule of Law Stabilization."
[68] Ibid., p. 6.
[69] Tetra Tech DPK, "Rule of Law Stabilization (Formal Component)," p. 3.
[70] Ibid.
[71] Ibid.
[72] See SIGAR, "SIGAR 15-68 Audit Report," p. 21.
[73] Antonio De Lauri, "Corruption, Legal Modernisation, and Judicial Practice in Afghanistan," *Asian Studies Review*, Vol. 37, No. 4 (2013), pp. 527–545; and Singh, "Explaining Varieties of Corruption in the Afghan Justice Sector."
[74] Checchi and Company Consulting, "Monthly Report, January 2014 Rule of Law Stabilization Program—Informal Component (RLS-I); Contract Number: Aid-306-C-12-00013" (Kabul: USAID, 2014), p. 1.
[75] See Dunn, Chisholm, and Mason, "Assessment," p. 17. The United States Institute for Peace also implemented a State Department–funded program that sought to bring stability by bolstering nonstate justice actors' capacity. The program faced similar issues. See Torunn Wimpelmann, "Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage," *Central Asian Survey*, Vol. 32, No. 3 (2013), pp. 406–422.
[76] Dunn, Chisholm, and Mason, "Assessment," p. 17.
[77] Checchi and Company Consulting, "RLS-I Impact Evaluation Report, July 2012" (Kabul: USAID, 2012), p. 1.

[78] Checchi and Company Consulting, "Final Evaluation Report: Rule of Law Stabilization Program—Informal Component" (Kabul: USAID, 2014); and Samuel Schueth, Shahla Naim, and Haroon Rasheed, "Performance Evaluation of the Rule of Law Stablization—Informal Component Program" (Kabul: USAID, 2014).
[79] Schueth, Naim, and Rasheed, "Performance Evaluation of the Rule of Law Stablization—Informal Component Program."
[80] Ibid., pp. 32–34.
[81] Noah Coburn, "Informal Justice and the International Community in Afghanistan" (Washington, D.C.: United States Institute of Peace, 2013).
[82] Ibid., p. 37.
[83] Checchi and Company Consulting, "Final Evaluation Report."
[84] Author interview with international NGO professional, Kabul, 2014; and author interview with legal specialist, Kabul, 2014.
[85] David J. Kilcullen, "Deiokes and the Taliban: Local Governance, Bottom-up State Formation, and the Rule of Law in Counterinsurgency," in Mason, *The Rule of Law in Afghanistan*, pp. 35–45.
[86] Thomas H. Johnson, "The Taliban Insurgency and an Analysis of Shabnamah (Night Letters)," *Small Wars & Insurgencies*, Vol. 18, No. 3 (September 2007), p. 328.
[87] Thomas Carothers, "Revitalizing Democracy Assistance: The Challenge of USAID" (Washington, D.C.: Carnegie Endowment for International Peace, 2009), p. 26.
[88] Ibid., p. 20.
[89] U.S. State Department, *INL: Afghanistan Program Overview* (Washington, D.C.: U.S. State Department, 2015), http://go.usa.gov/3y2Sk.
[90] The International Development Law Organization, rather than PAE, became the implementer of regional training activities under the first component of JSSP in January 2013.
[91] U.S. Senate Foreign Relations Committee, "Evaluating U.S. Foreign Assistance to Afghanistan: A Majority Staff Report" (Washington, D.C.: U.S. Government Printing Office, 2011), p. 38.
[92] SIGAR, "SIGAR 15-22 Financial Audit: Department of State's Afghanistan Justice Sector Support Program—Audit of Costs Incurred by Pacific Architects and Engineers, Inc." (Washington, D.C.: SIGAR, 2014), p. 2.
[93] SIGAR, "January 2015: Quarterly Report to the United States Congress" (Washington, D.C.: SIGAR, 2015), p. 137.
[94] SIGAR, "SIGAR 14-26 Audit Report: Support for Afghanistan's Justice Sector—State Department Programs Need Better Management and Stronger Oversight" (Washington, D.C.: SIGAR, 2014); and SIGAR, "SIGAR 15-68 Audit Report."
[95] Paris, "Afghanistan," p. 538.
[96] SIGAR, "SIGAR 14-26 Audit Report," p. 5.
[97] Department of Defense Centeral Command, "Rule of Law Conference Brings Together Afghan, International Partners" (2010), http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/903828/rule-of-law-conference-brings-together-afghan-international-partners/.
[98] U.S. Department of Defense, "Report on Progress toward Security and Stability in Afghanistan/United States Plan for Sustaining the Afghan National Security Forces: April 2012" (Washington, D.C.: U.S. Department of Defense, 2012), p. 75.

[99] U.S. Department of Defense, "Report on Progress toward Security and Stability in Afghanistan: December 2012" (Washington, D.C.: U.S. Department of Defense, 2012), p. 113.
[100] Ibid.
[101] Amos and Petraeus, *The U.S. Army/Marine Corps Counterinsurgency Field Manual 3-24*, p. 360.
[102] Mark Martins, "Rule of Law in Iraq and Afghanistan?" *Army Lawyer*, November 2011, p. 25.
[103] Ibid., p. 27.
[104] Douglass Cecil North, John Joseph Wallis, and Barry R. Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (Cambridge: Cambridge University Press, 2009); and Daron Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (London: Profile, 2012).
[105] SIGAR, "SIGAR 15-68 Audit Report."
[106] Edwina Thompson, "Winning 'Hearts and Minds' in Afghanistan: Assessing the Effectiveness of Development Aid in COIN Operations," paper presented at the Wilton Park Conference, March 11–October 14, 2010, Wilton Park, United Kingdom, p. 1; and Jan Rasmus Böhnke and Christoph Zürcher, "Aid, Minds, and Hearts: The Impact of Aid in Conflict Zones," *Conflict Management and Peace Science*, Vol. 30, No. 5 (2013), pp. 411–432.
[107] Paul Fishstein and Andrew Wilder, "Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan" (Medford, Mass.: Feinstein International Center, Tufts University, 2012).
[108] Wimpelmann, "Nexuses of Knowledge and Power in Afghanistan," p. 419.
[109] Rudra Chaudhuri and Theo Farrell, "Campaign Disconnect: Operational Progress and Strategic Obstacles in Afghanistan, 2009–2011," *International Affairs*, Vol. 87, No. 2 (March 2011), pp. 271–296, at p. 285.
[110] Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006), p. 76
[111] Tanja Chopra and Deborah Isser, "Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights," *Hague Journal on the Rule of Law*, Vol. 4, No. 2 (September 2012), pp. 337–358.
[112] Geoffrey Swenson and Eli Sugerman, "Building the Rule of Law in Afghanistan: The Importance of Legal Education," *Hague Journal on the Rule of Law*, Vol. 3, No. 1 (January 2011), pp. 130–146.
[113] USAID, "USAID/Afghanistan Strategic Plan, 2005–2010," p. 17.
[114] For example, see Paris, *At War's End*, p. 226–227; and Barfield, *Afghanistan*, pp. 315–320.
[115] Suhrke, *When More Is Less*, pp. 119–141.
[116] Mark Peceny and Yury Bosin, "Winning with Warlords in Afghanistan," *Small Wars & Insurgencies*, Vol. 22, No. 4 (October 2011), pp. 603–618.
[117] Carothers, "Promoting the Rule of Law Abroad," p. 9.
[118] Ibid.

[119] For examples of some different approaches for engagement with nonstate justice systems, see M. Cherif Bassiouni and Daniel Rothenberg, "An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan," in *Rome Conference "The Rule of Law in Afghanistan"* (Rome: 2007); Center for Policy and Human Development and United Nations Development Programme, "Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—Rule of Law and the Search for Justice" (Kabul: UNDP, 2007); and Checchi and Company Consulting, "Final Report of the Afghanistan Rule of Law Project."
[120] Center for Policy and Human Development and UNDP, "Afghanistan Human Development Report 2007," p. 12.
[121] Ali Wardak, "State and Non-State Justice Systems in Afghanistan: The Need for Synergy," *University of Pennsylvania Journal of Law & Social Change*, Vol. 32, No. 5 (2014), p. 1322.
[122] The draft law is discussed in the following section.
[123] Coburn, "Informal Justice and the International Community in Afghanistan"; and Wimpelmann, "Nexuses of Knowledge and Power in Afghanistan."
[124] Stanley McChrystal, "Commander's Initial Assessment" (Kabul: International Security Assistance Force, 2009), sec. 2, p. 14.
[125] Ibid.
[126] Frances Z. Brown, "The U.S. Surge and Afghan Local Governance" (Washington, D.C.: U.S. Institute of Peace, 2012), p. 3.
[127] Office of the Special Representative for Afghanistan and Pakistan, "Afghanistan and Pakistan Regional Stabilization Strategy" (Washington, D.C.: U.S. State Department, 2010), p. ii.
[128] My focus is on the joint plan, as it explicitly had unified approval. For similar plans, see U.S. Department of Defense and U.S. Department of State, "United States Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan" (Kabul: U.S. Department of Defense and U.S. Department of State, 2009); and Office of the Special Representative for Afghanistan and Pakistan, "Afghanistan and Pakistan Regional Stabilization Strategy."
[129] U.S. Mission Afghanistan, "U.S. Foreign Assistance for Afghanistan," p. 5.
[130] Ibid.
[131] Ibid., p. 9.
[132] Ibid.
[133] Liana S. Wyler and Kenneth Katzman, "Afghanistan: U.S. Rule of Law and Justice Sector Assistance" (Washington, D.C.: Congressional Research Service, 2010), p. 27.
[134] U.S. Mission Afghanistan, "U.S. Foreign Assistance for Afghanistan," p. 4.
[135] Ibid.
[136] Ibid., p. 5.
[137] Checchi and Company Consulting, "Final Evaluation Report."
[138] Ibid., p. 4.
[139] Ministry of Justice, "Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils" (Kabul: Islamic Republic of Afghanistan, 2009), p. 3.
[140] Ministry of Justice, "Draft Law on Dispute Resolution Shuras and Jirgas" (Kabul: Islamic Republic of Afghanistan, 2010).

[141] Ibid.
[142] Ibid.
[143] Author Skype interview with international rule of law professional in Afghanistan, 2015.
[144] Barfield, *Afghanistan*, pp. 300–318; and Rashid, *Descent into Chaos*.
[145] Seth G. Jones, "The Rise of Afghanistan's Insurgency: State Failure and Jihad," *International Security*, Vol. 32, No. 4 (Spring 2008), p. 7.
[146] Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace: United Nations Peace Operations* (Princeton, N.J.: Princeton University Press, 2006), p. 132.
[147] Barry R. Weingast, "The Political Foundations of Democracy and the Rule of the Law," *American Political Science Review*, Vol. 91, No. 2 (1997), pp. 245–263.
[148] Jürgen Habermas, "On the Internal Relation between the Rule of Law and Democracy," *European Journal of Philosophy*, Vol. 3, No. 1 (April 1995), p. 12.
[149] Singapore is occasionally cited as the exception that supposedly offers both non–fully democratic governance and an "authoritarian rule of law." See Jothie Rajah, *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore* (Cambridge: Cambridge University Press, 2012). This view, however, conflates state performance with the rule of law. Although the legal order in Singapore is largely predictable, opposition is effectively side-lined and "there is neither a free press nor an autonomous civil society, and divergence of political views is not readily tolerated." See Hussin Mutalib, "Illiberal Democracy and the Future of Opposition in Singapore," *Third World Quarterly*, Vol. 21, No. 2 (April 2000), p. 316. The law does not apply equally to everyone. There is a legitimate legal order, which protects economic rights and delivers high quality governance, but it is fundamentally designed to ensure the perpetuation of the existing political regime of "authoritarian dominance." See Dan Slater, "Strong-State Democratization in Malaysia and Singapore," *Journal of Democracy*, Vol. 23, No 2 (April 2012), p. 12.
[150] Guillermo A. O'Donnell, "Why the Rule of Law Matters," *Journal of Democracy*, Vol. 15, No. 4 (October 2004), p. 32.
[151] Paris, *At War's End*, pp. 164–165.
[152] Scott Worden, "Afghanistan: An Election Gone Awry," *Journal of Democracy*, Vol. 21, No. 3 (July 2010), pp. 11–25; and Nazif M. Shahrani, "The Impact of the 2014 U.S.-NATO Withdrawal on the Internal Politics of Afghanistan: Karzai-style Thugocracy or Taliban Theocracy?" *Asian Survey*, Vol. 55, No. 2 (March/April 2015), pp. 273–298.
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