

**THE ENIGMATIC ORIGIN OF THE CPA:  
AN ATTRIBUTE OF THE UNITARY EXECUTIVE**

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TABLE OF CONTENTS

I. INTRODUCTION.....	269
II. SECESSION MOVEMENTS IN IRAQ, OIL, AND DEMOCRACY .....	273
III. SEQUENCE OF IRAQI GOVERNMENTS & ELECTIONS .....	279
IV. THE CPA IMPOSING ITS WILL .....	291
V. FROM WHERE DID THE CPA EMERGE? .....	298
A. <i>State Responsibility</i> .....	298
B. <i>Was the CPA Established by the Security Council?</i> .....	299
C. <i>Actual Control in the White House</i> .....	310
VI. CONCLUSION.....	315

I. INTRODUCTION

President George W. Bush was known for taking executive unilateralism to an entirely new level<sup>1</sup> by systematically referencing the Commander in Chief authority to discretionarily execute operations correlative to the use of force,<sup>2</sup> including when

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1. See Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 391–93 (2008); see also Bruce Fein, A Forum on Presidential Authority, at Seattle University School of Law (November 3, 2006), in 6 SEATTLE J. SOC. JUST. 23, 89 (2007) (opining that, during his presidency, “President Bush . . . engaged in unprecedented usurpations of powers properly entrusted to the other branches of government”).

2. See Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871, 871 (2007) (“It is no secret that the administration of President George W. Bush has consistently asserted a

congressional participation was required under constitutional war powers.<sup>3</sup> Even when Congress strove to check the Executive, the President avoided congressional authority and did so under the presumption that Congress was interfering with the “unitary Executive” authority.<sup>4</sup> However, the constitutional Framers’s conception of a unitary Executive was not designed to be a mode for the Executive to expand authority relative to the legislature when there are potentially overlapping powers,<sup>5</sup> but was foremost devised to ensure that the Executive maintained control over and accepted responsibility for the acts of subordinate executive offices.<sup>6</sup> Alexander Hamilton emphasized that the unitary Executive was

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breathtakingly broad view of the scope of executive authority under Article II of the United States Constitution.”); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2350 (2006) (“[T]he Bush Administration and its supporters have pressed for a revamped constitutional and international vision that champions the supremacy of both executive and American unilateralism.”).

3. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 122 (2007) (“Congress may have thought it was granting the [P]resident limited wartime powers after 9/11, but the Bush-Cheney administration decided in secret that it wielded unlimited wartime powers.”).

4. In a pivotal example, in 2007, and after elections that led Democrats to recapture control of both Houses of Congress for the first time in twelve years, Congress responded to the overwhelming American public opposition to the continuing occupation of Iraq and passed a resolution to gradually withdraw American troops from Iraq to end the occupation. See Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 34–47 (2012) [hereinafter *Political Penumbbras*]. President George W. Bush vetoed the bill and stated: “[T]his legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces.” H.R. DOC. NO. 110-31, at 153 (2007).

5. See Jonathan T. Menitove, Note, *Once More Unto the Breach: American War Power and a Second Legislative Attempt to Ensure Congressional Input*, 43 U. MICH. J.L. REFORM 773, 778 (2010).

6. See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 358 (2010); see also Michael Sevi, *Original Intent, Timetables, and Iraq: The Founders’ Views on War Powers*, 13 TEX. REV. L. & POL. 73, 86–88 (2008) (referencing Constitutional Convention debates of several delegates who spoke of vesting the executive power in an individual); Robert J. Spitzer, *Bush, the Post-Bush Presidency, and the Constitutional Order*, at 8, 12, 15 (Sept. 3, 2009) (unpublished presentation at the Ann. Meeting of the Am. Pol. Sci. Ass’n, Toronto, Canada), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1450695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1450695) (stating that the Bush administration’s conception of unitary executive is “the fulfillment or realization of some long lost or misunderstood vision of the Constitution’s [F]ramers regarding executive power,” but further expressing that this unitary executive theory endeavors to expand executive power, “cherry-picks its evidence, often misrepresents the historical record, . . . ignores pertinent literature in other disciplines,” and “is an honest reading of the Constitution only if the reader is standing on his or her head at the time.”).

intended to avert responsibility shirking.<sup>7</sup>

The actions of the Coalition Provisional Authority (CPA) in Iraq wield critical lessons on principal-agent accountability and the oft-discordant interpretations of the unitary executive concept because the CPA was an effective agent of the White House that did whatever it pleased without reasonably being checked by international laws of occupation, legislative authority, or the plain language of Security Council Resolution 1483, the resolution that specified the parameters for the occupation.<sup>8</sup> Also, the CPA's existence engendered a disconcerting composite that enfeebled fundamentals of executive accountability.<sup>9</sup> Given that Congress apparently possessed a "mixed understanding of the CPA's legal status,"<sup>10</sup> a Congressional Research Service investigation was initiated and found that it was "unclear whether CPA is a federal agency," *who* created it, and *how* the CPA was established and under what authority, which frustrated legislative oversight and obscured executive accountability.<sup>11</sup>

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7. DAVID K. WATSON, 1 THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 861–62 (1910) (excerpting THE FEDERALIST NO. 70 (Alexander Hamilton)) ("one of the weightiest objections to a plurality in the Executive . . . is, that it tends to conceal faults and destroy responsibility . . . . [T]he multiplication of the Executive adds to the difficulty of detection in either case.").

8. *See generally* Robert Bejesky, How the US Occupation Imposed Economic Reforms on Iraq Irrespective of International Law as a Foundation for the Present Oil Bonanza (Oct. 2014) (Working Paper) (on file with author); Robert Bejesky, CPA Dictates on Iraq: Not an Update to the Customary International Law of Occupation but the Nucleus of Blowback with the Emergence of ISIS 17–35 (Oct. 2014) (Working Paper) (on file with author) [hereinafter *CPA Dictates*]; *see infra* Parts III, IV.

9. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 620 (E.D. Va. 2005) (Judge Ellis determining that the "essential nature of the CPA . . . [was] shrouded with ambiguity"); Jessica C. Morris, *Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act's War-Profitteering Roots?*, 41 GA. L. REV. 623, 636 (2007) (noting the substantive obscurity and believing that chronological events "provid[ed] clues to the CPA's origins").

10. Morris, *supra* note 9, at 637.

11. L. ELAINE HALCHIN, AM. NAT'L GOV'T, GOV'T & FIN. DIV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES, at summary, 32–33 (Apr. 29, 2004), *available at* <http://fas.org/man/crs/RL32370.pdf> ("Potential drawbacks of this arrangement are that the lines of authority and accountability could become entangled, or even obscured . . . . This scenario also could prove challenging for organizations that are attempting to monitor CPA and its activities . . . . Further compounding the problem, oversight initiatives might be met with the response that the activity in question was carried out under an authority over which the oversight body—Congress—has no jurisdiction."); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 7–8 (2007) (emphasizing the Bush "administration's approach of intense evasion of accountability disabled 'power of the purpose' checks on misdirected procurement and other spending."); *see*

The CPA adopted lasting rules and institutions<sup>12</sup> that incited violence and dissent within Iraq because of incompatibility with societal norms.<sup>13</sup> If perduring hostility and the attempted, violent state-shattering secession movement that is currently unfolding can be regarded as an expected outcome of the trajectory set by the CPA's entrenchment of institutions that are antipathetic to societal norms, this signals an imperative need to demand compliance with the rule of law, beware of instances in which government agents diffuse responsibility and evade being checked, and ensure that an occupied populace is endowed with rights of democratic self-determination that impart accountability and responsibility for its own institutions.

Part II addresses the current political and military context in Iraq due to the emergence of the Islamic State of Iraq and Syria (ISIS) and how oil concessions granted to foreign multinationals may have intensified the conflict and regional land grabs. Part III discusses

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also Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom*, 95 CALIF. L. REV. 2295, 2323 (2007); *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L. L. 601, 601 (2004) [hereinafter *Coalition Laws*].

12. The U.S. involvement in the Iraqi constitutional drafting process was highly controversial, but resulted in lasting rules. Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design* 94 MINN. L. REV. 1789, 1812 (2010) (iterating the importance of constitutional construction and that the adoption of a constitution is followed by interpreting abstract principles, vague clauses, and precedent to set a trajectory of expectations through rules and practices); see also David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT'L L. & FOREIGN AFF. 75, 142 (2007) (expressing the critical nature of constitutional reforms for the basis of future rules because all government powers derive from the Constitution).

13. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 78 (Cambridge: Cambridge University Press 2006) (stating that today's globalized world "requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes."); Stuart W. Bowen, Jr., *A Golden Moment: Applying Iraq's Hard Lessons to Strengthen the U.S. Approach to Stabilization and Reconstruction Operations*, 34 FLETCHER F. WORLD AFF. 17, 17-18 (2010) (special inspector general for Iraq reconstruction acknowledging that occupation operations were "frequently in the breach"); Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 883 (2006) (suggesting insurgency and strife over controversial constitutional provisions); Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, NEW YORKER, May 24, 2004, <http://www.newyorker.com/magazine/2004/05/24/the-gray-zone?currentPage=all> ("Insurgencies can be fixed or ameliorated by dealing with what caused them in the first place. The disaster that is the reconstruction of Iraq has been the key cause of the insurgency. There is no legitimate government, and it behooves the Coalition Provision Authority to absorb the sad but unvarnished fact that most Iraqis do not see the Governing Council as the legitimate authority. Indeed, they know that the true power is the CPA."). See *infra* Part III.

progressive CPA operations that formed the post-Hussein Iraq and the concomitant populace reaction. Part IV provides an overview of CPA dictates that could have led to a lingering hostility. Part V opens the analysis to how, with all of the controversy surrounding the CPA dictates, the Bush Administration avoided heightened responsibility due to the puzzles surrounding the origin of the CPA, which is the dilemma over the interpretation of the unitary Executive in the American constitutional order.

## II. SECESSION MOVEMENTS IN IRAQ, OIL, AND DEMOCRACY

The insurgency group named ISIS, which had been battling the Syrian military in Syria, swept across Sunni-occupied regions of Iraq in mid-June 2014 and has placed the U.S. position, quite oddly, on the same side as Syria and Iran.<sup>14</sup> To reduce the exacerbation of sectarian divisions, but ostensibly also to demerit this impression of a de facto alliance, Secretary of State Kerry told Iraq's neighbors to abstain from the conflict.<sup>15</sup> Opinions have ranged from those that have called ISIS brutal zealots,<sup>16</sup> leaders of a larger movement of Sunni "revolutionaries,"<sup>17</sup> and even a group targeting foreign oil production

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14. Arwa Damon, Chelsea J. Carter, Mohammed Tawfeeq & Laura Smith-Spark, *Iraqi PM Orders Troops to Make Stand in Samarra; U.S. Sends Aircraft Carrier*, CNN (June 14, 2014), <http://www.cnn.com/2014/06/14/world/mideast/iraq-violence/> (noting that Iran sent Revolutionary Guard troops into Iraq); Michael R. Gordon & Eric Schmitt, *Iran Secretly Sending Drones and Supplies Into Iraq, U.S. Officials Say*, N.Y. TIMES (June 25, 2014), <http://www.nytimes.com/2014/06/26/world/middleeast/iran-iraq.html> (stating that Iran began providing drone surveillance and supplies into Iraq); *Iraqi PM Welcomes Syria Air Strike on Border Crossing*, BBC (June 26, 2014), <http://www.bbc.com/news/world-middle-east-28033684> (reporting that Syria started bombing on the border and in Iraq and Maliki welcomed it. Maliki remarked that Iraq purchased 36 American jet fighters that they had not yet received and that he was acquiring "second-hand jet fighters from Russia that should arrive in Iraq in two or three days.").

15. *Kerry Warns Mideast Nations Against Taking Military Action in Iraq*, CBS D.C., June 26, 2014, <http://washington.cbslocal.com/2014/06/26/kerry-warns-mideast-nations-against-taking-military-action-in-iraq/> (reporting that "the involvement of Syria and Iran in Iraq suggests a developing Shiite axis among the three governments in response to the raging Sunni insurgency. And in an unusual twist, the U.S., Iran and Syria now find themselves with overlapping interests in stabilizing Iraq's government.").

16. Leon Watson, *Jihadi Terror Group PLC: ISIS Zealots Log Assassination, Suicide Missions and Bombings in Annual Report for Financial Backers*, DAILY MAIL (June 17, 2014), <http://www.dailymail.co.uk/news/article-2661007/15-000-fighters-1-000-assassinations-4-000-IEDs-How-Isis-publishes-annual-report-detailing-reign-terror-Middle-East.html>.

17. Scott Peterson, *Maliki or ISIS? Neither Looks Good to Sunni Awakening Veterans*, CHRISTIAN SCI. MONITOR (June 18, 2014), <http://www.csmonitor.com/World/Middle-East/2014/0618/Maliki-or-ISIS-Neither-looks-good-to-Sunni-Awakening-veterans>.

facilities in Iraq.<sup>18</sup>

Political leaders maintained that the answer to the crisis was to constitute a new and inclusive Iraqi government<sup>19</sup> because Prime Minister Nouri al-Maliki alienated both Kurds and Sunnis.<sup>20</sup> Maliki was an Iraqi exile-defector for twenty-three years prior to the 2003 invasion and has been prime minister for eight years,<sup>21</sup> which means that not long after he returned to Iraq following the Bush administration's invasion, he became prime minister and continued to hold that position ever since. Commentators have remarked that Maliki has been corrupt, has super-inflated his own power by deeming himself the "preeminent military leader," suppressed peaceful protests with his security services, labeled protesters terrorists, hired thugs to beat and kill protesters, and arrested and tortured thousands of dissenters until protests ended.<sup>22</sup> Sandy Berger, national security advisor during the Clinton administration, recently stated that "Maliki had governed in such an overtly anti-Sunni fashion that the Sunni tribes in the north had come to hate him more than they

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18. *Iraq Crisis: Baghdad Requests US Air Strikes Against Sunni Militants—Live*, GUARDIAN (June 18, 2014), <http://www.theguardian.com/world/middle-east-live/2014/jun/18/iraq-crisis-maliki-sacks-officers-and-calls-for-national-unity-live-updates>.

19. Jay Solomon & Carol E. Lee, *U.S. Signals Iraq's Maliki Should Go*, WALL ST. J. (June 19, 2014), <http://online.wsj.com/articles/u-s-signals-1403137521> ("The Obama administration is signaling that it wants a new government in Iraq without Prime Minister Nouri al-Maliki . . ."); Mark Tran, *Iraqi Prime Minister Rejects Pleas For Government of 'National Salvation'*, GUARDIAN (June 25, 2014), <http://www.theguardian.com/world/2014/jun/25/iraqi-prime-minister-rejects-calls-salvation-government> (German Chancellor Angela Merkel stating "We need a government in Iraq that embraces all parts of the population. For years this has not happened and because of this the pressure needs to be raised."); *Iraq Crisis: Kerry Urges Unity to Expel Isis Rebels*, BBC (June 24, 2014), <http://www.bbc.com/news/world-middle-east-27991414> (reporting that Secretary of State John Kerry explained that there was "no military solution" and affirmed that a new government was needed).

20. Jay Solomon & Matt Bradley, *Iraqi Parties Pressure Prime Minister Nouri al-Maliki to Step Down*, WALL ST. J. (June 23, 2014), <http://online.wsj.com/articles/u-s-s-kerry-arrives-in-baghdad-for-meeting-with-prime-minister-maliki-1403508006>.

21. Jason Burke, *Iraq: How Much is the Divisive Approach of Maliki Responsible for the Turmoil?*, GUARDIAN (June 15, 2014), <http://www.theguardian.com/commentisfree/2014/jun/15/nouri-al-maliki-is-he-the-man-to-blame-in-iraq>.

22. Zaid Al-Ali, *How Maliki Ruined Iraq*, FOREIGN POL'Y (June 19, 2014), [http://www.foreignpolicy.com/articles/2014/06/19/how\\_maliki\\_ruined\\_iraq\\_armed\\_forces\\_isis](http://www.foreignpolicy.com/articles/2014/06/19/how_maliki_ruined_iraq_armed_forces_isis); Shashank Bengali & Patrick J. McDonnell, *Resignation of Prime Minister Maliki Gives Rise to Hope in Iraq*, L.A. TIMES (Aug. 15, 2014), <http://www.latimes.com/world/middleeast/la-fg-iraq-maliki-resignation-relief-20140815-story.html> ("Sunni leaders accuse Maliki's Shiite-dominated government and security forces of marginalizing members of their sect as well as carrying out unlawful abductions and other abuses. Those policies, they say, have fueled support for the Islamic State militants.").

feared ISIS.”<sup>23</sup> A member of the U.K. House of Lords recently wrote that “Maliki has created a Mafia-like network of criminals and assassins to eliminate the voice of opposition at every level” and estimated that a thousand Sunnis have been killed every month for the past decade by Maliki’s assassins.<sup>24</sup> Remarking about officially authorized acts of Maliki’s special forces, Zaid Al Ali writes: “Groups of young men were arrested in waves, often in the middle of the night, and would be whisked to secret jails, often never to be seen again.”<sup>25</sup> Maliki, who exhibited no interest in making concessions to insurgents or dissenting political groups,<sup>26</sup> did finally resign<sup>27</sup> after being adamant during nearly two months of pressure, but was then appointed several days later to the position of vice president.<sup>28</sup> In addition to Maliki’s infamy, there is a second principal source of tension.

During the occupation, Iraqi defectors and CPA appointees offered periodic public statements endorsing privatization of Iraqi oil<sup>29</sup> and this advocacy became a source of evidence for those who contended for several years that the 2003 Iraq War was driven by interest in Iraqi oil, but the Bush Administration repeatedly

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23. Sandy Berger, Op-Ed., *U.S. Must Forge New Ties With Iraq to Tackle ISIS Threat*, TIME (Aug. 17, 2014), <http://time.com/3130983/sandy-berger-iraq-isis-maliki/>. Some percentage of Sunni refugees may support the militants but had been fleeing their homes because they feared that the Iraqi government would bomb cities controlled by the militants. See Janine di Giovanni, *Body Recount in Iraq*, NEWSWEEK (May 8, 2014), <http://www.newsweek.com/2014/05/16/body-recount-iraq-250219.html>; (describing the ongoing hostilities and tit-for-tat violence between Sunnis and Shias). In a PBS documentary, Thomas Ricks, the author of *Fiasco*, stated: “What’s going on in Iraq is not 800 Syrian militants running into Iraq. It’s the Sunni tribes, probably 20 percent of the country, have lost patience with the government in Baghdad led by Prime Minister Maliki, and encouraged by the Syrian war, and in part armed by the Syrian war, have risen up.” *Frontline: Losing Iraq*, (PBS television broadcast July 29, 2014), transcript available at <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/losing-iraq/transcript-66/>.

24. Lord Maginnis, *A Fictitious ISIL to Scare Us Away From the Truth in Iraq*, HUFFINGTON POST (June 15, 2014), [http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isis\\_b\\_5494529.html](http://www.huffingtonpost.co.uk/lord-maginnis/iraq-isis_b_5494529.html) (also questioning the origin of the labels, such as “ISIL” and noting that it was Maliki and mullahs in Iran who branded the group as the “frightful and horrific body” when the insurgency is against Maliki and his brutality).

25. Al-Ali, *supra* note 22.

26. *Iraq PM Maliki Rejects Emergency ‘Salvation’ Government*, BBC (June 25, 2014), <http://www.bbc.com/news/world-middle-east-28015169>.

27. See Bengali & McDonnell, *supra* note 22.

28. *What Do Iraqi Leaders Hope to Hear From Obama’s Strategy?*, PBS (Sept. 10, 2014), available at <http://www.pbs.org/newshour/bb/iraqi-leaders-hope-hear-obamas-strategy/>.

29. Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 219, 229–32, 245, 249 (2011) [hereinafter *Geopolitics*].

maintained the invasion of Iraq was not due to a U.S. interest in Iraqi oil.<sup>30</sup> In April 2013, CNN reported on the shift from Iraq's nationalized oil industries to a privatized industry that is now dominated by American and British oil companies, "Yes, the Iraq War was a war for oil, and it was a war with winners: Big Oil."<sup>31</sup> If the Iraqi government falls to an adversarial regime or the country separates by a secession movement, current and future oil concession contracts with American oil companies could be in jeopardy.<sup>32</sup> Referencing the current turmoil in Iraq and the request by Maliki's regime for military assistance, billionaire Donald Trump candidly remarked: "Iraq told us to get out, Iraq is now falling, and Iraq now wants us to come back! Don't do it unless we get the OIL, and I mean ALL OF IT!"<sup>33</sup> A June 2006 University of Michigan Institute for Social Research poll revealed that 76% of Iraqis were cynical and believed that the invasion was "to control Iraqi oil."<sup>34</sup>

Trump also raised an interesting point by remarking that "Iraq" wants the U.S. back. Iraqis generally were not very supportive of the American military occupation. In April 2004, a *USA Today/CNN/Gallup Poll* found that 71% of Iraqis considered foreign troops "occupiers" and not "liberators."<sup>35</sup> In October 2005, the British

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30. *Id.* at 209, 220–21, 226–28.

31. Antonia Juhasz, Op-Ed., *Why the War in Iraq was Fought for Big Oil*, CNN (Apr. 15, 2013), <http://www.cnn.com/2013/03/19/opinion/iraq-war-oil-juhasz/>.

32. *Geopolitics*, *supra* note 29, at 248–50; Borzou Daragahi, Guy Chazan, Geoff Dyer & Daniel Dombey, *Baghdad Launches Air Strikes on Insurgents in Mosul*, FINANCIAL TIMES (June 12, 2014), <http://www.ft.com/cms/s/0/09bf97c2-f200-11e3-9015-00144feabdc0.html#slide0> ("Shares in oil explorers focused on northern Iraq tumbled as investors took fright amid fears that violence could spread"); Dahr Jamail, *Western Oil Firms Remain as US Exits Iraq*, ALJAZEERA (Jan. 7, 2012), <http://www.aljazeera.com/indepth/features/2011/12/2011122813134071641.html> (quoting Antonia Juhasz, an oil industry analyst, stating that "[p]rior to the 2003 invasion and occupation of Iraq, US and other western oil companies were all but completely shut out of Iraq's oil market, . . . [b]ut thanks to the invasion and occupation, the companies are now back inside Iraq and producing oil there for the first time since being forced out of the country in 1973").

33. Donald Trump, TWITTER (June 12, 2014, 5:03 AM), <https://twitter.com/realDonaldTrump/status/477058640978120704>.

34. *Iraqi Attitudes: Survey Documents Big Changes*, U. MICH. NEWS SERV., June 14, 2006, available at <https://web.archive.org/web/20061104223358/http://www.umich.edu/news/index.html?Releases/2006/Jun06/r061406a>.

35. Cesar G. Soriano & Steven Komarow, *Poll: Iraqis Out of Patience*, USA TODAY, Apr. 30, 2004, [http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover\\_x.htm](http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover_x.htm); see also INDEP. INST. FOR ADMIN. & CIVIL SOC'Y, PUBLIC OPINION IN IRAQ: FIRST POLL FOLLOWING ABU GHRAIB REVELATIONS 35 (2004), available at <http://www.globalpolicy.org/images/pdfs/06iiacss.pdf> (poll revealing that that 92% viewed foreign troops as occupiers and 2% viewed them as liberators).

Ministry of Defense revealed that 82% of Iraqis were “strongly opposed” to the military occupation, 67% felt less secure with the occupation, and only 1% felt more secure with the presence of the foreign occupation.<sup>36</sup> One month later, Representative Murtha sponsored a U.S. House of Representatives Resolution to withdraw American troops and cited polls indicating that 80% of Iraqis wanted forces to leave and 45% felt attacks on U.S. forces were justified.<sup>37</sup> A January 2006 University of Maryland *PIPA* poll discovered that 80% of Iraqis believed that the U.S. planned to establish permanent bases even though 87% wanted to set a timeline for occupying military forces to withdraw.<sup>38</sup> An August 2007 ABC-BBC poll revealed that 79% of Iraqis opposed “the presence of Coalition forces in Iraq,” which was a percentage that had always been high but steadily appreciated when the same question was asked in 2004, 2005, and 2006.<sup>39</sup> Polls in February 2008 reflected that nearly three-fourths rejected continued foreign presence.<sup>40</sup>

As polls clearly represented opposition to a continuing military occupation, in November 2007, Bush and Malki secretly signed a “Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America,”<sup>41</sup> which many speculated was code for keeping permanent U.S. bases in Iraq.<sup>42</sup> The agreement was

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36. Sean Rayment, *Secret MoD Poll: Iraqis Support Attacks on British Troops*, TELEGRAPH, Oct. 23, 2005, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1501319/Secret-MoD-poll-Iraqis-support-attacks-on-British-troops.html>.

37. H.R.J. Res. 73, 109th Cong. (2005), available at <http://www.govtrack.us/congress/billtext.xpd?bill=hj109-73>.

38. PROGRAM ON INT’L POL’Y ATTITUDES, WHAT THE IRAQI PUBLIC WANTS: A WORLDPUBLICOPINION.ORG POLL 3–4 (2006), available at [http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq\\_Jan06\\_rpt.pdf](http://www.worldpublicopinion.org/pipa/pdf/jan06/Iraq_Jan06_rpt.pdf).

39. BBC, ABC, & NHK, IRAQ POLL SEPTEMBER 2007, at 11, available at [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10\\_09\\_07\\_iraqpoll.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/10_09_07_iraqpoll.pdf).

40. Juan Cole, *Iraq: The Necessary Withdrawal*, THE NATION (Jan. 12, 2009), <http://www.thenation.com/article/iraq-necessary-withdrawal>.

41. Press Release, White House, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America (Nov. 26, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html> [hereinafter Declaration of Principles]. See generally Michael J. Matheson, *The International Struggle over Iraq: Politics in the UN Security Council, 1980-2005*, 102 AM. J. INT’L L. 687, 687 (2008) (book review) (discussing briefly “the emergence of a comprehensive approach to peace, justice, security, and development,” which was generally unsupported by the data, as it was intended to be within the purview of the United Nations).

42. Patrick Cockburn, *Revealed: Secret Plan to Keep Iraq Under US Control*, THE INDEPENDENT (LONDON), June 5, 2008, <http://www.independent.co.uk/news/world/middle-east/revealed-secret-plan-to-keep-iraq-under-us-control-840512.html>. Secretary of State Rice and

controversial and was rejected by Iraqis over the next year.<sup>43</sup> In late-November 2008, after parliamentary debate, the Iraqi parliament and the Iraqi Cabinet approved an agreement to reduce the military occupation's involvement in local affairs and to specify that there would be a withdrawal of all occupation forces by the end of 2011.<sup>44</sup>

Two years after occupation forces departed, the signs of the insurgency surfaced.<sup>45</sup> As conflict intensified, former Vice President Dick Cheney discerned a desire to blame President Obama for the insurgency and stated, "I think that [invading Iraq] was the right decision then, and I still believe that today."<sup>46</sup> The current disaster was not caused by President Obama, and the unfortunate fact is that Iraqis are facing civil war-like conditions because of the Bush

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Secretary of Defense Gates did later state that the Bush Administration did not intend to seek an agreement that would place permanent military bases in Iraq, but mentioned that a SOFA would govern legal jurisdiction questions during the time that forces remained. Condoleezza Rice & Robert Gates, *What We Need Next in Iraq*, WASH. POST, Feb. 13, 2008, at A19.

43. See *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: Iraqi Parliament Approves Status-of-Forces Agreement Setting Timetable for U.S. Withdrawal*, 103 AM. J. INT'L L. 132, 132 (2009); Ernesto Londoño & Dan Eggen, *Iraq Wants Withdrawal Timetable in U.S. Pact*, WASH. POST, July 9, 2008, at A8 (noting the Iraqi demand to have a complete withdrawal of U.S. troops); Amit R. Paley & Karen DeYoung, *Iraqis Condemn American Demands*, WASH. POST, June 11, 2008, at A1 (stating that an Iraqi politician noted that there were U.S. demands to "maintain nearly 60 bases in their country indefinitely" and that Iraqis believed that they were better off without the U.S. presence).

44. Duncan B. Hollis & Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 508–09 (2009); Alissa Rubin & Campbell Robertson, *Iraq Backs Deal That Sets End of U.S. Role*, N.Y. TIMES, Nov. 27, 2008, at A1 (reporting that the vote was 149 to 35 to pass the act and that the "sweeping security agreement . . . sets the course for an end to the United States' role in the war . . ."); Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, art 24(1), Nov. 17, 2008, <http://www.state.gov/documents/organization/122074.pdf> [hereinafter *Withdrawal Agreement*] ("All the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.").

45. Qassim Abdul-Zahra, *Fallujah Falls Fully in Hands of al-Qaeda Group*, ASSOCIATED PRESS, Jan. 5, 2014, available at <http://www.military.com/daily-news/2014/01/05/fallujah-falls-fully-into-hands-of-al-qaida-group.html> (reporting that hostilities in Fallujah erupted again in January 2014, with Iraqi police contending that al-Qaeda fighters took over the city). A human rights group accused the Iraqi military of firing mortars into civilian areas and the locals explained that the al-Qaeda allegation was an excuse for Prime Minister Maliki to suppress Sunnis for fighting back against persecution committed by the Shiite-led government and military. *CBS Evening News* (CBS television broadcast Jan. 9, 2014) (video on file with author).

46. Zeke J. Miller, *Dick Cheney Says Iraq War Was "the Right Thing"*, TIME (June 25, 2014), <http://time.com/2919765/dick-cheney-iraq-obama/>.

Administration.<sup>47</sup> The Bush Administration invaded the country illegally,<sup>48</sup> transplanted institutions, dictated conditions of governance, transgressed occupation law, and did not withdraw when the Iraqi people demanded, which would have been the optimal means of respecting self-determination.<sup>49</sup> The progression of U.S.-appointed governments, which eventually led to the long-term tenure of Maliki, and the labeling of those governments as a product of the Iraqi people is addressed in Part III.

### III. SEQUENCE OF IRAQI GOVERNMENTS & ELECTIONS

Articles 50 and 56 of the Geneva Convention specify that a foreign military occupation can only undertake limited operations of authority over the local population and emphasize that the occupying command must cooperate with “national and local authorities.”<sup>50</sup> The Bush Administration publicly represented this conception of limited occupation as combat operations appeared to be ending in May 2003; Bush administration officials represented that an interim Iraqi government would be chosen, that the interim government would adequately represent the Iraqi people and interests, that Iraqis would govern themselves, and that Iraqis of all ethnic groups would participate in the Iraqi Governance Council.<sup>51</sup> While promoting these

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47. Eliana Johnson, *Rand Paul: Blame Bush, Not Obama*, NAT'L REV. (June 22, 2014), <http://www.nationalreview.com/corner/380933/rand-paul-blame-bush-not-obama-eliana-johnson> (remarking that Rand Paul, a Republican presidential candidate, stated that it was not President Obama who made the U.S. less safe but that “[t]he 2003 invasion of Iraq is the root of the current chaos in the country” and as “ISIS seizes cities and establishes strongholds across the country, he blames the Bush administration and its Republican supporters.”); see also H.A. Goodman, *ISIS Atrocities in Iraq Represent the Catastrophic Failure of Bush Doctrine and Neoconservative Foreign Policy*, HUFFINGTON POST (Aug. 8, 2014), [http://www.huffingtonpost.com/h-a-goodman/isis-atrocities-in-iraq-r\\_b\\_5661346.html](http://www.huffingtonpost.com/h-a-goodman/isis-atrocities-in-iraq-r_b_5661346.html) (noting that the Bush Administration’s neoconservatives caused this tragedy in Iraq and Syria and stated that the “Bush Doctrine policy of ‘preventive war’ not only failed to prevent future conflicts in Iraq and the Middle East, but also created a power vacuum that emboldened renegade and genocidal groups like ISIS.”).

48. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L. & COM. 295, 349–50 (2011) [hereinafter *Weapon Inspections*].

49. Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L.J. 799, 824 (2010).

50. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 50, 56, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter Geneva Convention IV].

51. *Nine Iraqis Expected to Lead Interim Government*, CNN (May 5, 2003), <http://www.cnn.com/2003/WORLD/meast/05/05/sprj.iq.main/> (reporting that Powell reiterated that Bush’s goal “is to allow the Iraqi people to decide how they will be governed”

views plausibly attained more support from the Iraqi populace and made the international community more willing to acquiesce to an official occupation, occupational authorities did not adhere to these assurances after assent was secured.

In early May 2003, the first group the occupation appointed to represent a local Iraqi government was a council of nine individuals, most of whom were exiles of Iraq.<sup>52</sup> On May 16, the CPA, which had an obscure origin, adopted CPA Order No. 1, which abolished the Ba'ath Party and removed 15,000 to 30,000 members from government office.<sup>53</sup> Banning the Ba'ath party did not just exclude members of a political alliance because underlying the ban is the fact that Sunnis were more likely to be Ba'ath party members and loyalists to the former regime.<sup>54</sup> Security Council Resolution 1483 was adopted one week later and called the U.S. and U.K. military occupation the "Authority" (without identifying a "Coalition Provisional Authority") and created a U.N. Special Representative for Iraq that would assist the Authority.<sup>55</sup> The Bush Administration later

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and Lt. Gen. Jay Garner, head of the Office of Reconstruction and Humanitarian Assistance (ORHA), remarked: "By the middle of this month, you'll really see a beginning of a nucleus of an Iraqi government with an Iraqi face on it that is dealing with the coalition."); George W. Bush, Pres. of the United States, Commencement Address at the University of South Carolina, May 9, 2003, available at <http://2001-2009.state.gov/p/nea/rls/rm/20497.htm> (stating that "[s]oon, Iraqis from every ethnic group will choose members of an interim authority"). Rather than stating the truth which was that Iraqis chosen would be Iraqi exiles or loyalists to the occupation, the Bush administration provided propaganda and stated that the individuals would be representative. Likewise, shortly after the invasion, the US military began to install mayors at the local level. Bathsheba Crocker, *Closing Remarks*, 20 OHIO ST. J. ON DISP. RESOL. 279, 283-84 (2005).

52. Zamira Eshanova, *Iraq: Opposition Groups Jockey for Position in Interim Government*, RADIO FREE EUR. RADIO LIBERTY (May 8, 2003), <http://www.rferl.org/content/article/1103167.html>. When Powell was asked why no local Iraqis were being selected, he explained that the decision . . . was made to "draw on the experience and the dedication of those who have been outside . . . as well as the experience and knowledge of those inside. And we think the best solution is a combination of those. . . ." Information Release, U.S. Dep't of State, Remarks With NATO Secretary General Lord Robertson After Their Meeting, (May 5, 2003), <http://2001-2009.state.gov/secretary/former/powell/remarks/2003/20224.htm>.

53. *Purge of Saddam Loyalists*, BBC (May 16, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/3033919.stm](http://news.bbc.co.uk/2/hi/middle_east/3033919.stm); see also Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L. L., 580, 614 (2006) (calling Order No. 1 a much criticized order).

54. Seabster Usher, *Baathist Mistake Corrected Amid Concern*, BBC (Jan. 12, 2008), [http://news.bbc.co.uk/2/hi/middle\\_east/7185276.stm](http://news.bbc.co.uk/2/hi/middle_east/7185276.stm); see also John Barry, *The Pentagon May Put Special-Forces-Led Assassination or Kidnapping Teams in Iraq*, NEWSWEEK (Jan. 7, 2005), <http://www.newsweek.com/pentagon-may-put-special-forces-led-assassination-or-kidnapping-teams-iraq-117209> (stating that the Pentagon planned to use Shia and Kurd assassination teams against suspected Sunni insurgents).

55. S.C. RES. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

ensured that the U.N. played almost no role.<sup>56</sup>

Iraq's economic and security situation further deteriorated shortly after the CPA issued Order No. 2, which dismissed 440,000 Iraqi army soldiers and awarded them with a one-time \$40 compensation payment<sup>57</sup> and dissolved all military, intelligence, security, and paramilitary structures of the former regime.<sup>58</sup> U.N. Iraqi Representative Faisal al-Istrabadi considered the order outrageous and was perplexed as to why anyone would "take 400,000 men, who were highly armed and trained, and turn them into your enemies."<sup>59</sup>

Ramiro Lopes da Silva, the senior U.N. official in Iraq, criticized the two orders that disbanded the entire Iraqi military and all Ba'ath Party members, explained that the directives would likely foment instability because most of the officials and employees may have only been party members on paper and may not have been allegiant to Saddam Hussein.<sup>60</sup> Nonetheless, government agencies, schools, hospitals, and universities were required to replace personnel deemed associated with the Ba'ath Party.<sup>61</sup> Logically, if government and associated personnel are stripped down so extensively, government obligations cannot be executed and public services cannot be provided, which of necessity mandated an alternative source to fill a deep void. The conservator would be the CPA, but its operations

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56. See BOB WOODWARD, *PLAN OF ATTACK* 359 (2004); Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 736–37 (2005); Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 840 (2003).

57. *Newsline: Former Iraqi Soldiers Not in Iraq*, RADIO FREE EUR. RADIO LIBERTY (Oct. 6, 2003), <http://www.rferl.org/content/article/1143016.html>.

58. James Thuo Gathii, *Commerce, Conquest, and Wartime Confiscation*, 31 BROOK. J. INT'L L. 709, 714–15 (2006); see also Coalition Provisional Authority, Order No. 22, Creation of a New Iraqi Army, CPA/ORD/7, available at [http://www.iraqcoalition.org/regulations/2003\\_0818\\_CPAORD\\_22\\_Creation\\_of\\_a\\_New\\_Iraqi\\_Army.pdf](http://www.iraqcoalition.org/regulations/2003_0818_CPAORD_22_Creation_of_a_New_Iraqi_Army.pdf) (Aug. 18, 2003) (CPA announcing that it would create a "New Iraqi Army").

59. DAVID PHILLIPS, *LOSING IRAQ: INSIDE THE POST-WAR RECONSTRUCTION FIASCO* 152 (2005); Tiefer, *supra* note 11, at 19–20, 22 ("It is hard to overstate this disaster of disbanding the Iraqi army in part from a procurement-aided unilateralism paradigm of relying upon contractors to equip and train a new army."); Michael R. Gordon, *Debate Linger on Decision to Dissolve the Iraqi Military*, N.Y. TIMES, Oct. 21, 2004, [http://www.nytimes.com/2004/10/21/international/21war.html?\\_r=0](http://www.nytimes.com/2004/10/21/international/21war.html?_r=0) ("Iraq was racked by unemployment and taking 350,000 armed men, cutting off their income and, in effect, throwing them out on the street could be disastrous").

60. Rory McCarthy, *UN Chief Warns of Anti-American Backlash in Iraq*, GUARDIAN (May 26, 2003), <http://www.theguardian.com/world/2003/may/27/iraq.rorymccarthy> (statement by Ramiro Lopes da Silva, the U.N.'s senior humanitarian official in Iraq).

61. DILIP HIRO, *SECRETS AND LIES* 312 (2004).

exacerbated societal unrest.

In early June 2003, an aggregation of leaders representing millions of citizens voiced their preference to immediately convene a national conference that would affix governance authority back into the dominion of Iraqis and lashed out against CPA proposals to appoint members to a second interim council.<sup>62</sup> The dissent should not have been unanticipated because Security Council Resolution 1483 did stress “the right of the Iraqi people freely to determine their own political future” and the prerogative of “representative governance.”<sup>63</sup>

Early elections were scheduled for June 2003, but the CPA cancelled the voting because L. Paul Bremer’s office believed that “the most organized political groups in many areas [were] rejectionists, extremists and remnants of the Baathists.”<sup>64</sup> Several days later, Bremer, the CPA administrator, remarked: “I’m not opposed to it, but I want to do it a way that takes care of our concerns . . . . Elections that are held too early can be destructive. It’s got to be done very carefully . . . . In a postwar situation like this, if you start holding elections, the people who are rejectionists tend to win.”<sup>65</sup> Bremer’s statement of taking “care of our concerns” apparently meant that it was necessary to wait long enough to isolate and negate the voice of those rejecting the occupation and CPA dictates (discussed in Part IV) so that voting and successful candidates would be amiable to

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62. Rajiv Chandrasekaran, *Iraqis Assail US Plans for Council*, PROBE INT’L (June 3, 2003), available at <http://journal.probeinternational.org/2003/06/03/iraqis-assail-u-s-plans-council/>; Rajiv Chandrasekaran, *US Sidelines Exiles Who Were to Govern Iraq: Former Opposition Leaders Considered Unrepresentative and Too Disorganized*, WASH. POST, June 8, 2003, at A22 (noting that the CPA did at least turn away the bands of exiles that were being courted by the White House and Pentagon); Donald Rumsfeld, Secretary of Defense Remarks to the Council on Foreign Relations (May 27, 2003), available at <http://www.cfr.org/iraq/remarks-secretary-defense-donald-h-rumsfeld/p5998> (reporting that Rumsfeld remarked about the possibility of leaders emerging from within Iraqi society: “[T]he Coalition Provision Authority has the responsibility to fill the vacuum of power. . .by asserting temporary authority over the country. The coalition will do so. It will not tolerate self-appointed ‘leaders.’”).

63. S.C. Res. 1483, pmb., U.N. Doc. S/RES/1483 (May 22, 2003).

64. David Rohde, *Iraqis Were Set to Vote, but US Wielded a Veto*, N.Y. TIMES, June 19, 2003, <http://www.nytimes.com/2003/06/19/international/worldspecial/19NAJA.html> (referring to the first scheduled elections in mid-June 2003 in Najaf).

65. William Booth & Rajiv Chandrasekaran, *Occupation Forces Halt Elections Throughout Iraq*, WASH. POST, June 28, 2003, available at <http://www.globalpolicy.org/component/content/article/168/36821.html> (referencing that “[t]he decision to deny Iraqis a direct role in selecting municipal governments is creating anger and resentment among aspiring leaders and ordinary citizens, who say the U.S.-led occupation forces are not making good on their promise to bring greater freedom and democracy . . .”).

maintaining the occupation even though polls consistently revealed that the democratic will of Iraqis opposed the occupation. Commentators also suggested that scheduled elections were postponed or canceled due to security concerns,<sup>66</sup> but others believed that the genesis of security concerns and violence was actually the failure to hold elections that would have assembled a more representative government, the existence of poor economic conditions, and the failure by the occupation to repair infrastructure that was devastated during the invasion.<sup>67</sup>

Ignoring the appeals for elections and a government run by the Iraqi people, on July 11, 2003, Bremer appointed a twenty-five person Iraqi Governing Council (IGC)<sup>68</sup> that did represent a broader spectrum of Iraqis than the initial nine individuals appointed to symbolize Iraqi involvement with government, but the second group was still comprised of a significant number of former exile-defectors who possessed pre-existing allegiance to the Bush administration,<sup>69</sup>

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66. Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 484 (2005).

67. Christina J. Sheetz & Matthew T. Simpson, *Rethinking the Future: The Next Five Years in Iraq*, 24 AM. U. INT'L L. REV. 181, 183 (2009) (stating that violence was also directed at the U.S. occupation due to poor economic conditions and the devastated infrastructure that followed the invasion); Jedediah Purdy, *The Ethics of Empire, Again*, 93 CALIF. L. REV. 1773, 1789 (2005) (essay review) (noting that even if a government was elected, there was no assurance that the foreign occupation would not assert its will on the local government's decisions, particularly when the present circumstance in Iraq consisted of "intense and widespread" hostility to the occupying power); Booth & Chandrasekaran, *supra* note 65 (noting the position among critics: "[O]ccupation authorities are fostering a dependent, passive mindset among Iraqis and leaving no one but themselves to blame for the crime, faltering electricity and general misrule Iraqis see in their daily lives."); *see also* Stan Crock, *How the U.S. Can Keep Iraq from Unraveling*, BUSINESSWEEK (June 1, 2003), <http://www.businessweek.com/stories/2003-06-01/commentary-how-the-u-dot-s-dot-can-keep-iraq-from-unraveling> ("Peace is turning out to be hell for average Iraqis. Electricity is still out in many parts of Baghdad. Looting is rampant, as thieves fill trucks with everything from scrap wood to crates of weapons. The threat of carjackings and kidnappings keeps people locked inside their houses. Drinking water is dicey. Many can't return to work, while children can't attend school."); Mark Danner, *Iraq: The New War*, N.Y. REV. BOOKS, Sept. 25, 2003, <http://www.nybooks.com/articles/archives/2003/sep/25/iraq-the-new-war/> (blaming the invasion for "weeks of looting and disorder" and destruction of Iraq's infrastructure and noting that during several weeks of destruction and insecurity, the occupation forces were unable to enforce security).

68. *Coalition Laws*, *supra* note 11, at 603 (stating that there were "Iraqi nationals selected by the United States"); *see also* GEORGE PACKER, THE ASSASSINS' GATE IN IRAQ 212 (2005) (mentioning that the United Nations offered some advisory role in selecting members); Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695, 695 (2004).

69. Feldman & Martinez, *supra* note 13, at 890 (stating that the local representative entity was stacked with pre-invasion opposition leaders); Sharon Otterman, *Iraq: Iraq's Governing Council*, COUNCIL ON FOREIGN RELATIONS, May 17, 2004,

such as Ahmad Chalabi,<sup>70</sup> who was instrumental in dispensing false weapon claims that led to the invasion,<sup>71</sup> and other exiles who favored privatization of, and foreign investment for, Iraq's oil industry.<sup>72</sup>

Two days after the CPA's announcement of its intention to appoint a new body, the CPA adopted Order No. 6, which formally created the IGC.<sup>73</sup> Similar to the perceptions of the first council, the IGC was "completely lacking in political legitimacy and popular support."<sup>74</sup> Critics avowed that the CPA selected IGC members who

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<http://www.cfr.org/iraq/iraq-iraqs-governing-council/p7665> (listing that 9 of the 25 were exiles); *Iraqi Governing Council Members*, BBC (July 14, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/3062897.stm](http://news.bbc.co.uk/2/hi/middle_east/3062897.stm) (stating that the "Iraqi Governing Council [was] chosen by the US administration in Iraq"); HIRO, *supra* note 61, at 326; *see also* Stilt, *supra* note 68, at 701–03.

70. John Daniszewski, *New Council Ends Holidays of Hussein Era*, L.A. TIMES, July 14, 2003, <http://articles.latimes.com/2003/jul/14/world/fg-iraq14> (reporting that Chalabi, as a member of the IGC sang praise to the US: "I take this opportunity to express my gratitude and the gratitude of the Iraqi people to President Bush, the US Congress and the people of the United States for helping the Iraqi people to liberate themselves from the scourge of Saddam.").

71. *See generally* Robert Bejesky, *Congressional Oversight of the "Marketplace of Ideas": Defectors as Sources of War Rhetoric*, 63 SYRACUSE L. REV. 1, 5–6, 14–28 (2012) (explaining that the Senate Select Committee on Intelligence investigation found that defectors provided false information to the American Intelligence Community in order to goad the US to invade Iraq and provided false claims directly to the media about weapons of mass destruction in Iraq, and noting that Chalabi was the lead defector).

72. The oldest appointed member of the IGC was 81-year-old Ayatollah Muhammad Bahr al Uloum, who Chalabi selected and whose power base is the London-based Shia group Ahl Ul Bayt. Al Uloum stated: "The establishment of this council is an expression of the national will in the wake of the collapse of the former oppressive regime." HIRO, *supra* note 61, at 327. In July 2003, Bremer appointed Ibrahim Bahr al-Uloum, who was a member of the Bush administration's Oil and Energy Working Group and the son of IGC member Muhammad Bahr al Uloum, to the position of head of Iraq's Ministry of Oil, and he proposed privatization and endorsed PSAs for Iraq's oil resources. ERIK LEAVER & GREG MUTTITT, FOREIGN POL'Y IN FOCUS, POLICY REPORT SLICK CONNECTIONS: U.S. INFLUENCE ON IRAQI OIL 3 (2007), [http://www.carbonweb.org/documents/Slick\\_Connections.pdf](http://www.carbonweb.org/documents/Slick_Connections.pdf); Scott C. Johnson, *Baghdad's Big Oil Bust*, NEWSWEEK, Jan. 29, 2006, <http://www.newsweek.com/baghdads-big-oil-bust-108615> (stating that "[t]here's certainly no question that the Bush administration, heavily peopled with veterans of the oil industry, focused on the importance of petroleum to Iraq's economy."); James Ridgeway, *The Black Gold Rush: Divvying Up Iraq's Oil*, MOTHER JONES, Jan. 29, 2007, <http://www.motherjones.com/politics/2007/01/black-gold-rush-divvying-iraqs-oil> ("Under Saddam, the industry was state-controlled; the Bush administration made it clear even before the war that it intended to open Iraqi oil up to more private involvement, and ever since 2003 representatives of various major oil companies have been closely involved in guiding Iraqi oil policy.").

73. Coalition Provisional Authority Regulation, Reg. No. 6, Governing Council of Iraq, pmbl., July 13, 2003, [http://www.iraqcoalition.org/regulations/20030713\\_CPAREG\\_6\\_Governing\\_Council\\_of\\_Iraq\\_.pdf](http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf).

74. Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 67 (2004).

were more loyal to the occupation than to the Iraqi people.<sup>75</sup> One author called the CPA's occupation strategy a "use of local proxies (the IGC and then the Interim Government) to attenuate its direct administration of Iraq by force."<sup>76</sup>

The original Security Council Resolution only permitted a short occupation and required a prompt transition to self-government<sup>77</sup> and Security Council members endeavored to terminate the CPA's authority.<sup>78</sup> The United Nations Special Representative of the Secretary-General reported on the "overwhelming demand" by Iraqis for "the early restoration of sovereignty."<sup>79</sup> The report stated that the CPA must "ensure Iraqi ownership of the political process and the tangible delegation of executive authority and real power to Iraqi representatives in terms of policy-making, including the allocation and administration of budgetary resources."<sup>80</sup> Just over a month after the IGC was created, French Foreign Minister Dominique de Villepin addressed the problem and punctuated that the French government's official position was that the U.S.-appointed IGC be replaced by "a real international force under a mandate of the United Nations Security Council."<sup>81</sup> France, Germany, and Russia indicated that they would only support another resolution if a definitive timetable was

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75. Monroe E. Price, *Iraq and the Marking of State Media Policy*, 25 CARDOZO ARTS & ENT. L.J. 5, 15 (2007) (the IGC was "largely appointed or selected by the CPA, [and] lacked legitimacy"); Rajiv Chandrasekaran, *Death Stalks an Experiment in Democracy*, WASH. POST, June 22, 2004, at A1 ("Iraqis criticize the local councils and the interim national government as illegitimate because their members were not elected").

76. Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 435 (2005); see also Brown, *supra* note 74, at 43–44; Tiefer, *supra* note 11, at 10 (stating that there was only a "minimalist legitimation" to "transition to a sovereign Iraq government.").

77. S.C. Res. 1483, pmbl., U.N. Doc. S/RES/1483 (May 22, 2003) (stating that the time for "Iraqis [to] govern themselves must come quickly"); S.C. Res. 1511, ¶ 6, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (requiring the CPA to "return governing responsibilities, and authorities to the people of Iraq as soon as practicable..."). However, the Bush Administration wanted "governing authority over Iraq for an indefinite period of time." Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT'L L.J. 435, 438, 444 (2004). Despite this desire and the representations of a short occupation and of Iraqi control prior to being granted authority in order to attain the authority, other Security Council members pushed to end the occupation.

78. U.N. Doc. S/PV.4761 (2003) at 3–7 (including statements by French, German, Mexican, and Russian representatives).

79. U.N. Secretary General, *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, at 3, UN Doc. S/2003/715 (July 17, 2003).

80. *Id.* at 5

81. *Bush Plan for Iraq Given Tepid U.N. Reply*, WASH. TIMES, Aug. 28, 2003, <http://www.washingtontimes.com/news/2003/aug/28/20030828-112115-9165r/?page=all>.

designated for constituting a credible Iraqi government and terminating the occupational authority.<sup>82</sup>

In October 2003, the Security Council adopted Resolution 1511 and called the IGC one of “the principal bodies of the Iraqi interim administration” and recounted that the IGC “embodies the sovereignty of the State of Iraq during the transitional period . . . .”<sup>83</sup> The Resolution called for a timetable for expiring the occupation’s mandate and this date was later agreed to be June 30, 2004.<sup>84</sup> Meanwhile, Iraqis remained captious. An Oxford Research survey, conducted in December 2003, discovered “that nearly three-fourths of Iraqis had little or no confidence in the government led by U.S. administrator Paul Bremer and the Governing Council.”<sup>85</sup>

On April 13, 2004, President Bush represented the legal fiction and formalities when he stated that there will be a “transfer of sovereignty back to the Iraqi people . . . . America’s objective in Iraq is limited, and it is firm: We seek an independent, free and secure Iraq.”<sup>86</sup> The reference was presumably to an abeyance of sovereignty and not a “transfer of sovereignty” because the Fourth Geneva Convention and the Hague Regulations assume that the occupier can

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82. *Coalition Laws*, *supra* note 11, at 603.

83. S.C. Res. 1511, para 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

84. *Coalition Laws*, *supra* note 11, at 603–04.

85. Steven Komarow, *Iraqi Governing Council in ‘a Serious Crisis,’* USA TODAY, Dec. 4, 2003, [http://usatoday30.usatoday.com/news/world/iraq/2003-12-03-council\\_x.htm](http://usatoday30.usatoday.com/news/world/iraq/2003-12-03-council_x.htm). Ayatollah Ali Sistani, the highest ranking Shiite cleric in Iraq, remarked: “The occupation officials do not enjoy the authority to appoint the members of a council that would write the constitution. General elections must be held so that every eligible Iraqi can choose someone to represent him.” *News Hour with Jim Lehrer, Politics and Religion in Iraq* (PBS television broadcast, Dec. 2, 2003), available at [http://www.pbs.org/newshour/bb/middle\\_east-july-dec03-iraq\\_12-02/](http://www.pbs.org/newshour/bb/middle_east-july-dec03-iraq_12-02/); see also Randall T. Coyne, *Reply to Noah Feldman: Escaping Victor’s Justice by the Use of Truth and Reconciliation Commissions*, 58 OKLA. L. REV. 11, 11 (2005); Melissa Patterson, *Who’s Got the Title? Or, The Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT’L L.J. 467, 486 (2006).

86. News Release, President George W. Bush, Global Message—Special Edition (Apr. 14, 2004), <http://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-5.html>; also see U.N. Secretary General, *supra* note 79, at 3 (also speaking in terms of “restoration of sovereignty”); Noah Feldman, *Better Sixty Years Tyranny Than One Night of Anarchy*, 31 LOY. L.A. INT’L & COMP. L. REV. 143, 148–49 (2009) (noting that there are different versions of this fiction including that Iraqis were always sovereign, that one government merely displaced another, and that the key U.S. government officials were always “wholly ignorant of what international law even said about the topic. And at no point subsequently have they tried to educate themselves on this.”); Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT’L L. 195, 195–96 (2004) (opining that the system of sovereignty has fractured or that it was never really *absolute*).

only temporarily execute state competencies<sup>87</sup> and belligerent occupation is validated on the premise that a military occupier has no legislative competence and cannot exert sovereign rights over the occupied territory.<sup>88</sup> Sovereignty cannot pass to the occupier because the occupier merely serves as a temporary custodian to maintain the status quo in the territory.<sup>89</sup> The U.S. Army Field Manual, which is the military's interpretation of its operations under Geneva and Hague Conventions and international law, states in Article 353 that "sovereignty of the occupied territory is not vested in the occupying power."<sup>90</sup>

Based on apparent meetings between the CPA and IGC, on June 1, 2004, Lakhdar Brahimi, U.N. Special Representative for Iraq, announced that Ayad Allawi would serve as the interim prime minister and his thirty-two cabinet ministers would reflect regional, ethnic and religious diversity in Iraq.<sup>91</sup> One week later, Security Council Resolution 1546 enshrined the date for the dissolution of the CPA, which was June 30, 2004, and affirmed the need to hold legislative elections.<sup>92</sup> Resolution 1546 highlighted the strides being achieved in the movement toward Iraq's "democracy" and reaffirmed

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87. Geneva Convention IV, *supra* note 50, arts. 27–34, 47–78; Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227.

88. Bhuta, *supra* note 49, at 800. Given that the Bush administration initiated an illegal war and the occupation faced such tremendous opposition, the occupation of Iraq was undoubtedly a belligerent occupation.

89. CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 357 (2006); *see also* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5–6 (1993); GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY OF THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION* 27–37 (1957); GREAT BRITIAN WAR OFFICE, *MANUAL OF MILITARY LAW, III: THE LAW OF WAR ON LAND* ¶ 510 (1958).

90. UNITED STATES ARMY, *THE LAW OF LAND WARFARE FIELD MANUAL* 27-10, § 353 (1956).

91. *Coalition Laws*, *supra* note 11, at 604. Shortly after these announcements, Security Council members reaffirmed the need for a resolution to clearly identify the transfer of power to an Iraqi government and specifically to end the occupation. *Id.* at 605 (citing Algeria, Chile, China, France, Germany, and Russia).

92. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 7, 2004); Coalition Provisional Authority, *The November 15 Agreement*, available at <http://www.iraqcoalition.org/governme nt/AgreementNov15.pdf>; Security Council, Letter dated Mar. 18, 2004 from the Secretary-General addressed to the President of the Security Council, Annex II, at 3, U.N. Doc. S/2004/225, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2004/225](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/225) ("We also look forward to United Nations assistance in providing advice and observations needed to ensure that direct elections are held before the end of January 2005"); M. Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT'L L.J. 327, 353 (2005).

“the right of the Iraqi people to determine their own political future and to exercise full authority and control over their financial and natural resources.”<sup>93</sup> The Resolution also referenced “the willingness of the multinational force to continue efforts to contribute to the maintenance of security and stability in Iraq in support of the political transition” and the “security partnership between the sovereign Government of Iraq and the multinational force.”<sup>94</sup> Professor Adam Roberts called this relationship a “formal ending” to the *ex officio* foreign occupation governance but an edict that was “concealing continued U.S. dominance of a puppet government.”<sup>95</sup>

While some Security Council members preferred to fully and unconditionally end the occupation by removing the foreign military forces, Resolution 1546 cited that the continued “presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq”<sup>96</sup> and was required for security reasons.<sup>97</sup> The Resolution referred to the “Interim Government of Iraq” (IGI) as

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93. S.C. Res. 1546, arts. 10–11, U.N. Doc. S/RES/1546 (June 8, 2004).

94. *Id.* (“the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq” and that there would be a “security partnership between the sovereign Government of Iraq and the multinational force.”). Similarly, ensuring security to uphold human rights as a fiduciary is also found in the European Court of Human Rights precedent. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 24 (1995) (“[t]he obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.”).

95. Roberts, *supra* note 53, at 616.

96. S.C. Res. 1546, para. 9, U.N. Doc. S/RES/1546 (June 8, 2004). Formal legal procedures for occupation and authority transfers were generally being followed. Had formal procedures not been followed, occupation troops would technically have been present inside Iraq with a less compelling justification and may have been in violation of U.N. Charter provisions on the use of force. U.N. Charter art. 2, para. 4 (expressing the foundational restriction against interfering with the territorial and political sovereignty of other countries); G.A. Res. 3314 (XXIX), art. 3(e), U.N. Doc. A/9631 (Dec. 14, 1974) (affirming the importance of having the agreement of a receiving state when foreign armed forces are present in the territory of the receiving state); Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L.J. 337, 366–67 (2011) (noting that a state can open its sovereignty by requesting foreign military assistance to thwart a coup). Alternatively, *de jure* legitimacy at the domestic level would have also given a sovereign Iraq more external legitimacy.

97. S.C. Res. 1546, Annex, U.N. Doc. S/RES/1546 (June 8, 2004) (stating that the occupation forces were still needed to continue searching for weapons of mass destruction and to authorize the occupying military to detain Iraqis and foreigners as “necessary for imperative reasons for security.”). Prime Minister Ayad Allawi stated: “There continue, however, to be forces in Iraq, including foreign elements, that are opposed to our transition to peace, democracy, and security.” *Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and United States Secretary of State Colin L. Powell to the President of the Council*, S.C. Res. 1546, Annex, U.N. Doc. S/RES/1546 (June 8, 2004).

granting the authority of U.S. military forces to remain, but the IGI was technically not officially designated by the CPA or named the “Iraqi Interim Government” until two days later.<sup>98</sup> Moreover, the members of the IGI were appointed and many of the same pro-occupation Iraqis were chosen for this third interim government.<sup>99</sup>

Rather than appointing a fourth loyalist government,<sup>100</sup> Iraq’s first election after the fall of the Baathist regime was held in January 2005.<sup>101</sup> Sunnis boycotted the elections, including the first parliamentary elections in December 2005, and only gradually began to participate as voters and candidates in later elections.<sup>102</sup> Likewise, it appears that those who best understood the CPA’s political institutions would have had an advantage with strategic candidate selection and with isolating vote dilution effects because in the December 2005 election, there were 6,655 registered candidates for the ballots, 307 political parties, and 19 coalitions<sup>103</sup> when the parliamentary assembly was constituted based on one seat for every 100,000 people, translating into 275 parliamentary positions<sup>104</sup> within the 18 governorates or provinces.<sup>105</sup> The Shia party coalition obtained 128 seats, the Kurds 53 seats, and the Sunnis 44 seats.<sup>106</sup> The first permanent government of Iraq took office in May 2006,<sup>107</sup>

98. S.C. Res. 1546, pmb., Annex, U.N. Doc. S/RES/1546 (June 8, 2004); Coalition Provisional Authority, Reg. No. 10, CPA/REG/9, June 9, 2004 (Annex A).

99. Brown, *supra* note 74, at 43–44.

100. Given the wholesale domestic rejection of Ahmed Chalabi and his Iraqi-exile confederates, another direct transfer of power to a new group, loyal to the occupation, was not a viable option. See PHILLIPS, *supra* note 59, at 136–39; LARRY DIAMOND, *SQUANDERED VICTORY: THE AMERICAN OCCUPATION AND THE BUNGLED EFFORT TO BRING DEMOCRACY TO IRAQ* 33–34 (2005).

101. Feldman & Martinez, *supra* note 13, at 897.

102. Compare IRAQI CONST. art. 20 (2005) (guaranteeing that all Iraqis have “the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office”), with Rend Al-Rahim, *Democracy’s Development: Second Elections in Iraq and Afghanistan*, 33 FLETCHER F. WORLD AFF. 47, 51–52 (2009) (noting the lack of involvement from Sunnis).

103. HOME OFFICE SCIENCE AND RESEARCH GROUP, COUNTRY OF ORIGIN INFORMATION BULLETIN, IRAQ: IRAQ GENERAL ELECTION, 15 DECEMBER 2005, at 4 (Feb. 2006), available at <http://www.unhcr.org/refworld/pdfid/43eb411e4.pdf>.

104. IRAQI CONST. art. 48 § 1 (2005).

105. Mohammed Tawfeeq, Salma Abdelaziz & Joe Sterling, *Iraqis Vote in Local Elections Despite Violence*, CNN (Apr. 20, 2013), <http://www.cnn.com/2013/04/20/world/m-east/iraq-elections/>.

106. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, ¶ 12, U.N. Doc. S/2006/137 (Mar. 3, 2006).

107. *Iraq’s New Unity Government Sworn In*, CNN (May 20, 2006), [http://www.cnn.com/2006/WORLD/meast/05/20/iraq.main/index.html?eref=sitesearch](http://www.cnn.com/2006/WORLD/meast/05/20/iraq.main/index.html?eref=sitesearch;); Note, *Demo-*

over three years after the invasion. Recent elections have suffered from extensive fraud in many provinces,<sup>108</sup> but did not approach the farce of pre-invasion elections.<sup>109</sup>

In summary, the trajectory of Iraqi democracy initiated with the appointment of clear loyalists to the occupation and gradually expanded to include larger groups of appointees. There was no competitive party system in Iraq at the time interim governments were appointed, but many of the same initial appointees created political parties and became the dominant party leaders after elections were held.<sup>110</sup> These conditions may have crafted governments that followed because during the years when Iraqi government affairs were presided over by appointed governments, new institutions were imposed. Those institutions were not a product of Iraqi will, but were imposed by the occupation and implicitly enforced by a foreign military occupation.<sup>111</sup> Consequently, perhaps hostilities would be contained until after the hegemon's military occupation ended, but could erupt thereafter.

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*cracy in Iraq: Representation Through Ratification*, 119 HARV. L. REV. 1201, 1204 (2006).

108. Ned Parker & Caesar Ahmed, *Maliki Seeks Recount in Iraq Elections*, L.A. TIMES, Mar. 22, 2010, <http://articles.latimes.com/2010/mar/22/world/la-fg-iraq-election22-2010mar22>.

109. Iraqis did previously hold elections but they were a farce. *Saddam "Wins 100% of Vote"*, BBC (Oct. 16, 2002), <http://news.bbc.co.uk/2/hi/2331951.stm> (reporting that 100% of the 11,445,638 eligible voters approved of Saddam Hussein on their ballots).

110. Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 529–30 (2007) (explaining that Jalal Talabani and Mas'ud Barazani became the leaders of the dominant Kurdish political parties in Iraq, Abdul Aziz al Hakim and Ibrahim al-Ja'fari became the two most prominent leaders of the United Iraqi Alliance, and Ayad Allawi and Adnan Pachachi were dominant leaders of the List Party; and Mohsen Abdul Hameed was former head of the Iraqi Islamic Party). Allawi's party, the Iraqi List Party was the most pro-U.S., had the most extensive media campaign, and garnered 13.7% of the national vote in the January 2005 election. Erich Marquardt, *A Dent to Washington's Iraqi Designs*, ASIA TIMES, Feb. 17, 2005, [http://www.atimes.com/atimes/Middle\\_East/GB17Ak03.html](http://www.atimes.com/atimes/Middle_East/GB17Ak03.html). Samir Shakir Mahmood Sumaidaie was appointed as an IGC member and became the Minister of Interior in Baghdad (managing the domestic security force of 120,000), Iraqi Ambassador to the U.S., and Iraq's Permanent Representative to the United Nations. Ambassador Samir Sumaida'ie, *Transcript: Trying Saddam: An Insider's Perspective*, 39 CASE W. RES. J. INT'L L. 15, 15 (2006–2007) (citing biography in symposium address). The political system's early-movers were apt to craft party platforms and hand-select and financially-support candidates.

111. In Bush's correspondence to Maliki, the US vowed to "defend [Iraq's] democratic system against internal and external threats;" support Iraq's market reforms and integration into international financial and economic organizations, and facilitate the "flow of foreign investments to Iraq, especially American investments;" and provide security assurances to Iraqi sovereignty and thwart terrorist groups. Declaration of Principles, *supra* note 41.

## IV. THE CPA IMPOSING ITS WILL

The Bush Administration continued to publicly convey optimism about the occupation's progress even as violence and dissent to the CPA escalated.<sup>112</sup> Intensifying opposition seems predictable due to the manner in which the CPA imposed its will without regard to the language embodied in Resolution 1483. The Resolution does not countenance "the Authority," the United Nations, or any entity to engage in "legislating" or lawmaking.<sup>113</sup> In the seven instances in which the Resolution mentions "institutions" and reform initiatives, surrounding language affirms that it is the Iraqi people who will determine their "own political future" and the Resolution requested all U.N. members, U.N. organs, and "the Authority" to "assist" Iraqis in the pursuit of establishing their own institutions.<sup>114</sup>

The Iraqi people neither expressly nor tacitly consented to the CPA's legal reforms during the occupation and Iraqi citizens were not realistically capable of consenting<sup>115</sup> because the CPA kept appointing loyalists to impotent interim governments.<sup>116</sup> Connoting that loyal appointees chose CPA mandates on behalf of 25 million Iraqis is farcical. The CPA's own mission statement identified itself as the temporary, "lawful government of Iraq."<sup>117</sup> Pursuant to Order

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112. 153 CONG. REC. H4249 (Feb. 15, 2007) (statement by Representative Jan Schakowsky) (giving examples of the Bush Administration providing periodic assurances of the necessity of staying the course with the military occupation in Iraq because progress was being made but those assurances were being made even as the country plunged into near civil war-like conditions); BOB WOODWARD, STATE OF DENIAL: BUSH AT WAR 488–89, 491 (2006) (Bush was not telling Americans "the truth about what Iraq had become"); *Political Penumbras*, *supra* note 4, at 32–53 (noting increasing American and foreign opposition to the occupation and that the Bush Administration maintained the same course and continued the occupation).

113. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

114. *Id.* at pmb1, ¶¶ 1, 4, 5, 7, 8(c)(i), 9.

115. Hamoudi, *supra* note 110, at 523–24 (former legal adviser to the Finance Committee of the Governing Council of Iraq remarking: "There is much truth to the common criticism that the Coalition Provision Authority (CPA)—the U.S.- and U.K.-run entity responsible for governing Iraq from May 2003 until June 28, 2004—was entirely removed from the concerns of ordinary Iraqis and was, therefore, ineffective in addressing the problems facing Iraq.").

116. Patterson, *supra* note 85, at 481; *see also* Hmoud, *supra* note 77, at 449–50 (discussing the overwhelming control by the CPA in financial affairs given that it took over the Oil-for-Food program and had the authority to disburse Iraqi money through the Development Fund for Iraq).

117. The CPA Mission Statement reads: "The Coalition Provisional Authority (CPA) is the name of the temporary governing body which has been designated by the United Nations as the lawful government of Iraq until such time as Iraq is politically and socially stable enough to assume its sovereignty. The CPA has been the government of Iraq since the

No. 1, the CPA “vested [itself] with all executive, legislative and judicial authority necessary to achieve its objectives,” and then added that those functions were being “exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war.”<sup>118</sup> The *ruling* organizational chart depicted the Pentagon and the CPA interacting at the apex, the CPA directing various U.S. and British functions and diplomats for their respective responsibilities, and the IGC subordinate to all relevant actors.<sup>119</sup> Other sources confirmed that the CPA possessed the sole legislative authority,<sup>120</sup> prevailed over all IGC functions, and

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overthrow of the brutal dictatorship of Saddam Hussein and his deeply corrupt Baath Regime in April of 2003.” Michael A. Newton, *The Iraqi High Criminal Court: Controversy and Contributions*, 88 INT’L REV. OF THE RED CROSS 399, 417 (June 2006).

118. Coalition Provision Authority, Reg. No. 1, sec. 1(2), CPA/REG/16 May 2003/01, available at [http://www.iraqcoalition.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf); Patterson, *supra* note 85, at 471.

119. STAFF OF S. COMM. ON FOREIGN RELATIONS, 108TH CONG., IRAQ: MEETING THE CHALLENGE, SHARING THE BURDEN, STAYING THE COURSE 17–18 (Comm. Print 2003 by Richard G. Lugar), available at <http://www.gpo.gov/fdsys/pkg/CPRT-108SPRT88594/pdf/CPRT-108SPRT88594.pdf> (providing organizational charts and not listing the Iraqi Governing Council but providing local governance tasks at the lower levels); NOAM CHOMSKY, IMPERIAL AMBITIONS: CONVERSATIONS ON THE POST-9/11 WORLD: INTERVIEWS WITH DAVID BARSAMIAN 46 (2005) (describing the originally released chart and the practical effect of the hierarchy).

120. Bremer endowed himself with a veto power over all IGC decisions and appointments. Bassiouni, *supra* note 92, at 352–53; Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 206 (2005); Stilt, *supra* note 68, at 695; *U.S. May Veto Islamic Law in Iraq*, ASSOCIATED PRESS, Feb. 16, 2004, available at [http://usatoday30.usatoday.com/news/world/iraq/2004-02-16-islam-law\\_x.htm](http://usatoday30.usatoday.com/news/world/iraq/2004-02-16-islam-law_x.htm) (noting that amid speculations that the IGC could act independently and exercise legislative authority, Bremer remarked that “it can’t be law until I sign it.”); Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. SCH. L. REV. 269, 270 (2006) (Iraqi Ambassador to the U.N. remarking that “nothing became law in Iraq unless it was signed by . . . Bremmer. . . It was the Civil Administrator, not the IGC, who had the power to legislate.”); SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, IRAQ RECONSTRUCTION: LESSONS IN HUMAN CAPITAL MANAGEMENT 11 (Jan. 2006) (affirming that the “CPA was the de facto government of Iraq that oversaw the reestablishment of Iraqi ministries, consulted with an advisory ‘legislature,’ promulgated laws and regulations, provided diplomatic links with foreign governments and coordinated with the coalition’s military leadership.”). The CPA’s preeminent authority over local Iraqi interests was recognized in Security Council Resolutions. S.C. Res. 1483, pmbl., U.N. Doc. S/RES/1483 (May 22, 2003) (U.S. and U.K. were represented as “the Authority”). Also, the General Accounting Office noted that the “CPA assigned U.S. advisors from various agencies, including the Department of State and the Department of Defense, to work directly with the Iraqi interim minister appointed by the Governing Council. According to a former senior advisor, the advisor had broad managerial authority, including the authority to hire and fire ministry employees, determine ministry budgets, change ministry structures and functions and make policy decisions.” GENERAL ACCOUNTING OFFICE, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE, ESSENTIAL SERVICES, AND OVERSIGHT ISSUES 75 (GAO-04-902R)

determined that the CPA was above the law.<sup>121</sup> As for the functioning of Iraqi administrative units with jurisdiction over executing the laws, the White House dispatched hundreds of U.S. economic advisors to Iraq to work in all Iraqi government ministries.<sup>122</sup>

Neither the Security Council resolutions nor international law imparted the expansive authority that the CPA exercised, such as that which is evinced by the CPA's assertion that it was the lawful government of Iraq and by executing actions and rules that subordinated Iraqi will with ambitions of the occupation. The CPA should have only exercised administrative control to the extent necessary to reach the point of self-determination with status quo laws. The Hague Regulations mandate that occupiers protect the legal, institutional, and cultural status quo;<sup>123</sup> the Geneva Conventions *prima facie* restricted occupation initiatives;<sup>124</sup> and nothing in Resolution 1483 stated that the "Authority" was empowered to disregard the Geneva or Hague Conventions, but instead the resolution expressly affirmed that the Authority was required to abide by the Geneva and Hague Conventions and other applicable

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(June 2004).

121. Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Whose Actions?*, 28 HAMLIN L. REV. 91, 131 (2005) ("Under the legal system established by the CPA in Iraq, the CPA was above the law."); Richard A. Opiel, Jr. & Robert F. Worth, *After the War: Politics; Top Iraqi Cleric Calls on Nation to Repudiate New Governing Council*, N.Y. TIMES, July 19, 2003, at A7 (reporting that Iraqis widely believed that the IGC was "an arm of the American occupation" and that cleric Sayed Muktada al-Sadr denounced it for representing "subservience to the Americans"); Paul McGeough, *US Exit May Lead to Iraq Civil War*, SYDNEY MORNING HERALD (Nov. 19, 2003), <http://www.smh.com.au/articles/2003/11/18/1069027122315.html> (noting that Bremer could "veto any decision the governing council makes he does not like").

122. Emad Mekay, *Challenges 2004-2005: U.S. to Take Bigger Bite of Iraq's Economic Pie*, INTER PRESS SERV. NEWS AGENCY (Dec. 24, 2004), <http://www.ipsnews.net/2004/12/challenges-2004-2005-us-to-take-bigger-bite-of-iraqs-economic-pie/> ("Washington has installed hundreds of U.S. economic advisors in all Iraqi government ministries, who have a decisive say on most economic decisions").

123. Hague Convention (IV) Respecting the Law and Customs of War on Land, arts. 46-47, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations] (requiring the occupiers to must respect the inhabitants' lives, liberty, religion, family honor, and property (including from plunder or confiscation)).

124. See article 1 in all Conventions, which requires the rules to be respected in all circumstances. Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention IV, *supra* note 50; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

international laws.<sup>125</sup> Article 47 states that the occupied population “shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power.”<sup>126</sup>

The CPA expressly acknowledged the applicability of occupation law<sup>127</sup> and habitually cited U.N. Resolutions 1483 and 1511 (2003) in the first sentence of its Orders as the basis of its authority, thereby suggesting that its orders were consistent with international law and Security Council resolutions.<sup>128</sup> Rather than adhering to restrictions, the CPA treated Iraq as if it had no laws, including by scrapping legal codes,<sup>129</sup> issuing laws that took “precedence over all other laws and publications to the extent such other laws are inconsistent,”<sup>130</sup> and imposing the CPA’s own choices of capitalist and open market regulations on the country.<sup>131</sup> The CPA solidified the rules by requiring an extremely challenging legislative process to displace the frameworks<sup>132</sup> and even adopted Order 100,

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125. S.C. Res. 1483, para. 5, U.N. Doc. S/RES/1483 (May 22, 2003).

126. Geneva Convention IV, *supra* note 50, art. 47.

127. Conor McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10 J. CONFLICT & SECURITY L. 43, 45 n.9 (2005).

128. See e.g. Coalition Provision Authority, Order No. 81, Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, CPA/ORD/26 April 26, 2004, available at [http://www.iraqcoalition.org/regulations/20040426\\_CPAORD\\_81\\_Patents\\_Law.pdf](http://www.iraqcoalition.org/regulations/20040426_CPAORD_81_Patents_Law.pdf) (Bremer stating, “Pursuant to my authority as Administrator of the Coalition Provisional Authority (CPA) and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483 and 1511 (2003).”); Alan K. Audi, *Iraq’s New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 GEO. L.J. 335, 353 (2004). The CPA’s own “orders,” “regulations,” “memoranda,” and “public notices” referred to instruments as defining “the institutions and authorities of the CPA.” *Coalition Laws*, *supra* note 11, at 602.

129. Pursuant to the CPA’s first order, Iraqi law that did not impede CPA objectives would remain in force. CPA, Reg. No. 1, *supra* note 118, at § 2. However, new orders often replaced existing legal codes and frameworks with very fundamental and dramatic new rules that might not effectively coexist with preexisting legal structures.

130. *Id.* at § 3(1).

131. Antonia Juhasz, Op-Ed., Bush’s Economic Invasion of Iraq, L.A. TIMES, Aug. 14, 2005, <http://articles.latimes.com/2005/aug/14/opinion/oe-juhasz14> (stating that the CPA adopted over thirty new capitalist laws relating the economy to meet U.S. goals and did so “with little real participation from the Iraqi people”).

132. *Id.* (“The [TAL laws] can be changed, but only with a two-thirds majority vote in the National Assembly, and with the approval of the prime minister, the president and both vice presidents. The constitutional drafting committee has, in turn, left each of these laws in place.”).

which replaced “the name of new Iraqi institutions and officials for those of the CPA” in order to “protect the [CPA] reforms into the future.”<sup>133</sup> Whatever the rationalization, the occupation conspicuously disregarded international standards and laws.<sup>134</sup>

After the CPA formally disbanded pursuant to Resolution 1546, which declared that “the occupation will end”<sup>135</sup> when the IGI assumed authority, the occupation did not end. Instead, the occupation evolved into two post-CPA stages that likely had the repercussion of sustaining the CPA rule frameworks even as popular support for the occupation was wanting.<sup>136</sup> The first post-CPA stage, which began after the CPA authority expired on June 30, 2004, involved the military occupation’s *de facto* exercise of sovereignty due to the interrelationship with succeeding Iraqi governments and their reliance on coercive US military power and dominance.<sup>137</sup> To authorize the military occupation’s presence, new Security Council Resolutions were adopted annually for the next three years<sup>138</sup> based on successive Iraqi government and U.S. State Department

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133. Zahawi, *supra* note 11, at 2332.

134. ROBERT LOONEY, CENTER FOR CONTEMPORARY CONFLICT, STRATEGIC INSIGHT: THE NEOLIBERAL MODEL’S PLANNED ROLE IN IRAQ’S ECONOMIC TRANSITION 6 (Aug. 1, 2003), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA525789> (Bremer opining that “[e]verybody knows we cannot wait until there is an elected government to start economic reform”); John Norton Moore, *A Theoretical Overview of the Laws of War in a Post-Charter World, With Emphasis on the Challenge of Civil Wars, “Wars of National Liberation,” Mixed Civil-International Wars, and Terrorism*, 31 AM. U. L. REV. 841, 843 (1982) (offering realist explanations); see also Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1349 (2008) (“this newfound fascination with the rule of law is misplaced” as it is invoked as the supposed causal mechanism that leads to human rights violations, threats to security, and even economic development but it is really a “desire to escape from politics by imagining the rule of law as technical, legal, and apolitical.”); Zahawi, *supra* note 11, at 2315 (“Many in Washington subscribed to this fiction of liberation and consequently believed that as liberators, American forces did not need to abide by international obligations reserved for occupiers.”). For arguments that occupation law is outdated, see Robert D. Tadlock, Comment, *Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations*, 39 U.S.F.L. REV. 227 (2004), and Brett H. McGurk, *A Lawyer in Baghdad*, 8 GREEN BAG 2D 51 (2004).

135. S.C. Res. 1546, para. 2, U.N. SCOR, 59th Sess., U.N. Doc. S/Res/1546 (June 8, 2004).

136. See *id.* at Part II.

137. Zahawi, *supra* note 11, at 2333 (noting that the status of “occupation” never changed and would remain in legal force as long as Coalition forces remained in Iraq and exercised “significant influence in the state’s administration”).

138. See S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

requests.<sup>139</sup> Meanwhile, the “Multinational Force-Iraq,” which was supposedly comprised of twenty-six countries<sup>140</sup> but was really run by one country, the United States,<sup>141</sup> was directed to undertake “all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>142</sup> If commentators accurately attributed violence and instability to CPA operations while it existed and if rule frameworks remained in conjunction with swelling Iraqi sentiment to end the occupation,<sup>143</sup> a notable percentage of Iraqis may have continued to believe that self-determination was lacking. Meanwhile, from the U.S. side, the American public became more opposed to continuing the occupation<sup>144</sup> and Bush blamed the Iraqi government for not being prepared to take responsibility over the country and set “benchmarks” for the Iraqi government to pass.<sup>145</sup>

A second stage of post-CPA occupation unfolded. The Iraqi Prime Minister included an annex letter with Security Council Resolution 1790, adopted in December 2007, and affirmed that this would be Iraq’s “final request to the Security Council for the extension of the mandate.”<sup>146</sup> At the same time, an Iraqi government spokesman expressed that the government would still need security

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139. See M. Cherif Bassiouni, *Legal Status of US Forces in Iraq From 2003–2008*, 11 CHI. J. INT’L L. 1, 7 (2010).

140. *Munaf v. Geren*, 553 U.S. 674, 679 (2008).

141. HALCHIN, *supra* note 11, at 11.

142. *Munaf*, 553 U.S. at 680.

143. See *id.* at 685–92.

144. *Political Penumbras*, *supra* note 4, at 35–36 (emphasizing that the American people wanted a withdrawal of U.S. troops from Iraq in 2006, and Democrats won back control of Congress in November 2006 for the first time in twelve years based on that issue). When Congress offered a bill to gradually draw down the number of troops and eventually end the occupation, Bush vetoed the bill, called it an unconstitutional infringement on the Commander in Chief authority, and increased the number of troops as a troop surge strategy. *Id.* at 35–39; Darin E.W. Johnson, *The Surge and Benchmarks – A Way Forward?*, 24 AM. U. INT’L L. REV. 249, 249–53 (2009).

145. Johnson, *supra* note 144, at 255 (Bush remarking that “America will change our approach to help the Iraqi government as it moves to meet these benchmarks.”). The “benchmark goals” were contained in the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery and Iraq Accountability Appropriations Act. Pub. L. No. 110-28, 121 Stat. 112 (2007) § 1314(b)(1)(A) (“the United States strategy in Iraq, hereafter, shall be conditioned on the Iraqi government meeting benchmarks, as told to members of Congress by the President, the Secretary of State, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, and reflected in the Iraqi Government’s commitments to the United States, and to the international community.”). While the benchmark provisions seemed uncontroversial, the tone imparts that Iraqis were required to meet U.S. set goals that were designed to surmount problems solely caused by Iraqis when reasons for the continuing occupation and meeting goals are irrelevant for purposes of American public demands for withdrawal.

146. S.C. RES. 1790, Annex, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

assistance for another ten years<sup>147</sup> and President Bush and Prime Minister Maliki consummated a secret agreement to maintain the occupation, but that accord was ultimately rejected when it was made public.<sup>148</sup> A legislatively ratified withdrawal agreement followed a year later,<sup>149</sup> which approximated the desires of the three-fourths of the Iraqi public that demanded withdrawal of the occupying military.<sup>150</sup>

To summarize, the CPA drastically overhauled political institutions to support elections and democratic governance, which was not controversial,<sup>151</sup> but the CPA violated the Hague and Geneva Conventions by imposing new laws that abruptly made Iraq one of the most open and capitalist-friendly countries in the world. The codifications occurred *before* an Iraqi government was elected. Meanwhile, the CPA was effectively a White House unit that operated pursuant to a neoconservative ideology and consistent with the White House's comprehensive pre-invasion reform agenda called

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147. Iraqi government spokesman Ali al-Dabbagh indicated: "Of course we need international support. We have security problems. For 10 years our army will not be able to defend Iraq. . . I do not think there is a threat of an invasion of Iraq, or getting involved in a war. [But] to protect Iraqi sovereignty there must be an army to defend Iraq for the next 10 years . . . . But on the other hand, does Iraq accept the permanent existence of US bases, for instance? Absolutely no." *Iraq Sees Need for Foreign Troops for 10 Years*, REUTERS, Dec. 17, 2007, available at <http://www.reuters.com/article/2007/12/17/us-iraq-troops-idUSL176928220071217>. Al-Dabbagh stated that he did not believe "there is a threat of invasion" by a neighboring country but in the very next sentence claims that the U.S. military is needed to "protect Iraqi sovereignty." *Id.* Protecting sovereignty, at least from the perspective of the normal use of the term, suggests that there is a foreign security threat. In the prelude to the war, an essential reason given by the Bush administration to justify the invasion was that Saddam Hussein's Iraq was a threat to his ostensibly "peaceful" and "good" government neighbors. *Newshour, Newsmaker: Condoleezza Rice*, PBS (July 30, 2003), [http://www.pbs.org/newshour/bb/w\\_hite\\_house-july-dec03-rice\\_7-30/](http://www.pbs.org/newshour/bb/w_hite_house-july-dec03-rice_7-30/) (Rice remarked: "Something had to be done about that threat. . . [and] this brutal dictator, with dangerous weapons, to continue to destabilize the Middle East."). Yet the region is filled with U.S.-friendly non-democratic monarchies that still called the US invasion illegal. *Arab States Line Up Behind Iraq*, BBC (Mar. 25, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/2882851.stm](http://news.bbc.co.uk/2/hi/middle_east/2882851.stm) (reporting that the 22-members of the Arab League convened for a special summit in Cairo on March 25, 2003, voted and adopted a unanimous resolution, with only Kuwait abstaining, that "demanded the immediate and unconditional withdrawal of US and British forces from Iraq" and prescribed that the invasion was a "violation of the United Nations Charter" and a "threat to world peace."). It seems rather unimaginable to those familiar with the history of US involvement in the Middle East that Bush could be speaking of the US leading a democratization mission in the Middle East.

148. Declaration of Principles, *supra* note 41.

149. Withdrawal Agreement, *supra* note 44, at art. 24(1).

150. Cole, *supra* note 40.

151. *CPA Dictates*, *supra* note 8, at 10–14, 28–30.

the *Future of Iraq Project*.<sup>152</sup> Nonetheless, during the time that the CPA undertook reforms, there was ambiguity over the CPA's origin, which might have made directives appear serendipitous and reduced the incidence of state responsibility. From the American constitutional order, the CPA's existence is an exceptional example of the two interpretations of the unitary executive. One position is reluctant to allow a check on the Executive and the other desires to prevent the Executive from shirking accountability. Part V addresses the imposition of responsibility for state actors under international law and the debates that unfolded over the origin of the CPA.

## V. FROM WHERE DID THE CPA EMERGE?

### A. *State Responsibility*

Article 4 of the International Law Commission's (ILC) Articles on State Responsibility explains that

[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.<sup>153</sup>

Article 5 states:

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of the State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in that particular

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152. Farrah Hassan, *New State Department Releases on the 'Future of Iraq' Project*, NAT'L SEC. ARCHIVE (Sept. 1, 2006), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB198/index.htm>.

153. Articles on Responsibility of States for Internationally Wrongful Acts, art. 4, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001); Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10, at 84–85 (2001); Rep. of the Int'l Law Comm'n, 30th sess., May 8–July 28 U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. Int'l L. Comm'n 79, U.N. Doc. A/CN.4/Ser.A/1978/Add.1 (Part 2) ("Article 13. Conduct of Organs of an International Organization").

instance.<sup>154</sup>

Oxford University Professor Stefan Talmon concluded through his assessment of the CPA's creation and oversight procedures that there was a plurality of responsible actors for controversial actions of the CPA.<sup>155</sup> Without an acknowledged and undisputed origin and command chain, the obligation to impose responsibility for wrongful acts under international law<sup>156</sup> is less manifest and this ambiguity likely permitted the CPA to function as a lone maverick, without oversight or restrictions during the occupation, because its principal was unclear. However, whether the CPA is viewed as a temporary institution, a governance unit, or facilitator of Iraqi government institutions, it did function as an agent of the U.S. government. The Bush Administration made high-level appointments to the CPA, formed the CPA, and held control over the entity.

*B. Was the CPA Established by the Security Council?*

One theory of control over and responsibility for the CPA derives from the contention that the Security Council established a common organ under international law, which could either mean that the organ-agent was beholden to two or more states or to the Security Council. The former interpretation imputes joint-responsibility, liability, and indemnity for illegal acts committed by an entity governed by two or more countries,<sup>157</sup> based on a joint-and-several responsibility,<sup>158</sup> comparative responsibility,<sup>159</sup> or some other liability

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154. Articles on Responsibility of States, *supra* note 153, art. 5; *see id.* at art. 8 (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.”).

155. *See generally* Stefan Talmon, *A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq*, 2–3 (University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 25/2007, Sept. 2007), *available at* <http://users.ox.ac.uk/~sann2029/SSRN-id1018172%5B1%5D.pdf>.

156. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10, at 229–30 (2001) (affirming a “responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”).

157. Second Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, ILC Yb. 1978, II/1, at 54.

158. MALCOLM N. SHAW, *INTERNATIONAL LAW* 580–83 (7th ed. 2014) (noting that there is no clear treaty-based answer to how compensation for wrongdoing should be assessed, but that circumstances and context can determine the result); *see also* Talmon, *supra* note 155, at 14 (citing Commentary of Draft Article 27, Rep. of the Int'l Law Comm'n, 30th sess., May

allocation. The latter interpretation circulated after CPA initiatives were criticized; the Pentagon<sup>160</sup> and White House<sup>161</sup> began alleging that U.N. Security Council Resolution 1483 created the CPA,<sup>162</sup> which could directly or insinuatingly mean that the Security Council or the broader international community was ultimately responsible for the CPA. Despite the technicality of the CPA already being in existence prior to the adoption of Resolution 1483, there are many other weaknesses in this interpretation.

First, an international organization, such as the U.N., could constitute an entity with an international personality for which the U.N. is responsible,<sup>163</sup> but had this been the case with the CPA, the

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8–July 28 U.N. Doc. A/33/10, at 99 (1978), *reprinted in* [1978] 2 Y.B. Int'l L. Comm'n 99, U.N. Doc. A/CN.4/Ser.A/1978/Add.1 (Part 2)) (stating that responsibility for that common organ can only be assessed on “each of the States whose common organ is it” and if there is a breach of “international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts”).

159. Talmon, *supra* note 155, at 23–26.

160. HALCHIN, *supra* note 11, at 7 (citing Pentagon Renovation Office, solicitation W914NS-04-R-0001, at 2, (Jan. 6, 2004)) (stating “The CPA was enacted by the United Nations Security Council under Resolution 1483 (2003)”).

161. *Id.* at 7 (citing OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, App., at 958–59 (2004); Operating Expenses of the Coalition Provisional Authority, Pub. L. No. 108-106, 117 Stat. 1226) (President’s budget proposal and P.L. 108-106 referring to CPA being established by Resolution 1483).

162. *Id.* at 8 (citing Correspondence from Maj. Frank A. March, Department of the Army, United States Army Legal Services Agency on Protest of Turkcell Consortium, B-293048 to U.S. General Accounting Office, at 2–4 (Oct. 21, 2003)) (“The CPA is not a Federal agency. . . . The Coalition Provisional Authority (CPA) is a multi-national coalition that exercises powers of government temporarily. . . . The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives.”); *see also* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, 177 Stat. 1209 (Nov. 6, 2003) (referring to the CPA as being “established pursuant to United Nations Security Council resolutions including Resolution 1483”).

163. There have not been exemplars of administering authorities over territories either by mandate before the U.N. or by a U.N. authorization endowing recognition to a legitimate international actor. The lack of a clear recognition as an international actor could also effectively permit avoidance of responsibility. Rights and responsibilities under international law fall upon recognized international actors, which are almost exclusively “states.” Jean D’Aspremont, *Non-State Actors From the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM 25 (Jean d’Aspremont, ed. 2011) (stating that “[f]rom a positivist point of view, most non-state actors, even the most influential of them are neither proper law-makers nor subjects of international law” but non-state actors can be important). However, agents are created. *See e.g.* Michael J. Tierney, *The Law and Politics of International Delegation: Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction*, 71 L. & CONTEMP. PROBS. 283, 289–93, 298–99 (2008) (noting the parent-agent relationship between the Secretary-General and Security

U.N. should have had a continuing effective control. There were also references to a *delegation* of authority from the Security Council to the U.S. and the U.K. as the occupying powers,<sup>164</sup> but many Security Council members called the invasion illegal,<sup>165</sup> the instrumental role that many expected the U.N. to perform in institution-building in Iraq after Resolution 1483 was adopted did not manifest,<sup>166</sup> and the Security Council had no control over the operations of the CPA or the Pentagon.<sup>167</sup> The U.N. even relinquished control over the Oil for Food Program to the CPA<sup>168</sup> and the CPA replaced it with the Development Fund for Iraq.<sup>169</sup> Moreover, Resolution 1483 did not list a coalition of countries, but referred to the U.K. and U.S. as the “occupying authority” and those occupying powers admitted that the CPA “is not an entity which is legally distinct from the United

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Council and operations of weapons inspectors).

164. U.N. S.C., 58th Year, 4761st mtg. at 11, U.N. Doc. S/PV.4761 (May 2, 2003) (“Pakistan, like several other members of the Security Council, has agreed, due to the exigencies of the circumstances, to the delegation of certain powers by the Security Council to the occupying Powers, as represented by the Authority.”); John Tagliabue, *Europe’s Fears Said to Affect Vote on Iraq*, N.Y. TIMES, Oct. 17, 2003, at A12 (noting that Germany and France voted for the resolution because the lack of reconstruction, the humanitarian catastrophe, and deteriorating conditions, could lead to “a spiral of violence in [Iraq and] the Middle East” generally).

165. U.N. SCOR, 58th Sess., 4726th mtg. at 17, 28, U.N. Doc. S/PV.4726 (Mar. 26, 2003) (referencing 116 Non-Aligned Movement and 57 Organization of the Islamic Conference members opposed to the use of force). *Arab States Line Up*, *supra* note 147 (22 Arab League members were opposed to the use of force and called the war illegal).

166. Grant, *supra* note 56, at 824–25; Hmoud, *supra* note 77, at 450 (stating that many Security Council members wanted to grant the United Nations the authority to administer the country).

167. Paul Blustein, *G-7 Agrees that Iraq Needs Help with Debt; Important Roles Seen for IMF, World Bank*, WASH. POST, Apr. 13, 2003, at A37 (The Bush administration was “balking at mandates that would give the United Nations as big a part in running postwar Iraq as many European nations want”). David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 850 (2003) (White House rejecting a significant UN role); *see also* Bhuta, *supra* note 56, at 736–37; Grant, *supra* note 56, at 853.

168. The Security Council might be faulted for relinquishing authority to the CPA for administering the Oil-for-Food program in the form in which it was established in April 1995. Perhaps the U.N. should have still exercised oversight. CRIMES OF WAR: IRAQ 277 (Richard Falk, Irene Gendzier & Robert Jay Lifton, eds. 2006); Frank Berman, *The Authorization Model: Resolution 678 and Its Effects*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY (David M. Malone, ed. 2004). The U.N.’s relinquishment of the administration of Iraq’s oil revenues occurred under conditions of duress. The invasion caused the humanitarian hardship and the conditions could not be rectified without an occupation to administrate. The CPA was presumed to be a legitimate authority that could be trusted with the funds, while the Ba’ath regime could not be so trusted under the U.N. Oil-for-Food program.

169. Hmoud, *supra* note 77, at 449–50.

Kingdom and the United States for purposes of international law.”<sup>170</sup>

Second, while the CPA’s Strategic Plan rested its authority on the presumption that there was a “co-ordinated international effort” to “bring peace and stability to the Iraqi people,”<sup>171</sup> the actual composition and functioning of the CPA was neither a coalition nor a bilaterally-controlled entity. An Inspector General was created under U.S. federal law to monitor and audit the CPA in the same manner that federal agencies are audited in the U.S.<sup>172</sup> and the Inspector General reported that of the nearly 1,200 staff members employed by the CPA, 85%–87% percent were from the U.S. and the remainder were nationals of twenty-five other countries.<sup>173</sup> The CPA was a U.S. government entity with a token number of foreigners who were not working at the direction of their respective governments but for the CPA administrator.<sup>174</sup> The personnel selected for the CPA accepted the approach of transformative occupation.<sup>175</sup> Jim O’Beirne, a Bush

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170. Talmon, *supra* note 155, at 17 (citing to Supplementary Memorandum Submitted by the Foreign and Commonwealth Office to the House of Commons Foreign Affairs Committee 5 (April 2004); Brief of the United States in Response to the Court’s Invitation of December 21, 2004, *United States v. Custer Battles, LLC*, No. CV-04-199 A (E.D. Va. Apr. 1, 2005), 2005 WL 871352); *Id.* at 19 (citing HC Debs., vol. 405, col. 22: 12 May 2003) (British Foreign Secretary remarking to the House of Commons: “The United Kingdom and the United States fully accept our responsibilities under the fourth Geneva Convention and the Hague Regulations.”).

171. Coalition Provisional Authority, *Achieving the Vision to Restore Full Sovereignty to the Iraqi People (Strategic Plan)* 9 (Working Document, Oct. 1, 2003), available at [http://www.globalsecurity.org/military/library/congress/2003\\_hr/03-10-08strategicplan.pdf](http://www.globalsecurity.org/military/library/congress/2003_hr/03-10-08strategicplan.pdf).

172. Pub. L. No. 108-106, 117 Stat. 1209, at 1234; Pub. L. No. 108-106, Sec. 3001(c)(e)(o); COALITION PROVISIONAL AUTHORITY, OFFICE OF INSPECTOR GENERAL, MESSAGE FROM THE INSPECTOR GENERAL OF THE COALITION PROVISIONAL AUTHORITY 1 (Mar. 30, 2004), available at [http://www.globalsecurity.org/military/library/report/2004/cpaig\\_30mar2004\\_report.pdf](http://www.globalsecurity.org/military/library/report/2004/cpaig_30mar2004_report.pdf).

173. Hearing before the Committee on Foreign Relations, United States Senate, *Iraq: Status and Prospects for Reconstruction – Resources*, 108th Congress, 1st Sess., July 29, 2003, at 86; see also United States General Accounting Office, *Rebuilding Iraq: Resources, Security, Governance, Essential Service, and Oversight Issues*, GAO-04-902R, at 37–41 (June 2004). There were 558 U.S. federal government employees assigned to the CPA, 411 were identified as “federal civilian workers,” 65 were from Foreign Service, and 79 were from the Senior Executive Service. HALCHIN, *supra* note 11, at 11.

174. Other British representatives also served on the CPA, including Sir Jeremy Greenstock, the U.K.’s Special Representative in Iraq, who was a deputy to Bremer. HALCHIN, *supra* note 11, at 3–4; Morris, *supra* note 9, at 668 (“the CPA personnel were largely Americans and a host of government agencies continue to work in Iraq under the shadow of the CPA’s misdeeds.”).

175. Americans selected by the White House and Pentagon for CPA operations and related occupational positions were those accepting the overall mission and approach. Ty O. Cobb, *Nevada Lawyer Shares Experiences of Working in Iraq*, 14 NEV. LAW. 14, 14 (Jan. 2006) (discussing questions White House Liaison Office for the Department of Defense posed

Administration appointee in the Pentagon, “recruit[ed] the people he wanted [for the CPA] . . . from the offices of Republican congressmen, conservative think tanks and GOP activists” and O’Beirne’s staff interviewed candidates with questions that sought to warrant that applicants were loyal to George W. Bush.<sup>176</sup> In executing the CPA’s mission, selectees deemed to have contributed exceptional service were bestowed special commendations from the U.S. Attorney General.<sup>177</sup> Yet, if the CPA operations were frequently “in the breach” as articulated by the Inspector General,<sup>178</sup> CPA personnel might have been endowed commendations for fulfilling directives that were incompatible with the international law of occupation.

A parallel example of labeling an entity a “coalition” when the composition is anything but a “coalition” is provided in the hackneyed discourse accompanying the phrase “coalition of the willing,” which was an assortment of countries that diplomatically assented to the invasion based on the Bush administration’s allegations about security threats from Iraq’s supposedly existing weapons of mass destruction.<sup>179</sup> The Bush Administration granted financial assistance and made promises to countries for their

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to the author before being selected to go to Iraq); NOAH FELDMAN, WHAT WE OWE IRAQ 19 (2004) (“some Americans may have arrived in Iraq expecting to re-create Iraqi politics in their own image.”).

176. Rajiv Chandrasekaran, *Ties to GOP Trumped Know-How Among Staff Sent to Rebuild Iraq*, WASH. POST (Sept. 17, 2006), [http://www.washingtonpost.com/wp-dyn/content/article/2006/09/16/AR2006091600193\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/09/16/AR2006091600193_pf.html) (stating that O’Beirne’s staff “discarded applications from those his staff deemed ideologically suspect, even if the applicants possessed Arabic language skills or postwar rebuilding experience”).

177. JIM FREDERICK, BLACK HEARTS: ONE PLATOON’S DESCENT INTO MADNESS IN IRAQ’S TRIANGLE OF DEATH 12 (2010) (stating that “people who worked at the CPA, from Bremer on down, arrived with a kind of visionary—even missionary—idealism,” and stating that “[f]or many, being Bush administration loyalists, rather than having experience in diplomacy or reconstruction, was their own qualification”); Eric H. Blinderman, *Lessons From the Saddam Trial: Article: Judging Human Rights Watch: An Appraisal of Human Rights Watch’s Analysis of the Ad-Dujayl Trial*, 39 CASE W. RES. J. INT’L L. 99 (2006/2007) (see author’s biography). Similarly, in mid-December 2004, Bush awarded the Presidential Medal of Freedom to CIA Director George Tenet, General Tommy Franks, and CPA Administrator Paul Bremer, and noted that they played “pivotal roles in great events.” Joel Roberts, *Bush Honors, Tenet, Franks, Bremer*, CBS NEWS (Dec. 14, 2004), <http://www.cbsnews.com/new/s/bush-honors-tenet-franks-bremer/>. Tenet was the scapegoat of the false claims and who delivered false intelligence allegations that led to the invasion of Iraq, Franks directed military operations for what many commentators called an illegal war, and Bremer unilaterally imposed laws that were inconsistent with occupation law.

178. Bowen, *supra* note 13, at 17–18.

179. *Weapon Inspections*, *supra* note 48, at 301–21, 344–50 (discussing the international diplomacy that prevailed as a justification for war, which involved Iraq possessing proscribed weapons and consisting of a threat to international peace and security).

diplomatic support,<sup>180</sup> but actual military deployments from other countries was meager. Not that constituting an assembly of states as a “coalition” should purify an illegal war<sup>181</sup> (although it probably did not rhetorically hurt), over 90% of the personnel participating in the Iraq War were members of the American military, while being marketed as troops of a “multinational coalition.”<sup>182</sup> Despite the virtual non-existence of a “coalition” for the invasion, the U.S. and U.K. delivered a letter to Security Council members on May 8, 2003, announcing that they and their “Coalition partners” had created the Coalition Provisional Authority to “exercise powers of government temporarily” in Iraq.<sup>183</sup> Resolution 1483’s language explicitly denied that there was a deeper responsibility flowing to a coalition because it subordinated “other States that are not occupying powers” even though nationals of other states did work “under the Authority.”<sup>184</sup>

Third, the CPA was not an entity possessing characteristics that have been recognized as a legitimate subject under international law<sup>185</sup> and in fact the U.S. and U.K. explicitly stated that the CPA did

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180. *Id.* at 346–48 (listing a number of countries and the coercive diplomacy and promises made); Michael J. Kelly, *Charting America’s Return to Public International Law Under the Obama Administration*, 3 J. NAT’L SECURITY L. & POL’Y 239, 254–55 (2009) (noting that Lithuania provided 120 soldiers for the invasion because the Bush Administration requested and Lithuania’s leaders recalled how the U.S. supported Lithuanian independence after the Soviet Union annexed Lithuania in 1940).

181. David B. Rivkin, Jr., Lee A. Casey & Mark Wendell DeLaquil, *Preemption and Law in the Twenty-First Century*, 5 CHI. J. INT’L L. 467, 486 (2005) (“a group of states has no more inherent right to use force than any one of its nation-state members, just as the illegal action of an individual can not be legalized merely because he obtains the agreement and assistance of his friends”).

182. JOSPEH A. CHRISTOFF, GOV’T ACCOUNTABILITY OFFICE, STABILIZING AND REBUILDING IRAQ: COALITION SUPPORT AND INTERNATIONAL DONOR COMMITMENTS, at preface (May 9, 2007), available at <http://www.gao.gov/new.items/d07827t.pdf> (non-U.S. “coalition countries represent about 8 percent of multinational forces in Iraq”); e.g. Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 219 (2006) (over 90% of “coalition” troops during invasion were from the U.S.).

183. Letter dated May 8, 2003 from the Permanent Representatives of the United Kingdom and the United States to the United Nations Addressed to the President of the Security Council, at 1, U.N. Doc. S/2003/538 (May 8, 2003).

184. S.C. Res. 1483, para. 12–13, U.N. Doc. S/RES/1483 (May 22, 2003).

185. Formal and traditional actors under international law are states, but a certain level of recognition has been extended to indigenous populations and non-government organizations. D’Aspremont, *supra* note 163, at 15; W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGRIED WIESSNER, GAYL S. WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 145 (2004); see also Benedict Kingsbury, *Claims by Non-State Groups*, 25 CORNELL INT’L L.J. 481, 486–88 (1992). Meanwhile, scholars distinguish other entities, such as multinational corporations, private armies, terrorist groups and gangs, which are not formal organizations under international law. REISMAN, ARSANJANI, WIESSNER &

not have an independent existence apart from the U.S. and U.K.<sup>186</sup> Even if a claim of independent existence could have reasonably been made, the events giving rise to international recognition should have been more pristine. U.N. Charter Article I emphasizes that “the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter.”<sup>187</sup> Previous General Assembly resolutions have expressly referred to “illegal occupations” as those deriving from an illegal use of force, required reparations for illegalities,<sup>188</sup> and specified that the aggressor’s obligation was to end the illegality by terminating the “illegal occupation.”<sup>189</sup> Resolution 1483 authorized the occupation,<sup>190</sup> but no U.N. authorization permitted the attack.

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WESTERMAN, *supra*, at 311–15.

186. Talmon, *supra* note 155, at 17, 19.

187. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970); *see also* Declaration on the Strengthening of International Security, G.A. Res. 2734 (XXV), ¶ 5, A/RES/25/2734 (Dec. 16, 1970).

188. G.A. Res. 2542 (XXIV), art. 26, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11 1969); G.A. Res. 42/22, ¶ 10, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc. A/RES/42/22 (Nov. 18, 1987). In 1968, the Security Council and General Assembly called South Africa’s presence in Namibia an “illegal occupation;” in 1973, the General Assembly called the Portuguese military presence in Guinea-Bissau an “illegal occupation;” in a series of resolutions from 1975 to 1980, the General Assembly called Israeli occupations of Arab and Palestinian territories illegal; and in 1990, the Security Council called Iraq’s occupation of Kuwait illegal. Yael Rouen, *Illegal Occupation and Its Consequences*, 41 *ISR. L. REV.* 201, 213–18, 223–24 (2008). Israel claimed that the Fourth Geneva Convention did apply to Israeli occupations of Gaza and the West Bank, which is a “patently sterile” argument. YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 21 (2009).

189. Rouen, *supra* note 188, at 227–28; *see also* Bhuta, *supra* note 49, at 820–21 (maintaining that “[a] military occupation that is not the result of a defensive use of force within the meaning of article 51 of the U.N. Charter or that continues longer than necessary to repel an act of aggression violates the population’s right to self-determination and may even be regarded as an ‘illegal’ occupation.”); Rouen, *supra* note 188, at 201, 244 (stating that before one can even claim to act within the confines of the limited activities contained in occupation law, the presence must first be legitimate, and reminding that “illegal occupations are primarily those achieved through the violation of the prohibition on the use of force, or maintained in violation of the right of self-determination.”).

190. Rouen, *supra* note 188, at 203; *see also* Richard Morgan, *The Law at War: Counterinsurgency Operations and the Use of Indigenous Legal Institutions*, 33 *HASTINGS INT’L & COMP. L. REV.* 55, 56 (2010) (contending that U.N. Security Council Resolution 1790 provided a continuing legal justifications for the U.S. military to remain in Iraq, without which, the U.S. military might not have had the ability to remain in Iraq). *See contra* Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 *MINN. INT’L L.* 407, 439 (2007) (opining that Resolution 1483 reflected “the UN’s indirect, albeit unwilling, endorsement of the US intervention policies”). There was also a contention that Resolution 1483 permitted making sweeping reform. One week into the invasion and in a March 26, 2003

In fact, one week after the invasion, eleven Security Council members called the attack a violation of international law, which presumably made the invasion an illegal act of aggression.<sup>191</sup> Experts called the Iraq War illegal and French President Jacques Chirac explained that “France would not accept a resolution tending to legitimize the military intervention and giving the American and British the power to administer Iraq.”<sup>192</sup> Resolution 1483 recognized

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memo British Attorney General Goldsmith stated: “In short, my view is that a further Security Council resolution is needed to authorize imposing reform and restructuring of Iraq and its Government. In the absence of a further resolution, the UK (and the US) would be bound by the provisions of international law governing belligerent occupation, notably the Fourth Geneva Convention and the 1907 Hague Regulations.” Roberts, *supra* note 53, at 609. He further added that the “imposition of major structural economic reforms would not be authorized by international law.” *Id.* at 609. Resolution 1483 was an authorization to temporarily occupy because of the humanitarian suffering that was caused and to search for weapons of mass destruction (that did not exist). Resolution 1483 contained no language that stated the CPA could unilaterally impose major substantive law structural reforms (beyond fortifying human rights standards and instituting the conditions for representative government. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

191. JAMES CARROLL, *CRUSADE: CHRONICLES OF AN UNJUST WAR* 169 (2004); Ben Chigara, *Short-Circuiting International Law*, 8 OR. REV. INT’L L. 191, 211 (2006); Elisabeth Bumiller, *White House Letter: Who’s Cool at the Group of 8 Meeting? It’s All in Bush’s Gestures*, N.Y. TIMES (June 2, 2003), <http://www.nytimes.com/2003/06/02/world/white-house-letter-who-s-cool-group-8-meeting-it-s-all-bush-s-gestures.html> (noting the split over the Iraq War at the G8 meeting); *Iraq War Illegal, Says Annan*, BBC (Sept. 16, 2004), [http://news.bbc.co.uk/2/hi/middle\\_east/3661134.stm](http://news.bbc.co.uk/2/hi/middle_east/3661134.stm); Felicity Barringer, *Annan Warns of World Crisis*, N.Y. TIMES, July 31, 2003, at A16 (U.N. Secretary General Annan calling the Iraq War a threat to the U.N.’s viability that placed the Security Council system in “crisis”); *Malaysian PM Condemns Iraq War*, BBC (Mar. 24, 2003), <http://news.bbc.co.uk/go/pr/ft/-/2/hi/asia-pacific/2880519.stm> (reporting that the Malaysian Prime Minister sought to bring criminal charges for the invasion).

192. Elaine Sciolino, *A Nation at War: Europe; France Opposes Proposal For U.S.-British Rule in Iraq*, N.Y. TIMES, Mar. 22, 2003, <http://www.nytimes.com/2003/03/22/world/nation-at-war-europe-france-opposes-proposal-for-us-british-rule-in-iraq.html>; *see also* High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. GAOR, 59th Sess., at 54 U.N. Doc. A/59/565 (Dec. 2, 2004), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CP.R%20A%2059%20565.pdf> (“[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action[.]”); Hmoud, *supra* note 77, at 451 (stating that several Security Council members wanted the United Nations to administer the country); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (explaining that the Bush Administration’s legal theory for invasion was “not persuasive”); *Desmond Tutu Calls for War Crimes Charges for Blair, Bush*, ASSOCIATED PRESS, Sept. 12, 2012 (Nobel Laureate Desmond Tutu “called for Tony Blair and George Bush to face prosecution at the International Criminal Court for their role in the 2003 U.S.-led invasion of Iraq”); Jarrett Murphy, *Mandela Slams Bush on Iraq*, CBS NEWS (Jan. 30, 2003), <http://www.cbsnews.com/stories/2003/01/30/iraq/main538607.shtml> (Nobel Laureate Nelson Mandela explained: “What I am condemning is . . . one power, with a president who has no foresight, who cannot think properly[.]”).

that the disruption caused by the invasion could not be undone,<sup>193</sup> that there was a practical need to mitigate the humanitarian misery,<sup>194</sup> that Iraq had no government to assist with the humanitarian crisis (due to the previous regime being displaced by the invading military),<sup>195</sup> and

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193. Dissenting Security Council members sought to address the mess caused by the unauthorized invasion with an expedient and practical result. The Security Council certainly could not raise an army to eject the “coalition,” even if it was largely only the U.S., or voice overwhelming dissent to demand withdrawal as it would only prove itself impotent to enforce its demands. Some have contended that the U.N. could not exist without the U.S. John C. Yoo & Will Trachman, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT’L L. 379, 380 (2005); see also Brown, *supra* note 74, at 60 (2004) (calling the U.N. a “flawed institution with limited power,” particularly because its “most powerful organ, the Security Council, has expansive authority on paper, but can act effectively only when there is a consensus”). It also may not be feasible that the U.N., which resides on U.S. soil, receives 22% of its operational budget from the U.S., and is dependent on U.S. military force to have credibility with the enforcement of its orders (such as for a peacekeeping mission), could oppose the U.S. authority. United Nations Secretariat, *Assessment of Member States’ Advances to the Working Capital Fund for the Biennium 2014-2015 and Contributions to the United Nations Regular Budget for 2014*, at 10, ST/ADM/SER.B/889 (Dec. 27, 2013); Robert J. Delahunty, *Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U.L. REV. 871, 893–94 (2007) (noting that despite periodic attempts to create a standing military force over its six decade history, the U.N. has never had a standing military force); *Reform and Progress in the United States: Interview with Sir Kieran Prendergast, Former U.N. Under-Secretary-General for Political Affairs*, 30 FLETCHER F. WORLD AFF. 61, 73 (2006) (opining that “without the United States the U.N. is a vehicle without an engine”). The U.N. could not have imposed a peacekeeping mission against the will of the occupying force and if the Security Council had not passed Resolution 1483, Iraqis would have suffered more and could not have received oil funds. Had Resolution 1483 not been passed, the United Nations could have been blamed for not only failing to prevent the invasion, but also for the adverse consequences.

Ultimately, to preserve the integrity of international law, to defend the Bush Administration, or to save the credibility of the U.N., many scholars and commentators rationalized the invasion with a series of explanations that involved “mistakes,” “misinterpretations” of the perceived threat, or espoused legality via novel interpretations. If the international community pursued war crime violations against Mr. Bush and his top officials, the pursuit might further undermine the credibility of the Security Council because it was impotent to stop an action it debated for over five months. Leaving the legality of the invasion in ambiguity was the most expedient result.

194. Under international law, the CPA *created* the conditions mandating occupation—(1) existing government structures are incapable of exercising regular authority and (2) the occupying power is in a position of undertake those normal functions of government. Hague Regulations, *supra* note 123, art. 42 (entered into force Jan. 26, 1910); UNITED STATES ARMY, *supra* note 90, ¶ 351; UK MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 275 (2004).

195. S.C. Res. 1483, pmb., para. 4, U.N. Doc. S/RES/1483 (May 22, 2003) (stating that the US and UK were required to “promote the welfare of the Iraqi people through effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future”).

that there should be inspections to ensure disarmament.<sup>196</sup> In fact, the Resolution endeavored to restrain the US and British occupation<sup>197</sup> because the U.S. and U.K. did not even want to accept the label of “occupier” to limit their authority.<sup>198</sup> Resolution 1483 emphasized parameters and the temporary nature of the occupation, but the meaning of the Resolution was twisted, the CPA did whatever it wanted,<sup>199</sup> and the Bush Administration acted as if it had no control over the occupation.

Fourth, critics mentioned that the occupation was poorly-planned by the Bush Administration<sup>200</sup> (and there is no doubt that this is a justifiable perception given the humanitarian disaster that followed the invasion), but the White House had already constituted an entity for the occupation pursuant to National Security Presidential Directive 24, adopted on January 20, 2003.<sup>201</sup> Hence, there were traces of the CPA long before Resolution 1483 was adopted, which further suggests that the Bush Administration intended to occupy Iraq and that there was sole U.S. control and responsibility over the CPA because it merely replaced the forerunning entity. The occupational authority was then named the Office of Reconstruction and

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196. On April 14, 2003, British Prime Minister Blair emphasized that “the coalition and the Office of Reconstruction and Humanitarian Assistance will have responsibility under the Geneva and Hague conventions for ensuring that Iraq’s immediate security and humanitarian needs are met.” Adam Roberts, *Transformative Military Occupation: Applying the Law of War and Human Rights*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 478 (Michael Schmitt & Jelena Pejic eds., 2007); The U.S. and U.K. stated to the UN Security Council that the “States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq.” Letter From the Permanent Representatives of the UK and the US to the Security Council, U.N. Doc. S/2003/538 (May 8, 2003), available at <https://www.globalsecurity.org/component/content/article/168/36083.html>. This letter and representatives emphasized humanitarian need and disarmament of prohibited weapons at the time the resolution was adopted and never mentioned drastic reform. *Id.*

197. Patterson, *supra* note 85, at 467.

198. Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 MCGILL L.J. 285, 306–07 (2005).

199. Bowen, *supra* note 13, at 17–18 (the Special Inspector General for Iraq Reconstruction acknowledging that occupation operations were “frequently in the breach,” but Iraq provided painful lessons about building stability in fragile states).

200. 152 CONG. REC. H11607 (June 16, 2006) (statement of Rep. Ryan Costello) (“The heart of this discussion needs to be that the Bush administration has been almost totally inept in its planning and prosecution of the war and occupation of Iraq.”); Price, *supra* note 75, at 8–9.

201. National Security Presidential Directive No. 24 (Jan. 20, 2003); HALCHIN, *supra* note 11, at 2; *Coalition Laws*, *supra* note 11, at 601.

Humanitarian Assistance (ORHA).<sup>202</sup> Jay Garner, a retired general, was appointed to head the ORHA.<sup>203</sup> ORHA was not internationally-authorized<sup>204</sup> but was connected to the Pentagon and missioned to direct the post-invasion activities of “civilian aid, reconstruction, and civil administration or governance.”<sup>205</sup>

Fifth, there was a transition from the ORHA to the CPA, with the CPA leadership being appointed by the U.S.<sup>206</sup> On April 16, 2003, General Tommy Franks announced: “I am creating the Coalition Provisional Authority to exercise powers of government temporarily, and as necessary, especially to provide security, to allow the delivery of humanitarian aid and to eliminate weapons of mass destruction.”<sup>207</sup>

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202. Judith Miller, *Threats and Responses: Looking Ahead: White House Assembles Officials to Review Plan to Rebuild Iraq After War*, N.Y. TIMES, Feb. 23, 2003, <http://www.nytimes.com/2003/02/23/world/threats-responses-looking-ahead-white-house-assembles-officials-review-plan.html>.

203. *Id.* (announcing the plan nearly a month before invasion). After the media accepted the justifications for the invasion as true for several months, it hosted former military commanders explaining potential invasion plans. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 67–69 (2011); David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand: Courting Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at A1. Ideas of an anticipated invasion were being planted at the same time Bush administration officials explained that no such action was inevitable. *Excerpts from News Conference: Imagine 'Hussein With Nuclear Weapons,'* N.Y. TIMES, Nov. 8, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9907E1DD1731F93BA35752C1A9649C8B63> (“I hope this can be done peacefully. It’s up to Saddam Hussein, however, to make that choice.”).

204. ORHA was created at a time when the U.N. inspections were still conducting operations to assess whether Iraq possessed prohibited weapons, before Colin Powell addressed the Security Council and stated unequivocally that Iraq was in violation of U.N. prohibitions, and before the U.N. Security Council had even begun the most intensive debates. *Weapon Inspections*, *supra* note 48, at 330–36.

205. Miller, *supra* note 202; Karen DeYoung & Dan Morgan, *U.S. Plan for Iraq's Future is Challenged; Pentagon Control, Secrecy Questioned*, WASH. POST, Apr. 6, 2003, at A21 (stating that the ORHA was connected to the Pentagon and that ORHA would control funding for humanitarian operations and reconstruction works, while the U.S. Agency for International Development (USAID) would implement the operations).

206. Several press releases explained that there was a transition to the CPA, but the ORHA dissolved without explanation. After the CPA was created, neither ORHA nor Garner was mentioned in the press release. Halchin, *supra* note 11, at 2. The CPA undertook operations that were originally intended for ORHA and Garner returned to Washington by mid-June 2003. Secretary of State Donald Rumsfeld, U.S. Dep’t of Defense, Media Availability with Jay Garner, (June 18, 2003), *available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2758>; *see also* Roberts, *supra* note 53, at 610.

207. *Laudes Corp. v. United States*, 84 Fed. Cl. 298, 300–01 (2008) (citing Tommy R. Franks, *Freedom Message to the Iraqi People* (Apr. 16, 2003)); John R. Crook, *Justice Department Brief Addresses Military Occupation, Legal Status of Coalition Provisional Authority in Iraq*, 99 A.J.I.L. 709, 709–10 (2005). Franks was apparently not speaking of creating an entity that would have the characteristics of a state actor because the Department of Defense does not have authority to create sovereign entities, but he was apparently describing the CPA as an adjunct to the Pentagon, but this makes ORHA’s then-existing role uncertain.

On May 6, 2003, President Bush announced that he appointed Ambassador Bremer as a Presidential Envoy to “oversee Coalition reconstruction efforts and the process by which the Iraqi people build the institutions and governing structures[.]”<sup>208</sup> About the chain of command, he remarked: “Ambassador Bremer will report to Secretary of Defense Rumsfeld and will advise the President, through the Secretary, on policies designed to achieve American and Coalition goals for Iraq.”<sup>209</sup> Several days later, it was Rumsfeld who named Bremer as CPA “Administrator.”<sup>210</sup>

Sixth, the hypothesis that the CPA was established under international law by a U.N. Security Council resolution<sup>211</sup> is not chronologically sound. Resolution 1483 was adopted on May 22, 2003 and called the U.S. and U.K. occupying powers.<sup>212</sup> However, the CPA’s first order to dissolve the Iraqi government was issued on May 16, 2003,<sup>213</sup> the Bush Administration appointed Bremer over two weeks prior, and General Franks had announced that *he* had created the CPA nearly one month earlier. Despite all of the elements indicating that there was sole U.S. responsibility over the CPA under international law and the extensive practical control at the domestic level (which is discussed in the next section), the White House found it arduous to affirm a conspicuous line of responsibility over the CPA’s initiatives.

### C. Actual Control in the White House

The functioning of the CPA suggests that not only was there no broad coalition of countries responsible for occupation activities, but

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208. News Release, White House, President Names Envoy to Iraq (May 6, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030506-5.html>; see also Roberts, *supra* note 53, at 610 (stating that there was “confusion about which person, and indeed organization, was in charge”).

209. *Id.*

210. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 620 (E.D. Va. 2005); see also L. PAUL BREMER (with MALCOLM MCCONNELL), MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE 12–13 (2006). On May 13, the Secretary of Defense named Bremer the CPA Administrator, who would be responsible for “the temporary governance of Iraq” and “oversee, direct and coordinate all executive, legislative and judicial functions necessary to carry out this responsibility.” *Laudes Corp.*, 84 Fed. Cl. at 300–01.

211. HALCHIN, *supra* note 11, at 4.

212. S.C. Res. 1483, pmbll., U.N. Doc. S/RES/1483 (May 22, 2003).

213. Coalition Provisional Authority, Order No. 1, De-Ba’athification of Iraqi Society, CPA/ORD/16 May 03/01 (May 16, 2003), [http://www.iraqcoalition.org/regulations/20030516\\_CPAORD\\_1\\_De-Ba\\_athification\\_of\\_Iraqi\\_Society\\_.pdf](http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf); Halchin, *supra* note 11, at 3.

also that the British had minimal control over the CPA. When Ambassador Bremer was appointed on May 9, 2003, Bush remarked that Bremer was endowed “with full authority over all U.S. government personnel, activities and funds” in Iraq.<sup>214</sup> The CPA referred to itself as a part of the U.S. federal government<sup>215</sup> and the CPA vested itself with an encompassing authority in Regulation number 1, stating: “The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives.”<sup>216</sup> Other top foreign officials admitted that “throughout its entire existence, the CPA was a US government department.”<sup>217</sup>

The U.S. President detailed how the CPA spearheaded operations performed by multiple U.S. government agencies deployed to Iraq and specified that the Office of Management and Budget (OMB) would fund operations and coordinate with the CPA.<sup>218</sup> The FY2004 supplemental funding of \$18.649 billion was provided to the CPA and was justified in P.L. 108-106 by calling the CPA part of the U.S. federal government.<sup>219</sup> The OMB reported to Congress:

The Administrator of the Coalition Provisional Authority (CPA) reports to the President through the Secretary of Defense. He oversees, directs and coordinates all U.S. Government (USG) programs and activities in Iraq, except those under the command

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214. Roberts, *supra* note 53, at 611.

215. HALCHIN, *supra* note 11, at 7 (citing Coalition Provisional Authority, *List of Questions and Answers Compiled from a Pre-Proposal Conference Held on Jan. 21, 2004*, at 20) (document referring to the CPA’s “Sector Program Management (SPMO) is a Government entity”).

216. Coalition Provisional Authority, Order No. 1, *supra* note 213, ¶ 1.

217. Patrick Wintour, *US Authority Accused of Ignoring Allies in Iraq*, GUARDIAN (June 15, 2007), <http://www.theguardian.com/politics/2007/jun/16/iraq.iraq> (further noting that a British official further remarked that “no agreement was ever signed between the British and the Americans, because the Americans refused even to consider it.”); Talmon, *supra* note 155, at 10 (citing HC Debs., vol. 421, col. 1632W: May 26, 2004) (British Foreign Secretary Jack Straw referring to Bremer as “responsible for all CPA decisions.”).

218. A May 9, 2003 memorandum from President Bush states: “In accordance with Presidential direction relating to Iraq relief and reconstruction, multiple agencies are deployed with the Coalition Provisional Authority (CPA) and are serving as implement partners or executing agents for programs and projects. These agencies will identify funding requirements for such programs and projects through CPA. OMB will work with CPA to transfer funds to the appropriate implementing agencies.” Halchin, *supra* note 11, at 6 (citing Memorandum of the Functions of the President under the Heading ‘Iraq Relief and Reconstruction Fund’ in the Emergency Wartime Supplemental Appropriations Act, 2003, 39 WEEKLY COMP. PRES. DOC. 555 (May 6, 2003)). The funding directives were repeated in another letter from the president in January 2004. *Id.* at 6 (citing U.S. President (G.W. Bush)).

219. P.L. 108-106, 117 Stat. 1225; HALCHIN, *supra* note 11, at 6–7.

of the Commander, U.S. Central Command (CENTCOM). . .The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq. . .The CPA is vested by the President with all executive, legislative and judicial authority necessary to achieve its objectives, exercised consistent with relevant U.N. Security Council resolutions[.]<sup>220</sup>

The CPA used standard U.S. government contracting procedures and forms and CPA officials acted as procurement officials for the U.S. government.<sup>221</sup> In the *Custer Battles* contractor fraud case, the U.S. government acknowledged that the CPA was “an instrumentality of the United States for the purposes of the False Claims Act,”<sup>222</sup> which is a relationship that is required to collect on the numerous claims brought under the FCA.<sup>223</sup> For purposes of remedying a wrong with the government as the plaintiff, the CPA was a U.S. government entity, but for purposes of addressing the wrongs committed by the CPA, there was more ambiguity over whether the CPA was a U.S. government entity.<sup>224</sup>

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220. HALCHIN, *supra* note 11, at 5 (citing OFFICE OF MANAGEMENT AND BUDGET, REPORT TO CONGRESS PURSUANT TO SECTION 1506 OF THE EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003 (Public Law 108-11), (June 2, 2003)).

221. United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617, 629, 631 (E.D. Va. 2005).

222. Supplemental Brief of the United States, United States *ex rel.* DRC, Inc. v. Custer Battles, LLC, 472 F. Supp. 2d 787 (E.D. Va. 2007) (No. 1:04cv199), 2005 WL 1129476; Crook, *supra* note 207, at 709.

223. As Senator Chuck Grassley wrote in a letter to Attorney General Alberto Gonzales, “If the FCA is found not to apply to any contract entered into by the CPA, any recovery for fraud, waste and abuse of taxpayer dollars under the FCA would be prohibited.” Morris, *supra* note 9, at 627. In September 2009, the Department of Justice stated that there were 1,000 False Claims Act (FCA) cases pending in a backlog. Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 IND. L.J. 257, 269 (2011).

224. DAN SAROOSHI, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWER 33 (2005) (stating that there is an established law of agency under international law). The law of agency seems applicable to assess CPA relations with the White House and within the context of *ultra vires* actions. Yet the manner in which the CPA’s agency relations were depicted later when chaos, corruption, and illegalities erupted, no one had responsibility for the CPA. The White House created an entity, appropriated billions in US taxpayer funds, and directed other US federal agencies to adhere to the dictates of the entity, but for purposes of assuming responsibility, the White House lacked effective oversight and control. The former Administrator of the Office of Federal Procurement Policy explained that “the CPA is *not* the United States Government. Accordingly, if one enters into a contractual relationship with the CPA, one is not entering into a contractual relationship with the United States. The rights and remedies available to parties contracting with the United States will not be available in a contractual relationship with the CPA.” Angela B. Styles, *Seller Beware: Assessing the Risks of Iraq Reconstruction Contracting*, 81 FEDERAL CONTRACTS REPORT 65 (Jan. 20, 2004); *see also Custer Battles*, 376 F. Supp. 2d 630 (E.D.

Legal and practical control over the CPA did remain with the U.S. government, but the political chain of command became obscure. From the December 2008 Inspector General's Report on Iraq Reconstruction, entitled *Hard Lessons: The Iraq Reconstruction Experience*, an interview of Deputy Secretary Armitage was quoted for a discussion transpiring between Secretary of Defense Rumsfeld and National Security Advisor Rice over responsibility for Bremer and the CPA. Armitage remarked that Dr. Rice turned to Rumsfeld and asked him to direct Bremer to have him execute some initiatives.<sup>225</sup> Rumsfeld remarked: "'No, he, Bremer, doesn't work for me.' She said, 'Yes, he does. Who does he work for?' And he [Rumsfeld] says, 'he works for the NSC [National Security Council].'"<sup>226</sup> Rice then responded, "he works for you," to which Rumsfeld retorted, "No, he works for you."<sup>227</sup>

When Bremer was asked why there were no regular updates flowing back to Washington, he retorted: "Now, look, things were moving at such a quick pace, we didn't have the time to do that."<sup>228</sup> It was also reported that Bremer convinced Stephen Hadley, Rice's deputy at the NSC, to exempt him from having to take important decisions through the interagency process.<sup>229</sup> Rumsfeld expressed to Hadley that the U.S. government was impotent to fulfill even basic

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Va. 2005) (Defendants alleging that he was assured that the CPA, under the Security Council resolution, was a "separate and distinct entity from the warring powers" and "under no circumstances was it the U.S. government"); Ellen Nakashima, *Court Revives Suit Over Iraq Work*, WASH. POST (Apr. 11, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041003448.html?hpid=topnews> (noting that this ruling of the CPA not being "a U.S. government entity and thus not governed by U.S. laws" was not reversed in the Custer Battles case until 2009).

225. SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, *HARD LESSONS: THE IRAQ RECONSTRUCTION EXPERIENCE* 120 (2009).

226. *Id.*

227. *Id.* There was technically a division with the May 2003 enactments, which divided military occupation activities and CPA civilian activities. Commonwealth of Australia, Official Committee Hansard, Senate, Foreign Affairs, Defence and Trade Legislation Committee Estimates (Budget Estimates Supplementary Hearings), Nov. 6, 2003, at 54, <http://www.aph.gov.au/~media/Estimates/Live/committee/S7062.ashx>. For example, when detainee abuses arose, the CPA asserted that it was the U.S. and U.K. that retained legal responsibility for detainees. Talmon, *supra* note 155, at 12 (citing Written Submission from the CPA to the U.N. High Commissioner for Human Rights, May 28, 2004); *see also* Human Rights Council Res. 60/251, Opinions adopted by the Working Group on Arbitrary Detention, 4th Sess., Feb. 2, 2007, A/HRC/4/40/Add.1, Feb. 2, 2007, at 31, 39, 114.

228. *Frontline: The Lost Year in Iraq* (PBS television broadcast Aug. 9, 2006), available at <http://www.pbs.org/wgbh/pages/frontline/yeariniraq/analysis/assessments.html>.

229. *Id.*

missions because “the interagency process was broken.”<sup>230</sup> Many controversial CPA initiatives were repeatedly reported in global news sources, which in many cases might obviate the logic of contending that there was no ability to react in Washington due to a frail interagency process.

Ensuring that there is accountability in governing bodies is a firm goal in transitional situations, but the Bush White House did not uphold this principle in the case of the CPA.<sup>231</sup> However, shortly after adopting numerous controversial orders, such as those that endeavored to initiate privatization—the issuance of a new Bank Law that opened the Iraqi banking industry and the economy generally to foreign investment, and the creation of a new currency—the Bush White House announced that it had adopted a new “Iraq Stabilization Group” inside the White House, headed by Rice who created “coordinating committees” to address political and economic affairs and counterterrorism efforts in Iraq.<sup>232</sup> According to a “senior Administration official,” the purpose was to “put accountability right into the White House.”<sup>233</sup>

Consequently, the impression was that the Bush White House did not previously exert adequate control over the CPA and perhaps did not view the CPA initiatives of essential interest or have its intentions incorporated into occupation edicts. However, the White House had begun to produce the 2,000-page *Future of Iraq Project* to itemize details of reform over a year before the invasion.<sup>234</sup>

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230. WOODWARD, *supra* note 112, at 265–69, 276–79 (noting that there was a lack of cooperation and lack of unity in command for operations in Iraq). Similarly, for military operations in Iraq, retired General James L. Jones describes that the “Joint Chiefs have been systematically emasculated by Rumsfeld.” *Id.* at 404. This apparently suggests that operational problems for the military resided within the political leadership and not the Pentagon military leadership.

231. Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 LOY. L.A. INT’L & COMP. L. REV. 57, 77–78 (2009).

232. David E. Sanger, *White House to Overhaul Iraq and Afghan Missions*, N.Y. TIMES, Oct. 6, 2003, <http://www.nytimes.com/2003/10/06/world/white-house-to-overhaul-iraq-and-afghan-missions.html>.

233. *Id.* The Iraq Stabilization Group possessed responsibilities within a chain of command that involved the Pentagon and CPA, ostensibly implying that the White House could not exercise control and accept responsibility before. More ambiguity was created even though no other government agencies could have created the CPA without inherent White House assent. The CPA did not spontaneously manifest itself and administratively delegate itself responsibilities.

234. Hassan, *supra* note 152; Eric Schmitt & Joel Brinkley, *The Struggle For Iraq: Planning; State Dept. Foresaw Trouble Now Plaguing Iraq*, N.Y. TIMES, Oct. 19, 2003, <http://www.nytimes.com/2003/10/19/world/struggle-for-iraq-planning-state-dept-study-foresaw>

Nonetheless, the circulating public impression of the CPA's one year in Iraq—after controversial reform measures were being locked in through CPA Orders, irrespective of the approach of isolating U.N. influences,<sup>235</sup> and with neglect of the language in Resolution 1483 and restrictions of occupation law—was that no one was clearly responsible for the CPA and that initiatives were expedient, but exigent.

## VI. CONCLUSION

Iraq presently confronts a crisis with violence and claims to autonomy from both Kurds and Sunnis against the Shia-controlled regime that governed under the institutions devised, enforced militarily, and left in place by the occupation. There is no doubt that institutional reforms implicate trade-offs between short- and long-term goals and tussles between adhering to sound principles and pragmatism,<sup>236</sup> but there are risks with foreign overreaching that leaves an occupied population with the sentiment that it was excluded from the nation-building process.<sup>237</sup> Institutions can have fortitude and beneficially reform society or they could foment societal dissent,

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w-trouble-now-plaguing-iraq.html (stating that the 13 volumes and over 2,000 pages of the Future of Iraq Project was not released until “several House and Senate committees” had requested them); see also Susan B. Glasser & Rajiv Chandrasekaran, *Reconstruction Planners Worry, Wait and Reevaluate*, WASH. POST, Apr. 2, 2003, at A1 (noting the disastrous conditions following invasion and that some U.S. officials contended the role of occupation would only last ninety days). If the Bush administration disapproved of Bremer's activities, he could have been dismissed. In fact, Jay Garner, who was effectively dismissed and replaced by Bremer, later remarked that he “fell out with the Bush circle” and was replaced by the Bush administration because “he wanted [earlier] free elections and rejected an imposed programme of privatization.” David Leigh, *General Sacked by Bush Says He Wanted Early Elections*, GUARDIAN (March 18, 2004), <http://www.theguardian.com/world/2004/mar/18/iraq.usa>. Bremer was opening up Iraq's economy to capitalism.

235. The Bush Administration had generally negated the influence of the United Nations on the affairs of the occupation. WOODWARD, *supra* note 56, at 359; Bhuta, *supra* note 56, at 736–37; Grant, *supra* note 56, at 835. However, after all of the controversial reforms were dictated and the CPA authority neared expiration, Bush requested that the U.N. lend assistance on rectifying political clashes. Steven R. Weisman, *Bush Urges U.N. to Help Fix Iraqi Clash on Rule*, N.Y. TIMES, Feb. 4, 2004, A1. Perhaps this appeal was a means of portraying a final impression of U.N. involvement.

236. Christine Bell, *Peace Agreement: Their Nature and Legal Status*, 100 A.J.I.L. 373, 399 (2006). Some examples of operations that permitted reform included the short-term appointments of loyalists and banning of the Baathist Party, and eventually holding elections at a time when there might have been more loyalty to the occupation. An alternative approach could have loosened the rigidity of all of these operations and made *all* Iraqis believe that they are part of the process.

237. See generally Part II.

backlash, or even revolution if implementation of foreign transplant institutions results in discrimination.<sup>238</sup> The laws that the CPA imposed were not a product of the Iraqi people and there were hostile reactions to the CPA's initiatives.<sup>239</sup> Hence, if a link can be made between current perceptions of discrimination or unfairness between the acts of the new regime and preceding foreign dictates, there is all the more reason to ensure that future occupations adhere to international law, that the entire occupied population perceives that they were part of the institution-building process to ensure that there is overwhelming internal support during the occupation, and that the international community supports the process. If this causal link is credible, bottled up hostilities or even a revolution might be a regrettable, probable result after the foreign military occupation departs.

Ensuring that responsibility is firmly affixed on an occupying state is a means of curtailing authority frolics so that reforms remain more legitimate and respected by local citizens and this conception parallels what the Framers of the U.S. Constitution sought to instill with unitary Executive principles. However, the CPA's existence, the scope of its power, and the chain of responsibility for its initiatives, remained an enigma. One position maintained that there was a broad Security Council sanction both for the CPA's authority and for the entity under international law. However, this interpretation is at odds with the fact that the CPA was very much a U.S. federal government agency, the process involved the Bush administration appointing

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238. ROBERT DAHL, *POLYARCHY* 210 (1971) (referencing that it is difficult for American policymakers to successfully argue that it is easy to transplant favorable institutions in another country); Ted Robert Gurr, *The Revolution. Social Change Nexus: Some Old Theories and New Hypotheses*, 5 *COMP. POL.* 359, 362–64 (1973) (stating that “social change” can occur with new institutions but there can also be revolution when there is widespread stress, repression, grievances toward because there is intense discontent against the government and institutions). However, during the period that CPA dictated institutions, there may have been an excessively high perceived cost due to the U.S. military enforcing rules under occupation. Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 *J. OF THEORETICAL POL.* 1 (1989), 131, 144 (“even when institutional arrangements are not optimally suited to a given environment, they may nevertheless endure because prospective gains from change are more than outweighed by the costs of effecting them.”). The manner in which Maliki governed is similar to the approach that was dictated in the CPA's very first order, which punished 15,000 to 30,000 people. *Purge of Saddam Loyalists*, *supra* note 53; Usher, *supra* note 54 (noting that it was predominantly Sunnis who were subject to discrimination).

239. See *supra* Parts III, IV (emphasizing that CPA operations were outside the parameters of the Geneva and Hague Conventions, customary occupation law, and the language of Resolution 1483).

loyalists to the CPA, which then selected individuals for impotent, temporary local governance bodies in Iraq, and the CPA imposed legal institutions on Iraq without an effectual check on obscure chains of command.<sup>240</sup> A more viable alternative was proposed by General Jay Garner, the former head of the ORHA, who proposed to immediately hold democratic elections in Iraq and permit the Iraqi people to decide their own political and institutional structures. However, according to Garner, he was dismissed because of this intention to immediately hold elections.<sup>241</sup>

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240. The CPA was a White House entity and Bremer was a Bush administration appointee, much like cabinet appointees but for a task-specific duration. The chain of command for Iraq went from the White House to both the Pentagon and the CPA and eventually to interim Iraqi governments. Other considerations are the similarities with the context of the invasion, which involved all of the false claims about Iraq and the fact that it may have been difficult to address the fallout from the invasion and the occupation activities at the same time that occupation dictates were imposed. Scandal during the occupation shifted attention from the false allegations that led to the invasion. The CPA was, whether intended or not, an intermediary scapegoat that took the brunt of criticism from what was actually occurring during the occupation of Iraq, despite the nexus to the White House and the fact that the White House had produced the *Future of Iraq Project*. Constituting the *Future of Iraq Project* impliedly meant that the Bush White House also had no intention of adhering to restrictions of occupation law.

241. Kathleen T. Rhem, *Iraqis Need Work, Paychecks, U.S. Administrator Says*, AM. FORCES PRESS SERVICE, Apr. 24, 2003, <http://www.defense.gov/news/newsarticle.aspx?id=29065> (Garner stating that “And nobody is going to run those ministries other than the Iraqis themselves. I think we need to be absolutely clear about that. . . The new ruler of Iraq is going to be an Iraqi. . . I don’t rule anything.”); Leigh, *supra* note 234 (Garner stating that the intention of holding early elections was rejected by the Bush Administration and this led to his dismissal).