

THE ROOTS OF COLLAPSE: IMPOSING CONSTITUTIONAL GOVERNANCE

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ABSTRACT

The foundational assumption of constitutional governance poses a conundrum for contemporary state-builders: a constitution heavily influenced by foreigners does not represent the views of the governed. Can a modern state-building effort foster democratic institutions when the new government reflects foreign? Nowhere was this tension more apparent than in Afghanistan, where the United States and the United Nations were heavily involved in drafting the 2004 Constitution. They shaped the process from the initial framework to the final, frenzied approval. Foreigners were engaged at both the procedural level—determining how the negotiations would occur and who would participate—and at the substantive level—providing input about particular provisions. Using judicial review as a lens through which to understand the constitution-writing process, this article shows how foreign involvement led to a final draft that failed to resolve a fundamental issue of governance: what institution had the authority to interpret

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the constitution. The resulting confusion contributed to an ineffective central government and, eventually, the quick downfall of the Afghan government.

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INTRODUCTION

When Americans tuned into their nightly news programs in January 2004, they were treated to images of hundreds of Afghans coming together in a large tent, debating a new proposed constitution.¹ Evoking the collective memory of the constitutional convention of 1787, this gathering of men—and a small number of women—presented a benign, even beneficial, image of U.S. occupation, one that empowered Afghans to use law and legal reform to build a better society while international officials stood back. These images of hope from 2004 stand in stark contrast with those from August 2021, showing a disorganized and tragic evacuation as the United States ceded control of the country back to the Taliban.² Tens of thousands of Afghans desperately tried to flee the country, fearing retaliation for their work with the United States and U.S.-backed Afghan government.

These two seemingly discordant events are not as disconnected as we might initially think. The pomp and circumstance of the Afghan constitution-drafting gathering, more properly called the Constitutional Loya Jirga (CLJ), masked the true level of U.S. involvement in the constitutional process. Positioned to the side of the main tent, largely out of view of the cameras, foreign officials and their Afghan allies called most of the shots.³ For months beforehand, a small group of foreign officials and their chosen partners had pushed a constitutional vision with a strong central state headed by a powerful executive, with few external checks on

¹ *ABC Evening News* (ABC television broadcast Jan. 4, 2004).

² See *Video Shows Afghans Clinging to Outside of US Military Plane as It Takes Off*, CNN (Aug. 16, 2021), <https://www.cnn.com/videos/world/2021/08/16/kabul-clinging-to-airplane-taking-off-tarmac-afghanistan-ward-vpx.cnn> [<https://perma.cc/TXX7-23TP>].

³ See J. Alexander Thier, *Big Tent, Small Tent: The Making of a Constitution in Afghanistan*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 535, 550 (Laurel E. Miller ed., 2010), https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter20_Framing.pdf [<https://perma.cc/6SU2-YKDB>] (discussing the substantial involvement of U.S. and U.N. envoys); see also Miriam Ghani, *Annotated Guide to the Interactive Map, KABUL RECONSTRUCTIONS*, <http://www.kabul-reconstructions.net/constitutions/GuideToTheMap.pdf> [<https://perma.cc/J94E-MU4K>] (listing the U.N. and U.S. officials who assisted in the CLJ proceedings taking place in the VIP tents).

power. Once enshrined in the Constitution, this vision laid the groundwork for years of disfunction and corruption.⁴

More than fifteen years later, the formal Afghan government seemed to evaporate overnight, with high-level officials fleeing the country and other institutions shutting down.⁵ Though many of the failures and miscalculations leading up to that moment were political and military decisions, legal missteps contributed to the quick downfall.⁶ Afghanistan's Constitution of 2004 did not create robust and effective methods to resolve disputes—even those that fell within the limited purview of the country's formal legal mechanisms. The lack of effective, functional government institutions made it easier for the Taliban to win control of the country, though U.S. officials were quick to blame Afghans. During and after the U.S. withdrawal, President Biden invoked the common but inaccurate trope⁷ of Afghanistan as a “graveyard of empires” that “is not susceptible to unity,” conveniently absolving the United States of responsibility.⁸

But in fact, the system of governance established in 2004 proved to be unworkable. Constitutions occupy a unique space in the legal and moral identity of a country, but above all they establish the parameters of how disputes over governance should be resolved—

⁴ Jennifer Brick Murtazashvili, *The Collapse of Afghanistan*, J. DEMOCRACY, Jan. 2022, at 40, 42-45 (discussing the absence of democratic provisions in Afghanistan's constitution).

⁵ See Thomas Gibbons-Neff, Fahim Abed & Sharif Hassan, *The Afghan Military Was Built Over 20 Years. How Did It Collapse so Quickly?*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/08/13/world/asia/afghanistan-rapid-military-collapse.html> [<https://perma.cc/2YF9-96WJ>]; see also Murtazashvili, *supra* note 4, at 42 (“[H]ad the Afghan state not been considered illegitimate by the people, the Taliban would not have had a fighting chance inside of Afghanistan.”).

⁶ Cf. Shamshad Pasarlay, *Fatal Non-Evolution: Afghanistan's 2004 Constitution and the Collapse of Political Order*, VERFASSUNGSBLOG (Sept. 9, 2021), <https://verfassungsblog.de/fatal-non-evolution/> [<https://perma.cc/UAY2-8L4J>] (arguing that Afghanistan's constitutional breakdown stems not from the concentration of centralized power in the constitution itself, but from the failure of subsequent Afghan governments to adapt).

⁷ See Alexander Hainy-Khaleeli, *Why We Need to Stop Calling Afghanistan “The Graveyard of Empires”*, AJAM MEDIA COLLECTIVE (Aug. 24, 2021), <https://ajammc.com/2021/08/24/stop-calling-afghanistan-graveyard-empires/> [<https://perma.cc/CR8G-E6T9>] (“Far from being a place where empires go to die, the land of Afghanistan was, for millennia, a place in which they thrived and prospered, thanks in part to its strategic location at the crossroads of Asia.”).

⁸ President Joseph R. Biden, Remarks in Press Conference (Jan. 19, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/19/remarks-by-president-biden-in-press-conference-6/> [<https://perma.cc/DKW5-XX27>].

both national values and the institutions that should implement them.⁹ Afghanistan's constitution may have been doomed from the start because the Taliban was excluded from the drafting process and unlikely to participate in whatever power-sharing arrangement emerged,¹⁰ but there were other flaws—foreign leadership, poor public consultation, weak institutional design, and a penchant for symbolism over substance. These flaws were at the very heart of U.S. state-building, which assumed American-style democracy could be exported through largely symbolic gestures towards participatory governance.

The United States and the United Nations were heavily involved in drafting the 2004 Constitution. They shaped the process from the initial framework to the final, frenzied approval. Foreigners were engaged at both the procedural level—determining how the negotiations would occur and who would participate—and at the substantive level—providing input about particular provisions. The United States enforced specific policy preferences on some hot-button issues like the role of religion and the status of women. On many other issues, however, the United States agreed to “stand aside” while Afghans worked through the drafting process.¹¹ This reflected the growing conventional wisdom that intervening in process was good practice, while intervening in substance was disfavored.¹² U.S. and U.N. officials nevertheless exerted control by

⁹ See Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 3, 8 (Denis J. Galligan & Mila Versteeg eds., 2013) (examining constitutions as expressions of values and manifestations of power).

¹⁰ See JOHNNY WALSH, U.S. INST. PEACE, *CONSTITUTIONAL REVIEW UNDER A PEACE AGREEMENT* 1 (2020), https://www.usip.org/sites/default/files/Afghanistan-Peace-Process_Constitutional-Review-Under-a-Peace-Agreement.pdf [<https://perma.cc/RS3C-Q8P7>] (noting that “the Taliban object at least as much to their exclusion from the 2004 process as to any particular provision of the document it produced”).

¹¹ ZALMAY KHALILZAD, *THE ENVOY: FROM KABUL TO THE WHITE HOUSE, MY JOURNEY THROUGH A TURBULENT WORLD* 194 (2016).

¹² See Laurel E. Miller, *Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future*, in *FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING* 601, 642 (Laurel E. Miller ed., 2010) (“In general, rather than demanding a particular end product or strengthening a particular party, the role of the United Nations or foreign powers is best focused on ensuring a good process—one that is broadly inclusive and has sufficient resources and staffing, adequate time, and neutral outside expert assistance.”); cf. VIVIEN HART, U.S. INST. PEACE, *SPECIAL REP. 107, DEMOCRATIC CONSTITUTION MAKING* 1 (2003) (“Process has become equally as important as the content of the final document for the legitimacy of a new constitution.”).

setting a quick timeline and giving little weight to public opinion. These procedural controls, as well as substantive interventions, meant that the United States and the United Nations influenced all aspects of the Constitution.

Using judicial review¹³ as a lens through which to understand the constitution-writing process, this Article shows how U.S. involvement shaped the final result even in substantive areas where foreigners did not dictate a specific outcome. The United States did not take a firm line on the specifics of judicial review, but it promoted a system with a strong executive with few checks on authority.¹⁴ Judicial review and constitutional interpretation were important to influential Afghans who saw their potential to constrain a powerful president with U.S. backing or, in some cases, as a way to increase the influence of religion in governance. Since the foreigners did not insist on a particular result,¹⁵ the final outcome could be vague. In the end, the Constitution did not definitively specify which institution had the authority to interpret the Constitution, or how judicial review of different types of government action should occur. Both the Supreme Court and a separate entity called the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC) claimed constitutional authority to interpret the document and review

¹³ This technical detail of governmental structure has been commonplace in new constitutions since the middle of the 20th century. Most modern constitutions invoke judicial review to constrain the executive and legislative branches of government. Judicial review is considered an important element of democracy and constitutional development. See Tom Ginsburg, *The Rise of Constitutional Courts and Judicial Review*, in *COMPARATIVE LAW AND SOCIETY* 290, 292 (David S. Clark, ed., 2012) (discussing the use of judicial review in Latin American and Mexican constitutions as an important mechanism for the protection of individual rights); MOHAMMAD HASHIM KAMALI, AFG. RSCH. & EVALUATION UNIT, AFGHANISTAN'S CONSTITUTION TEN YEARS ON: WHAT ARE THE ISSUES? 4 (2014) (noting that modern constitutions provide judicial review as a means to limit the powers of the executive and legislative branches); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 9 (2003) (documenting the late-twentieth century shift towards establishing special courts tasked with constitutional review). See generally CHRISTOPHER FORSYTH, MARK ELLIOTT, SWATI JHAVERI, MICHAEL RAMSDEN & ANNE SCULLY-HILL, EFFECTIVE JUDICIAL REVIEW: A CORNERSTONE OF GOOD GOVERNANCE (2010) (reviewing the scope and transformation of judicial review in common law countries and analyzing common problems across jurisdictions).

¹⁴ Interview with Zalmay Khalilzad, former U.S. Ambassador to the United Nations, Iraq, and Afghanistan, U.S. Dept. State, in Washington D.C. (June 1, 2015).

¹⁵ *Id.*

various government acts and laws for constitutional compliance.¹⁶ The ambiguity caused a “crisis” in constitutional interpretation.¹⁷ The confusing text of the final Constitution was the outcome of a last-minute debate between different Afghan factions, but it was also the product of a long process that prioritized the needs of the United States and its allies while marginalizing dissenting views. As a result, the Constitution failed to resolve a fundamental issue of governance and ultimately contributed to the ineffectiveness of the central government.

Drawing on interviews with several of the major American actors, as well as archival material, this article details the origins of the dispute over constitutional interpretation and how its persistence contributed to constitutional collapse. Part I situates the Afghan Constitution within a tradition of U.S. imposed constitutions. Part II traces the dispute over judicial review through the drafting process, showing the role of Americans and their Afghan allies in creating institutional conflict. Part III details how Afghan presidents and parliament exploited the textual ambiguity to advance their own constitutional interpretations, leading to years of confusion. Part IV shows the damage the conflict inflicted on Afghanistan’s prospects for peaceful, constitutional governance. Part V discusses the contradictory legacies of constitutional ambiguity on the rule of law. The Conclusion suggests that foreigners cannot intervene in the process of constitution drafting without also influencing the substance and that foreign interference in the Afghanistan constitutional process ultimately contributed to instability.

I. IMPOSED CONSTITUTIONS

The weakness of the Afghan Constitution stemmed from specific policy choices, such as the decision to bypass local actors in favor of

¹⁶ The body is sometimes referred to as the Independent Commission for the Implementation of the Constitution (ICSIC). The organization uses ICOIC in its English materials. I follow its usage.

¹⁷ See J. ALEXANDER THIER & JOHN DEMPSEY, U.S. INST. PEACE, RESOLVING THE CRISIS OVER CONSTITUTIONAL INTERPRETATION IN AFGHANISTAN (2009), <https://www.usip.org/publications/2009/03/resolving-crisis-over-constitutional-interpretation-afghanistan> [<https://perma.cc/XPT7-CFA5>].

centralized institutions,¹⁸ but it was also rooted in the imposed nature of the Constitution itself. When foreigners substantially influence a constitution, it cannot plausibly reflect a democratic arrangement between the government and the governed. The question facing outside forces is whether such an undemocratic drafting process can foster an enduring, representative governing arrangement.

a. Role of Constitutions and Constitution-Writing

Nearly all countries in the contemporary world operate under the legal umbrella of a constitution.¹⁹ Constitutions express national values, reflect power dynamics, serve as coordinating devices, and function as contracts.²⁰ They may protect minorities, including groups who are out of power, to reduce the likelihood of extra-constitutional (often violent) means of political participation.²¹ In countries emerging from upheaval, new constitutions can unite disputing parties under a governing rubric while giving voice to the values of the new regime.²² Constitution-making in post-conflict contexts can be a form of reconciliation and transitional justice.²³ Constitution writing can also be a performative act for both domestic and foreign audiences. It can signal that the new

¹⁸ See Murtazashvili, *supra* note 4, at 47 (“A final assumption common among both the international community and many Afghan authorities was that Afghanistan’s traditional decentralized political order, rich in customary governance and tradition, was anathema to the normative underpinnings of a modern state, such as gender equality and formal democracy.”).

¹⁹ See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 48-50, 49 n.11 (2009).

²⁰ Galligan & Versteeg, *supra* note 9, at 8.

²¹ ELKINS ET AL., *supra* note 19, at 38.

²² Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1535 (2008) (identifying more than 200 new constitutions which have been written “in countries at risk of internal violence” in the preceding 40 years). *But see* Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1154 (2008) (noting that “a majority of occupations do not result in new constitutions”).

²³ See Aeyal Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47, 49 (2004) (examining the role constitutions play in transitional, transformation and reconciliation periods); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L. 663, 664 (2006) (discussing the constitution-making process in areas of post-conflict).

government will be bound by certain principles and institutional arrangements regardless of shifting policy preferences of the legislature or executive. It suggests a commitment to predictability and the rule of law.

There are also risks inherent in constitution drafting, particularly in a divided society like Afghanistan.²⁴ These risks are heightened when an outside power directs the constitution-making process behind the scenes. A foreign-driven process can expose a lack of domestic legitimacy, and the expectation that foreign support will eventually be withdrawn may discourage local buy-in. The reduction or end of foreign support may also encourage participants to agree in the short term to terms that they expect to challenge in the long term.

In Afghanistan, foreign actors were aware of the risks. As a result, they tried a mix of approaches, inviting domestic participation when it was feasible and convenient, limiting it when Afghan voices interfered too strongly with foreign interests. U.S. and U.N. officials had to be responsive to their own domestic and internal audiences, particularly in the United States where the rights of Afghan women became a justification for the invasion and occupation.²⁵ Certain substantive areas, like a formal guarantee of gender equality, were nonnegotiable. But in many other areas, the United States kept its influence in the shadows. Nevertheless, U.S. influence was pervasive. The demand for an agreement at any cost pushed the drafters towards ambiguous compromises with limited efficacy.

b. Definitions

Drafting a new constitution is fundamentally a domestic political engagement, but the process is increasingly globalized.²⁶ New constitutions are influenced by a host of international and foreign factors, as well as direct foreign intervention. The amplified role of the United Nations, foreign governments, technical advisors,

²⁴ HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 33 (2011).

²⁵ Kim Berry, *The Symbolic Use of Afghan Women in the War on Terror*, 27 HUMBOLDT J. SOC. RELS. 137, 137 (2003).

²⁶ David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1171 (2011).

and NGOs has contributed to what one scholar referred to as the “constitutional law industrial complex.”²⁷ The “complex” is particularly active when the constitution is drafted under the auspices of a foreign or international military presence. These “occupation constitutions” are common.²⁸ Since 1789, at least 42 constitutions have been written during or just after periods of foreign occupation.²⁹

Occupation constitutions cover a range of circumstances, from end-stage colonial transition arrangements to carefully monitored UN-brokered peace agreements. Imposed constitutions are a subset of these documents. Not all foreign involvement in constitution drafting means that a constitution is imposed. Various constituencies may invite foreigners to provide advice or expertise in technical matters, or to share their own experiences in domestic constitution-writing. Scholars have developed several methods to classify foreign involvement in constitution drafting, often drawing the line of what constitutes an “imposed” constitution in different places.³⁰ The Afghan case suggests a broad definition is appropriate: a constitution is imposed if foreigners use military, economic, diplomatic or financial power to obtain substantive or procedural results that advance their interests. This definition avoids creating a strict dichotomy between constitutions written by foreigners and those in which foreigners ‘merely’ exploited a power imbalance in

²⁷ Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 885 (2005); see also Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008) (criticizing outside normative advice during constitutional drafting).

²⁸ Elkins et al., *supra* note 22, at 1140.

²⁹ *Id.* at 1152. Due to definitional choices that exclude colonial occupations and certain territories, this should be considered a minimum estimate.

³⁰ Manon Bonnet, *The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building*, in THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS 208, 209 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2019) (discussing the dimensions and repercussions of a constitution-drafting process initiated by foreigners and discussing how those repercussions obtain regardless of the precise nature of further involvement by foreigners in a nation’s constitution drafting); Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant – Constitution-Making Under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B. U.N. L. 423, 428-30 (2006) (proposing three categories of the degree of external influence: total, partial, and marginal); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907, 907 (2005) (reserving the classification of “imposed” for constitutions with truly minimal domestic input); Feldman, *supra* note 27, at 858-59 (defining a contemporary imposed constitution as one in which there is “substantial local participation in the constitutional process; but . . . also seen substantial intervention and pressure imposed from outside to produce constitutional outcomes preferred by international actors”).

their favor. It also implicates constitutions where foreigners influence the process of drafting, which can have significant substantive ramifications. Imposed constitutions have always involved varying degrees of local participation.³¹ A constitution need not be entirely written by outsiders to be imposed.

There have been many historical imposed constitutions, but there are unique features to constitutions crafted “in the shadow of the gun”³² in the twenty-first century. Constitution drafters have months to prepare, access to national and international experts, and the ability to communicate with the public through modern technology. International NGOs and experts are plentiful and well-resourced, while local populations and community groups may not be. Technology facilitates rapid communication around the globe. And, most importantly, it is not politically acceptable or desirable for outsiders to simply write a constitution for another country.³³ Such a process would be obviously undemocratic and run counter to the publicly expressed values of the United States, United Nations, and European countries. Contemporary constitution drafters must grapple with how to appear to create democratic institutions without undermining domestic legitimacy or compromising their own national interest in particular outcomes.

c. Inherent Contradictions

Constitution-drafting presents a paradox for occupying forces seeking to empower new local governments after a military conflict; there is no credible pretense that a constitution heavily influenced by foreigners represents the views of the governed.³⁴ Imposed

³¹ Elkins et al., *supra* note 22, at 1163 (arguing that the 1946 Japanese constitution reflected more Japanese involvement than previously realized); *see also* Richard Albert, *Constitutions Imposed with Consent?*, in *THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS* 103 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2019) (analyzing the scholarly debate surrounding imposed constitutions).

³² Feldman, *supra* note 27, at 858.

³³ *Id.* at 879 (“The crucial fact about the dynamics of contemporary imposed constitutionalism is that the constitutional drafting process is understood by all participants as a negotiation among local political elites *and* the occupying power *and* international organizations capable of exerting pressure.”); *see also* HART, *supra* note 12, at 12 (“Despite efforts at external intervention, a democratic constitution cannot be written *for* a nation.”).

³⁴ This is not unique to constitutions imposed by foreigners. Constitutions may embody values that are unrepresentative in a myriad of ways. The U.S.

constitutions always infringe on sovereignty and self-determination,³⁵ but they raise unique problems when the outside power is ostensibly attempting to foster representative governance while at the same time protecting its interests and providing legal safeguards for specific communities. Foreign intervention creates a fundamental disjunction between the constitution and popular will.³⁶ If outsiders intervene in the substance, they risk creating a document that does not reflect the preferences of the governed. If they intervene in the process, they risk a situation where the recipient nation does not have the institutional capacity or will to enforce the new constitution.

Process and procedure are increasingly recognized as important components of constitutionalism.³⁷ They are also seen as a proper venue for foreigners to exert influence.³⁸ Even when an occupying force has no public hard line on a specific issue, it may still shape the process and power distribution in a way that privileges particular outcomes. In these instances, the occupier may empower a particular local actor or structure the drafting process in a way that favors one group over another. Short timelines, for instance, permit less public participation and encourage political actors to make choices that maximize their immediate political gain.³⁹ This can have important implications for the legitimacy and democratic nature of the resulting constitution.

In the iconic imposed constitutions of the twentieth century – post-World War II West Germany and Japan – Allied diplomats and military officers went to great lengths to limit the perception of their involvement.⁴⁰ After the war, the United States and its allies

Constitution did not protect the rights of women or enslaved people, and even many modern constitutions which are facially more inclusive represent the will of the elite or an autocratic state. Many constitution-writing processes are highly circumscribed and hardly democratic. *See generally* Miller, *supra* note 12, at 629-38 (introducing case studies in different countries incorporating public participation in the constitution-making process).

³⁵ Bonnet, *supra* note 30, at 213.

³⁶ Dann & Al-Ali, *supra* note 30, at 427.

³⁷ Louis Aucoin, *Introduction* to FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING, *supra* note 3, at xiii; Widner, *supra* note 22, at 1514; HART, *supra* note 12.

³⁸ Miller, *supra* note 12, at 642.

³⁹ Bonnet, *supra* note 30, at 218-19.

⁴⁰ EDMUND SPEVACK, ALLIED CONTROL AND GERMAN FREEDOM: AMERICAN POLITICAL AND IDEOLOGICAL INFLUENCES ON THE FRAMING OF THE WEST GERMAN BASIC LAW (GRUNDGESETZ) 124 (2001); JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 386-92 (1999).

pursued two distinct approaches to circumvent the *problematique* of a 'democratic' constitution written by occupying forces. In Japan, U.S. forces did not initially plan to write the new constitution directly, but General MacArthur did not hesitate to empower a small group of U.S. officials with the task when the Japanese government failed to move quickly enough to implement the reforms he thought necessary.⁴¹ The Japanese were able to work around some U.S. designs through translation,⁴² but American influence was significant.⁴³ The extent of U.S. involvement was an 'open secret' among a select few, but the public did not become aware until several years after the war.⁴⁴ Despite an outcry and periodic discussions about amendments, it remains unaltered. The situation in Germany was quite different. The Allies were not so bold as to write the German Basic Law outright. Instead, they established guidelines for "where the process of constitution-making in Germany should head" and intervened when the Germans deviated from these parameters.⁴⁵ The Allies largely controlled the drafting procedures and exerted both informal and formal control over the substance.⁴⁶ The end product was a compromise with significant U.S. influence.⁴⁷

As in Afghanistan nearly sixty years later, these constitution-drafting exercises were part of a larger strategy to liberalize the Japanese and German legal systems. After failing to curb German militarism after World War I, U.S. occupiers in the late 1940s took a holistic approach towards inculcating liberal values of individual rights through reforming not only constitutions but also courts, laws, and the judiciary. These efforts resulted in "substantial but, at the end of the day, incomplete transformational change."⁴⁸ Nevertheless, Germany and Japan loomed large in the imagination

⁴¹ General MacArthur's influence was so pervasive that the document is commonly referred to as "MacArthur's constitution."

⁴² KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 2* (1991).

⁴³ See DOWER, *supra* note 40, at 346-404.

⁴⁴ *Id.* at 385.

⁴⁵ SPEVACK, *supra* note 40, at 121.

⁴⁶ *Id.* at 173-79.

⁴⁷ *Id.* at 22.

⁴⁸ R.W. KOSTAL, *LAYING DOWN THE LAW: THE AMERICAN LEGAL REVOLUTIONS IN OCCUPIED GERMANY AND JAPAN 7-8* (2019).

of twenty-first century nation-builders.⁴⁹ They held out the tantalizing possibility of a peaceful, representative government emerging from a U.S. military occupation. President George W. Bush even referred to the post-war experience of Europe and Japan as “a beacon to light the path that we too must follow.”⁵⁰ But these “beacons” pointed in different directions when it came to U.S. involvement in constitution writing. Public opinion and heightened media attention would not have allowed for a repeat of the situation in Japan. Instead, the approach in Afghanistan mostly closely echoed that in Germany.

II. DRAFTING THE AFGHAN CONSTITUTION

Like their post-war predecessors, twenty-first century occupiers had to contend with the contradiction of fostering a representative government using unrepresentative means. U.S. diplomats and advisors faced great uncertainty regarding short-term and long-term prospects for the successful creation of a stable governing structure. They also had to navigate American politics, particularly related to women’s rights and religious freedom. Most significantly, they had to devise a new government that would work with U.S. counter-terrorism efforts and support controversial U.S. policies regarding detainees and military operations. This required a high degree of centralization which also dovetailed with U.S. beliefs that a centralized state would lead to more effective internal governance.⁵¹

In certain areas, the United States articulated clear policy preferences or requirements, while other efforts to shape the new constitution were less overt. U.S. influence was both direct and indirect, impacting both substance and process. Though the constitutional drafting period lasted two years and benefitted from

⁴⁹ See generally NOAH FELDMAN, *WHAT WE OWE IRAQ 1* (2004) (describing the influence of German and Japanese rehabilitation on nation-building in Iraq).

⁵⁰ President George W. Bush, Remarks at the Virginia Military Institute (Apr. 17, 2002) (transcript available at http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_041702.html [<https://perma.cc/SG5F-QX58>]).

⁵¹ Murtazashvili, *supra* note 4, at 45 (“Although the United States promised that decisions about the constitution would be left up to Afghans, it signaled its preference for a centralized presidency. When pressed about the need for a weaker executive, such as a prime minister, or greater decentralization of authority, U.S. ambassador Robert Finn said that ‘Afghanistan needed a strong president given all the vectors of power.’”).

extensive Afghan and foreign technical expertise, the process was rushed at every stage.⁵² Public consultations were widespread but impact was minimal. Expert input was often subservient to the wishes of foreign diplomats and President Karzai and his advisors. As a result, both expert recommendations and public support for more decentralized governing arrangements, such as a strong parliament, were overruled. Calls for a robust constitutional court with strong powers of judicial review were sidelined, eliminating a potential check on presidential power. The high degree of centralization, strong presidential powers, and low level of accountability weakened the subsequent Afghan government.⁵³

a. The Bonn Agreement

The Constitution was drafted and adopted under the auspices of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, more commonly known as the Bonn Agreement. After the U.S.-led invasion in 2001, the United Nations hosted a conference in Bonn, Germany where Afghan delegates agreed on a framework for an interim system of governance and laid the groundwork for a more permanent arrangement. The Bonn Agreement established interim bodies which were to govern until an Emergency Loya Jirga could empower a Transitional Authority. The Transitional Authority would then replace the Interim Authority and “lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no later than two years from the date of the convening of the Emergency Loya Jirga.”⁵⁴ Within two months, the Transitional Authority was to establish a Constitutional

⁵² It is difficult to specify an ideal timeframe for writing a new constitution, but we might look to the South African constitution, widely regarded as a model, as an example. South Africans took two and half years to write an interim constitution, which lasted for two years while a final constitution was drafted. The final constitution did not come into force until 1996, six years after the initial conversations about a new constitution. The entire process in Afghanistan took half this time.

⁵³ See Murtazashvili, *supra* note 4, at 45.

⁵⁴ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, in letter dated Dec. 5, 2001 from the Secretary-General to the President of the Security Council, § I(4), U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement].

Commission to assist a Constitutional Loya Jirga in preparing a new constitution. A *jirga* is a method of dispute resolution where leaders meet to reach decisions by consensus. They are most common among the Pashtuns of Afghanistan and Pakistan.⁵⁵ Though jirgas have deep roots in Pashtun tradition,⁵⁶ convening a loya jirga to approve a new constitution or endorse a national leader is a particularly modern phenomenon which first occurred in Afghanistan in 1923.⁵⁷ Since then, Afghan governments have endorsed numerous constitutions, few of which had any real impact.⁵⁸ The Bonn Agreement endorsed Afghanistan's 1964 Constitution, with some exceptions, as the legal framework during the rule of the Interim Authority.⁵⁹ Afghanistan's 1964 Constitution is considered the most liberal of the many constitutions adopted during the 20th century. Embracing the 1964 Constitution was seen as "a source of much-needed continuity," but the document was still fairly authoritarian and established a baseline of a heavily centralized system.⁶⁰

The Bonn Agreement was silent on representation, public consultation, and the role of foreign advisors. It focused primarily on timing and process while setting a precedent for rushed decision-making. The Agreement itself was passed just nine days after the conference began.⁶¹ Four Afghan constituencies were represented: a group with loose ties to the exiled king, two groups representing expatriates with ties to Pakistan and Iran, and the Northern Alliance—a military alliance of several groups opposing the Taliban who had allied with the United States in 2001.⁶² Despite long-

⁵⁵ See THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 23-33 (2001) (giving an overview of the different ethnic and tribal groups within Afghanistan).

⁵⁶ MOHAMED KAMALI, *LAW IN AFGHANISTAN* 4 (1985).

⁵⁷ Benjamin Buchholz, *The Nation's Voice? Afghanistan's Loya Jirgas in the Historical Context*, AFG. ANALYSIS NETWORK (Nov. 19, 2013), <https://www.afghanistan-analysts.org/en/reports/context-culture/the-nations-voice-afghanistans-loya-jirgas-in-the-historical-context/> [https://perma.cc/2D6P-3EH8].

⁵⁸ See generally *id.* (discussing the shortcomings of past constitutions endorsed by Afghan governments); BARFIELD, *supra* note 55 (offering further discussions on the shortcomings of past constitutions endorsed by Afghan governments).

⁵⁹ Bonn Agreement, *supra* note 54, § II(1)(i).

⁶⁰ Murtazashvili, *supra* note 4, at 43.

⁶¹ Barnett R. Rubin, *Crafting a Constitution for Afghanistan*, *J. DEMOCRACY*, July 2004, at 5, 6.

⁶² *Id.* at 6-7.

standing, fundamental disagreements among the participants,⁶³ they were able to quickly agree on the transitional process. They reached an impasse, however, over who should lead the interim authority and what would be appropriate role for the former king. Karzai, who addressed the group remotely from “a small, damp hut with mud-baked walls” in southern Afghanistan, was the forerunner to lead the process going into the conference but faced unexpected opposition.⁶⁴ At first, the American delegates at Bonn took an approach of “benign neglect,” but they intervened once Karzai’s position was threatened.⁶⁵ With the support of the Northern Alliance, Zalmay Khalilzad, an American diplomat who spent his childhood in Afghanistan, pressured the king and his supporters to back Karzai.⁶⁶ With Karzai’s position secured, and the contentious issue of interim cabinet positions resolved, the conference disbanded.⁶⁷

Each subsequent stage of the process was intended to be more representative, but the final product was deemed more important than a more open process. Lakhdar Brahim, Head of the United Nations Assistance Mission in Afghanistan (UNAMA), “stressed that no one would remember how unrepresentative the meeting had been if the participants managed to fashion a process that would lead to a legitimate and representative government.”⁶⁸ Coupled with the unrepresentative, elite nature of the group was the lack of public consultation or education. This may have been inevitable, as widespread consultations take time and resources, but it became a recurring theme. Concerns about secrecy, as well as haste and representation, resurfaced later in the drafting process.

b. The Constitutional Drafting Commission

The Bonn Agreement gave only the barest guidance for how the new constitution was to be drafted. A subsequent plan set down in

⁶³ Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory* 160 (2016) (Ph.D. dissertation, University of Washington) (on file with the University of Washington Library).

⁶⁴ KHALILZAD, *supra* note 11, at 122.

⁶⁵ *Id.*

⁶⁶ *Id.* at 123-24.

⁶⁷ *Id.* at 127.

⁶⁸ Rubin, *supra* note 61, at 7.

a U.N. working paper clarified that there would be two commissions—a small, technical drafting commission that would produce the first version and a larger group that would review it.⁶⁹ Karzai selected the nine members of the initial Constitutional Drafting Commission from a list prepared by the U.N.⁷⁰ On November 7, three months late according to the timeline established at Bonn, the former king inaugurated the Commission.⁷¹ The Drafting Commission struggled from the beginning to work cohesively.⁷² One member of the Commission resigned because its leader, Nematullah Shahrani, had expertise in Islamic law and not constitutional law.⁷³ The remaining members produced two competing sets of notes which differed over the proper structure of government, appropriate constitutional rights, and form of judicial review.⁷⁴ Guy Carcassonne, a French advisor to Karzai who had also advised the Afghan constitutional process in 1964,⁷⁵ produced a separate draft.⁷⁶ In addition to struggling with internal divisions, the Drafting Commission had so little logistical or financial support that it lacked a functional conference room three months after its inauguration.⁷⁷

⁶⁹ Int'l Crisis Grp., *Afghanistan's Flawed Constitutional Process*, ICG Asia Report N°56, at 13 (June 12, 2003).

⁷⁰ Pasarlay, *supra* note 63, at 174-75.

⁷¹ Int'l Crisis Grp., *supra* note 69, at 13.

⁷² Thier, *supra* note 3, at 543.

⁷³ Pasarlay, *supra* note 63, at 178. Shahrani holds degrees from Kabul University and Al Azhar University in Cairo. He also studied at George Washington University. *Id.*

⁷⁴ *Id.* at 181.

⁷⁵ AHMED RASHID, *DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* 212 (2008).

⁷⁶ In his November 2002 draft, Carcassonne recommended creating a robust constitutional court. His initial draft gave the President, Prime Minister, and Parliament the ability to refer treaties and international conventions, as well as statutes that had not yet been enacted, to the court for review. Individual citizens could also ask for review of laws as applied, subject to some limitations. Provisions found to be unconstitutional could not be enacted or enforced, and court rulings were final. The court also had a number of other responsibilities, including supervising presidential elections and referendums. Carcassonne prepared other drafts in the coming months. Notably, in a draft dated April 2003, the powers of the constitutional court were weakened significantly. Though he provided advice, Carcassonne's language regarding a constitutional court was not incorporated into drafts prepared by either the Constitutional Drafting Commission or the Constitutional Review Commission. Drafts are on file with the author.

⁷⁷ SECRETARIAT OF THE CONST. COMM'N OF AFG., *THE CONSTITUTION-MAKING PROCESS IN AFGHANISTAN* 10 (2003).

In April, the Drafting Commission submitted a draft to Karzai that was largely based on the 1964 Constitution, though it differed on judicial review.⁷⁸ The earlier constitution had not clearly empowered one person or institution to interpret the constitution.⁷⁹ In contrast, the first draft of the 2004 Constitution included an entire chapter creating a court with the authority to interpret the Constitution and determine if laws conform to it.⁸⁰ The draft clearly enumerated the court's responsibilities. These included "examin[ing] the conformity of laws, legislative decrees, and international treaties with the Constitution" and "interpret[ing] the Constitution, laws and legislative decrees."⁸¹ Lower courts could refer cases to the constitutional court on their own initiative or at the request of one of the parties, and both the president and the government could refer legislation for review.⁸² A decision from the court was "final."⁸³ The clarity exhibited here stands in stark contrast to the text in the final constitution. The Drafting Commission, which struggled to work productively, managed to agree that a body independent of the Supreme Court should have authority to interpret the constitution. Members of the Drafting Commission embraced a constitutional court because of its ability to

⁷⁸ See Shoaib Timory, *Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency*, 42 LOY. L.A. INT'L & COMPAR. L. REV. 223, 227-34 (2019) (giving a history of judicial review in Afghan law from the 1880s to 2004). For a broader discussion of Afghan history, see BARFIELD, *supra* note 55; ELISABETH LEAKE, *THE DEFIANT BORDER: THE AFGHAN-PAKISTAN BORDERLANDS IN THE ERA OF DECOLONIZATION, 1936-1965* (2016); TIMOTHY NUNAN, *HUMANITARIAN INVASION: GLOBAL DEVELOPMENT IN COLD WAR AFGHANISTAN* (2016); BARNETT R. RUBIN, *AFGHANISTAN FROM THE COLD WAR THROUGH THE WAR ON TERROR* (2013).

⁷⁹ THE CONSTITUTION OF AFGHANISTAN Oct. 1, 1964, arts. 7, 94, 102; *see also* Mohammad Qasim Hashimzai, *The Separation of Powers and the Problem of Constitutional Interpretation in Afghanistan*, in *CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY* 665, 675 (Rainer Grote & Tilmann Röder eds., 2012).

⁸⁰ There is no official English translation of the draft constitutions, though drafts were translated into English at various times during the process. Pasarlay provides an English translation of the portions of the final CDC draft related to the constitutional court, as well as all draft articles for which the wording in the final constitution differed from that put forth by the Constitutional Drafting Commission. Pasarlay, *supra* note 63, at 195, app. B.

⁸¹ *Id.* at 195.

⁸² *Id.*

⁸³ *Id.*

constrain executive power and because of the growing prevalence internationally of such courts.⁸⁴

c. The Constitutional Review Commission and Public Consultations

In April 2003, Karzai appointed members of a Constitutional Review Commission (CRC) in consultation with a small group of powerful government ministers who were affiliated with the Northern Alliance and who had been central to the foreign coalition military strategy.⁸⁵ The Review Commission included militia leaders, Islamists, liberals, and allies of Karzai, as well as representatives of different ethnic groups. This disparate group tried to establish some independence from Karzai by not initially sharing its work with him.⁸⁶

The Review Commission marked the first time when the public had a voice in the new constitution. Commission members held meetings throughout the provinces and gathered feedback through questionnaires in newspapers. There was also an educational campaign using TV, print, and radio.⁸⁷ Members of the public seized the opportunity to be heard. Despite the challenges of soliciting opinions on highly technical aspects of government from a dispersed and impoverished population, the Review Commission received 80,000 completed questionnaires, 6,000 written proposals and 17,000 oral suggestions.⁸⁸ Though public consultation was extensive, it had little impact.⁸⁹ The final report was issued too late to benefit the Review Commission, though individual members were involved in collecting the information it contained. Even after the report was published in October, it was not distributed to

⁸⁴ Shamshad Pasarlay, *Restraining Judicial Power: The Fragmented System of Judicial Review and Constitutional Interpretation in Afghanistan*, 26 MICH. ST. INT'L L. REV. 245, 253 (2018).

⁸⁵ Int'l Crisis Grp., *supra* note 69, at 16.

⁸⁶ Pasarlay, *supra* note 63, at 200.

⁸⁷ Thier, *supra* note 3, at 546.

⁸⁸ SECRETARIAT OF THE CONST. REV. COMM'N, ANALYTICAL REPORT OF PEOPLE'S VIEWS AND RECOMMENDATIONS FOR THE DRAFTING OF A NEW CONSTITUTION 9 (2003).

⁸⁹ Pasarlay, *supra* note 63, at 207 n.123. This "participation without power" is not limited to Afghanistan. See Angela M. Banks, *Expanding Participation in Constitution Making: Challenges and Opportunities*, 49 WM. & MARY L. REV. 1043, 1045 (2008).

members of the Constitutional Loya Jirga in advance.⁹⁰ Participants only received the report upon arriving at the Jirga itself.

Had the drafters had the benefit of reading the Secretariat's report, they would have seen that public opinion favored a constitutional court. Though the report reflected a diversity of opinions, there was widespread support for powers of judicial review to be vested in some institution and the most popular choice was a separate constitutional court.⁹¹ There was also support for other institutional arrangements, including a "Supreme Court, a Special Institution established by the Constitution, the Ministry of Justice, or special Loya Jirgas."⁹² While the consultations on which the report was based may not have completely captured public opinion,⁹³ it provided the best evidence available of what the public wanted from the new constitution.

But public engagement was essentially a sideshow that created the appearance of participation without much substance.⁹⁴ The greatest impediment to true public involvement was secrecy surrounding the text of the draft. Though several draft constitutions were in circulation among the CRC and its foreign advisors, no draft was made public. It would have been difficult for U.S. and U.N. officials to openly endorse a procedure that did not consult the public, but UNAMA, the Review Commission, and Karzai feared that opening controversial aspects to public scrutiny could weaken their positions and possibly derail the process.⁹⁵ Barnett Rubin,⁹⁶ a U.S. expert who advised the Review Commission at UNAMA's invitation, stated that Karzai and U.N. officials agreed to keep the draft text confidential to avoid giving Islamists who opposed the constitutional effort something concrete to rally against.⁹⁷ The upshot was that the vast majority of Afghans also had no concrete

⁹⁰ Thier, *supra* note 3, at 546.

⁹¹ SECRETARIAT OF THE CONST. REV. COMM'N, *supra* note 88, at 31.

⁹² *Id.*

⁹³ Int'l Crisis Grp., *supra* note 69, at 19-20; Int'l Crisis Grp., *The Constitutional Loya Jirga*, at 2 (Dec. 12, 2003).

⁹⁴ MICHELE BRANDT, CONSTITUTIONAL ASSISTANCE IN POST-CONFLICT COUNTRIES, THE UN EXPERIENCE: CAMBODIA, EAST TIMOR & AFGHANISTAN 20 (2005); *see also* Pasarlay, *supra* note 63, at 206-09.

⁹⁵ Int'l Crisis Grp., *supra* note 69, at 19-20.

⁹⁶ During the Bonn negotiations, Rubin was a special advisor to the UN Special Representative of the Secretary General for Afghanistan, and he continued to serve as an advisor to the UN during the drafting of the constitution, the Afghanistan Compact, and the Afghanistan National Development Strategy.

⁹⁷ Rubin, *supra* note 61, at 9.

information about the system of government under consideration. This contributed to a sense that public opinion was not taken seriously and that the process was too rushed.⁹⁸

At best, the public consultation campaign informed Afghans about the existence of the constitution, even if their opinions were not taken into account. Alexander Thier, a legal adviser to the CRC and the Judicial Reform Commissions in Kabul from 2002 to 2004, noted:

In the end, the public education and consultation process did more to advertise the process to the Afghan people and give the illusion of inclusion than to actually provide effective avenues for public input to the process. Most Afghans knew that a constitutional process was under way, but few knew what the substantive issues at stake were.⁹⁹

Even this modest assessment may in fact be somewhat optimistic. A survey by Tufts University for USAID in 2003 found that 0% of rural women in Kabul, Herat, and Badghis provinces were even aware of the constitutional process. Awareness was higher among women in Kandahar (8%) and Nangarhar (26%). Awareness among rural men ranged from 0 to 67%.¹⁰⁰ A survey by The Human Rights Research and Advocacy Consortium found higher levels of awareness among a mixed rural and urban population, concluding that about 70% of surveyed individuals were aware of the process.¹⁰¹ Even using the most generous numbers, about a third of Afghans had not even heard of the new constitution. Despite the disappointing reach of public consultations, President Bush touted these “town hall meetings” as step towards freedom, democracy, and self-governance.¹⁰²

After the consultation period, the CRC broke into groups and debated each section of the draft constitution.¹⁰³ This phase took longer than the meager one month allotted under the schedule

⁹⁸ AFGHAN INDEP. HUM. RTS. COMM'N, HUMAN RIGHTS AND RULE OF LAW: CONSTITUTIONAL AND LEGAL REFORM 11 (2003).

⁹⁹ Thier, *supra* note 3, at 546.

¹⁰⁰ FEINSTEIN INT'L FAMINE CTR., TUFTS UNIV., HUMAN SECURITY AND LIVELIHOODS OF RURAL AFGHANS, 2002-2003, at 93-94 (2004).

¹⁰¹ HUM. RTS. RSCH. & ADVOC. CONSORTIUM, SPEAKING OUT: AFGHAN OPINIONS ON RIGHTS AND RESPONSIBILITIES 4 (2003).

¹⁰² President George Bush, Remarks by the President in Commencement Address at the University of South Carolina (May 9, 2003).

¹⁰³ Thier, *supra* note 3, at 544.

promulgated by the Secretariat because of debate over the court and whether to create a presidential or a parliamentary system.¹⁰⁴ Both controversies related to the central question of how much power to concentrate in the hands of the executive. On one hand, a strong presidential system with few checks on executive power would allow the country to unify behind a single leader and prevent deadlock from immobilizing the government. On the other, a parliamentary system would distribute power more widely among different ethnic, regional, and political groups, potentially generating more support for the new government.

In late September, the Review Commission sent a draft to Karzai that created a system with both a president and a weak prime minister, and an independent constitutional court.¹⁰⁵ The Review Commission refined the position on the court taken by the Drafting Commission, eliminating some responsibilities to focus on core roles of constitutional interpretation and review.¹⁰⁶ Though the Review Commission may not have had the Secretariat's final report on public opinion, its recommendation aligned with feedback received during the public consultations. The Review Commission's recommendation was also consistent with advice from foreign experts,¹⁰⁷ though there were concerns about whether such a court could effectively carry out its functions. Rubin and Yash Ghai,¹⁰⁸ another advisor to the CRC, made a round of suggestions in August 2003 regarding the constitutional court, including narrowing its jurisdiction to purely constitutional matters and recommending that judges have training in constitutional law.¹⁰⁹ Rubin also commissioned a series of papers from a group of U.S.-based legal academics that presented different options for court structure, appointment procedures, size, jurisdictional scope, and other technical factors.¹¹⁰ Some of the papers explicitly recommended

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 545.

¹⁰⁶ Pasarlay, *supra* note 84, at 256.

¹⁰⁷ Herman Schwartz, *A Constitutional Court for Afghanistan*, in CTR. ON INT'L COOP., N.Y.U., AFGHANISTAN: TOWARDS A NEW CONSTITUTION 119, 119-24 (2003); Yash Ghai & Barnet Rubin, Short Summary of Suggestions for the Constitution (Aug. 5, 2003) (unpublished comments) (on file with author).

¹⁰⁸ Ghai is a Kenyan constitutional lawyer who is a professor of public law at the University of Hong Kong. In addition to advising the commission on the Afghan constitution, Ghai served as the Chairman of the Constitution of Kenya Review Commission in the early 2000s.

¹⁰⁹ Ghai & Rubin, *supra* note 107.

¹¹⁰ AFGHANISTAN: TOWARDS A NEW CONSTITUTION, *supra* note 107, at 119-32.

creating a constitutional court,¹¹¹ while others described the different technical options or theoretical benefits and risks without taking a particular position. The extent of the influence of these papers and recommendations was probably minimal. Rubin made several suggestions related to the judiciary, “none of which,” he said, “was adopted.” Furthermore, he stated: “The U.S. role in this process is grossly overstated by many people who were not involved.”¹¹² Outside expert advice was not pushed on the two drafting committees. Direct foreign input at this stage was minimal, but it is noteworthy that foreign advisors, Afghan experts, and the public all supported a constitutional court.

Karzai and his allies, however, overruled the recommendations of the Review Commission. When the Review Commission submitted its draft to Karzai, it was expected that it would become public.¹¹³ However, Karzai declined to release a draft until undertaking extensive revisions with members of his national security council and a few members of the Review Commission.¹¹⁴ When the draft was eventually released to the public, after a ceremonial presentation to Karzai, the former king, and Brahimi,¹¹⁵ it differed significantly from the draft produced by the CRC. In what the International Crisis Group described as a “radical shift,”¹¹⁶ the new draft eliminated the office of the prime minister and deleted any mention of a separate constitutional court. Instead, a new provision was inserted into the section outlining the role of the judiciary, granting power of constitutional interpretation to the existing Supreme Court:

¹¹¹ See Said Amir Arjomand & Kim Lane Scheppele, *Constitutional Court for Afghanistan*, in CTR. ON INT’L COOP., N.Y.U., AFGHANISTAN: TOWARDS A NEW CONSTITUTION 125, 125-31 (2003).

¹¹² Email from Barnett Rubin, Senior Fellow and Assoc. Dir., Afg. Pak. Reg’l Program, Ctr. on Int’l Coop., to author (Apr. 8, 2015) (on file with author).

¹¹³ SECRETARIAT OF THE CONST. COMM’N OF AFG., *supra* note 77, at 5; Thier, *supra* note 3, at 545; see also Amin Tarzi, *Why the Delay in Afghanistan’s Constitutional Loya Jirga?*, RADIO FREE EUR. RADIO LIBERTY (Sept. 18, 2003), <https://www.rferl.org/a/1340635.html> [<https://perma.cc/RSP7-BVSC>].

¹¹⁴ Int’l Crisis Grp., *The Constitutional Loya Jirga*, *supra* note 93, at 3; Thier, *supra* note 3, at 545; Pasarlay, *supra* note 63, at 230.

¹¹⁵ Burt Herman, *Afghanistan Unveils Draft Constitution*, OCALA STARBANNER (Nov. 4, 2003, 11:54 PM), <https://www.ocala.com/story/news/2003/11/04/afghans-reveal-draft/31284914007/> [<https://perma.cc/RSP7-BVSC>].

¹¹⁶ Int’l Crisis Grp., *The Constitutional Loya Jirga*, *supra* note 93, at 3.

Draft Article 121

Ch. 7. Art. 6

The Supreme Court on only [sic] by request of the Government and or the Courts can review the laws, legislative decrees, international treaties, and international conventions, for their compliance with the Constitution.

The Supreme Court shall have the authority of the interpretation of the Constitution, laws, and legislative decrees.¹¹⁷

Though the text included a mandate for the Supreme Court to interpret the constitution, the contours of the powers were vague. There was little discussion of how questions of interpretation would be referred to the Court, and no indication of whether such a referral could take place before or after a law or treaty has been promulgated. There was also no provision delineating whether Supreme Court interpretations are binding or advisory. These changes concentrated power in a small number of institutions, making it easier for Karzai, the presumptive first president, to influence constitutional interpretation. Taken together with other extensive changes to the structure of the government, this draft created a much stronger executive.

Karzai's stated reason for the changes was to avoid giving supremacy to religious law. He was concerned that a constitutional court would function like the Council of Guardians in Iran, evaluating legislation for compliance with Islamic law.¹¹⁸ This explanation made little sense. It was far more likely that vesting powers of judicial review in the existing Supreme Court would empower religious factions because the Court was conservative and staffed by clerics.¹¹⁹ Fazal Hadi Shinwari, Chief Justice of the Supreme Court from 2002 to 2006, was a religious jurist with ties to Islamist politicians.¹²⁰ Shinwari was initially appointed to the

¹¹⁷ Draft Constitution of Afghanistan (Nov. 3, 2003) (unofficial translation) (on file with author).

¹¹⁸ Email from Barnett Rubin, Senior Fellow and Assoc. Dir., Afg. Pak. Reg'l Program, Ctr. on Int'l Coop., to author, *supra* note 112; Interview with Zalmay Khalilzad, *supra* note 14; Pasarlay, *supra* note 63, at 234.

¹¹⁹ See Barnett Rubin, *Crafting a Constitution for Afghanistan*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN AND AFGHANISTAN 147, 157 (Said Amir Arjomand ed., 2008); Int'l Crisis Grp., *The Constitutional Loya Jirga*, *supra* note 93, at 8.

¹²⁰ Alexander Thier, *Balancing Religion and Rights*, INT'L HERALD TRIB., Mar. 26, 2006, at 8.

Supreme Court by former President Burhanuddin Rabbani, and Karzai elevated him to Chief Justice in 2002.¹²¹ Like Shinwari, the other members of the court were trained in religious law, not secular law,¹²² which occupy different tracks in the Afghan legal educational system. Under Shinwari's leadership, the Court issued controversial conservative rulings and elevated unqualified judges.¹²³

At least some members of the CRC were concerned that putting constitutional interpretation in the hands of the Supreme Court would benefit "reactionary elements,"¹²⁴ but Karzai overruled them in favor of consolidating executive power. In conjunction with the shift from a semi-presidential to a fully presidential system, eliminating the court appeared to be part of a larger design to maximize the powers of the presidency. Karzai had long supported such a move, under the assumption that he would be the first to occupy the position. There was also speculation that the U.S. supported Karzai's position because it would be easier to influence a government with a unitary executive without strong legislative or judicial checks on power.¹²⁵ A strong presidential system with Karzai at the helm would make "it easier to monitor [U.S.] investments in Afghanistan and to coordinate with the new government."¹²⁶

Strong opposition to the changes arose at least partially because of a perception that they could be attributed to the U.S. Ambassador Khalilzad.¹²⁷ Though he only arrived as ambassador in November 2003, Khalilzad was close to U.S. Deputy Secretary of Defense Paul

¹²¹ See Hafizullah Gardish, *Chief Justice Under Scrutiny*, INST. FOR WAR & PEACE REPORTING (Feb. 21, 2005), <https://iwpr.net/global-voices/chief-justice-under-scrutiny> [<https://perma.cc/L54U-J2LX>].

¹²² See *Crisis in Supreme Court*, INST. WAR & PEACE REPORTING (Nov. 17, 2005), <https://iwpr.net/global-voices/crisis-supreme-court> [<https://perma.cc/5YJK-S6A7>] (describing the Islamic education received by Supreme Court members).

¹²³ See Int'l Crisis Grp., *Reforming Afghanistan's Broken Judiciary*, Report 195/Asia, at 8 (Nov. 17, 2010) (discussing Shinwari's controversial rulings, which included a decision to ban cable television in January 2003).

¹²⁴ *Id.* at 7-8.

¹²⁵ See Int'l Crisis Grp., *The Constitutional Loya Jirga*, *supra* note 93, at 3; Thier, *supra* note 3, at 545 (discussing Karzai's change in government from a semi-presidential to a presidential system and arguing this change reflected a desire to narrow government control and wield power more effectively with the support of the United States).

¹²⁶ Murtazashvili, *supra* note 4, at 43.

¹²⁷ See Thier, *supra* note 3, at 548 (highlighting the considerable influence that Khalilzad wielded over Karzai).

Wolfowitz and had been active in foreign relations for many years.¹²⁸ Karzai and Khalilzad had an unusually close working relationship. They saw each other nearly daily and often dined together in the evenings.¹²⁹ Khalilzad demurred when asked about his role in this stage of the drafting process, stating that there was no U.S. advisor working directly and regularly with Karzai.¹³⁰ However, in his memoir, Khalilzad said that before the Constitutional Loya Jirga he “worked with Afghan leaders to shunt aside one draft that envisioned an Islamist government structure similar to Iran’s.”¹³¹ This is likely a reference to his role in revising the CRC’s draft in concert with Karzai and members of the National Security Council. It is likely that he was involved in the decision to eliminate the constitutional court. The published draft formed the basis for the discussion at the CLJ. There were no further opportunities for input or revision, either by the members of the CRC or the public.

d. The Constitutional Loya Jirga

In early December 2003, two months behind schedule and only five weeks after the public release of the draft, 502 delegates assembled at a CLJ in Kabul to debate and ratify the final text.¹³² This event was a major victory for the United States and the United Nations—a visual demonstration of their commitment to an Afghan-led process. The Jirga provided an opportunity for delegates to voice their concerns in a public forum, though like earlier opportunities for public engagement, the pathways to meaningful participation were few. As one delegate noted: “They’ve picked a presidential system, and the draft constitution is based on that. If we changed that now, we’d have a whole new set of problems.”¹³³ Many major decisions had already been made and would prove difficult to alter, though the creation of the special commission to

¹²⁸ *Id.*; see also KHALILZAD, *supra* note 11, at 71-73 (detailing his years working as a diplomat and his close working relationship to Paul Wolfowitz).

¹²⁹ See KHALILZAD, *supra* note 11, at 191.

¹³⁰ See Interview with Zalmay Khalilzad, *supra* note 14.

¹³¹ KHALILZAD, *supra* note 11, at 194.

¹³² Most delegates were elected to represent their home district; fifty were appointed by Karzai. See Pasarlay, *supra* note 63, at 239-40; see also Int’l Crisis Grp., *The Constitutional Loya Jirga*, *supra* note 93.

¹³³ *Wide Angle: Hell of a Nation* (PBS television broadcast Sept. 9, 2005).

oversee the constitution—the institution that would come to rival the Supreme Court—was a partial victory for a coalition of delegates who strongly opposed several elements of the published draft. Most delegates supported the creation of some type of constitutional court.¹³⁴

The Jirga was ostensibly structured to promote dialogue among different coalitions. Delegates were divided into working groups, each of which had a representative on a thirty-eight-member coordination committee. The makeup of the working groups was originally supposed to be random. In practice, however, many participants felt that militia leaders were distributed among them such that other voices were drowned out.¹³⁵ Most of the serious negotiating occurred in VIP tents flanking the main tent that hosted the public debates and served as the backdrop for foreign news crews.¹³⁶ Khalilzad and Brahimi were quite active in the VIP tents. According to one international advisor:

These two men were determined to bring about an agreement within a brief period of time that would support their key Afghan allies (President Karzai), provide enough incentives to keep opposition figures engaged in the political process, and stand up to international scrutiny on issues of human rights, women's rights, and democratic governance.¹³⁷

Khalilzad maintained that he played a smaller role at the Jirga than others seem to believe.¹³⁸ In any event, the presence of foreigners and media—not to mention the fact that the U.N. was funding the meeting—exerted pressure on the discussions to fit a

¹³⁴ See Pasarlay, *supra* note 63, at 249.

¹³⁵ See Thier, *supra* note 3, at 548 (discussing the agreement to distribute the mujahideen leadership and their supporters among the various constitutional committees); see also Pasarlay, *supra* note 63, at 243 (“[L]eaders of the former mujahideen parties headed almost every working group of the CLJ.”); Loya Jirga: *Roundup of Proceedings*, INST. WAR & PEACE REPORTING (Jan. 26, 2004), <https://iwpr.net/global-voices/loya-jirga-roundup-proceedings> [<https://perma.cc/2932-7RES>] (highlighting participants’ fear of former militia commanders and reluctance to disagree with them in light of their influence and power).

¹³⁶ See Thier, *supra* note 3, at 550; see also Ghani, *supra* note 3 (discussing the physical layout of the CLJ and access for journalists).

¹³⁷ Thier, *supra* note 3, at 550.

¹³⁸ Interview with Zalmay Khalilzad, *supra* note 14.

neat narrative of progress towards a constitution that papered over competing interests and ongoing conflicts.

The time pressure came into play during the final days of the Jirga, when negotiations almost broke down entirely. There was significant disagreement over several issues, including the establishment of a national language, the status of government ministers with dual citizenship, and the extent of presidential power. As a compromise measure, on December 29, delegates agreed to keep the presidential system but introduced a high council that would evaluate new legislation for compliance with the constitution—essentially taking on some of the functions of a constitutional court.¹³⁹ But the draft presented the next day did not include the high council, causing an outcry.¹⁴⁰ Two powerful figures, Burhanuddin Rabbani and Abdul Rab Rasul Sayyaf, supported the council. Support from these two conservative former militia leaders meant that the issue could not be ignored, though their endorsement also caused female, pro-democracy delegates who had previously supported a constitutional court to abandon it. A female delegate from Kabul, Suria Parlika, said: “At first we women agreed with this proposal. But later we realized there were jihadis working for their own advantage and wanting to dominate the country. So we changed our stance.”¹⁴¹ Others opposed the council from the beginning because it appeared to grant a significant amount of power to “jihadi leaders.”¹⁴² Around this time, another article of the Constitution was amended to read: “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”¹⁴³ Earlier drafts had insisted on compliance with both Islam and the values of the constitution, which included

¹³⁹ See Golnaz Esfandiari, *Afghanistan: Loya Jirga Adjourns amid Disputes over Constitution*, RADIO FREE EUR. RADIO LIBERTY (Dec. 29, 2003), <https://www.rferl.org/a/1105430.html> [<https://perma.cc/VMA6-JS8R>] (discussing the delegates’ agreement to establish a high council that would counterbalance presidential power by reviewing laws for constitutional compliance).

¹⁴⁰ Ezatullah Zawab, Mohammad M. Mehraban & Danish Karokhel, *Articles Altered in Constitution*, INST. WAR & PEACE REPORTING (Jan. 1, 2004), <https://iwpr.net/global-voices/articles-altered-constitution> [<https://perma.cc/Y6N8-KJU7>] (describing a heated exchange among delegates after the article creating the council was not included in the revised constitutional draft); see also Pasarlay, *supra* note 63, at 250.

¹⁴¹ Zawab et al., *supra* note 140.

¹⁴² *Id.*

¹⁴³ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan 26, 2004, art. 3.

international human rights law. The combination of this change with the creation of some type of constitutional review commission created the potential for the commission to function like a religious review board, prompting the liberals to withdraw their support.

Shifting bases of support for a constitutional review board or court illustrate the dialectic relationship between religion, power, and institutional design. Karzai said he opposed the creation of a constitutional court because of its potential to become a religious court, even as he empowered a Supreme Court known to be religiously conservative. At the CLJ, the debate over the court often played out in religious terms, but religion and ideology alone do not explain positions on the court and executive power.¹⁴⁴ At various times, Afghans with vastly different ideologies supported a constitutional court. Support or opposition was more tied to preferences for or against strong institutions that could challenge a powerful executive.

With the Jirga deadlocked, Sayyaf presided over a meeting on Wednesday, December 31 to try to reach an agreement. This effort was unsuccessful, and the meeting broke up amidst shouts and insults.¹⁴⁵ The coordinating committee then reached an apparent compromise, making changes to five articles of the draft, including adding Article 157 and creating the Independent Commission for Supervision of the Implementation of the Constitution:

The Independent Commission for supervision of the implementation of the Constitution shall be established in accordance with the provisions of the law. Members of this Commission shall be appointed by the President with the endorsement of the House of People.¹⁴⁶

The new text created a commission similar to the deleted high council, but it eliminated the explicit grant of authority to interpret the constitution. These changes were discussed with various power

¹⁴⁴ As a general matter, there is no clear-cut ideological or religious perspective on a constitutional court. Liberals might support a strong institution in the style of the Constitutional Court of South Africa, while Islamists can point to the Council of Guardians in Iran. Proponents of women's or minority rights could see a separate court as an asset or a threat, depending on its mandate and composition.

¹⁴⁵ See *Loya Jirga Falls into Disarray*, INST. WAR & PEACE REPORTING (Jan. 1, 2004), <https://iwpr.net/global-voices/loya-jirga-falls-disarray> [<https://perma.cc/YX3Y-FUE2>].

¹⁴⁶ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, art. 157.

brokers at the Jirga and then read aloud to the entire assembly on Thursday and “declared approved.”¹⁴⁷ No debate or objection was permitted. The leadership decided not to put the final text up for a vote; instead, delegates were merely asked to stand to show their approval.¹⁴⁸ The provisions on judicial review, as well as the final constitution, were passed without so much as a discussion.

The ambiguity of the new text was immediately apparent to journalists and observers. The *Washington Post* noted that “[s]everal contentious issues were left unresolved in order salvage the assembly.”¹⁴⁹ The Institute for War & Peace Reporting further said:

The article fails to specify how the commission would be composed or the extent of its powers. It is also unclear whether the commission will rule on the constitutionality of new laws—a role otherwise assigned to the Supreme Court—or have the authority for other practical aspects of the new government.¹⁵⁰

The role of the Supreme Court was called into question because the CLJ amended Article 121 as well, eliminating the section which had granted the court explicit authority to interpret the constitution. The new text read:

Article 121

Ch. 7

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.¹⁵¹

The text gives little indication of whether Supreme Court rulings are binding or advisory or whether the Court can strike down laws.

¹⁴⁷ Zawab et al., *supra* note 140.

¹⁴⁸ Thomas Ruttig, *Flash from the Past: Long Live Consensus – A Look Back at the 2003 Constitutional Loya Jirga*, AFG. ANALYSTS NETWORK (Jan. 28, 2014), <https://www.afghanistan-analysts.org/flash-to-the-past-long-live-consensus-a-look-back-at-the-2003-constitutional-loya-jirga/> [<https://perma.cc/6MSH-A6GU>].

¹⁴⁹ Pamela Constable, *Afghan Delegates Approve Charter*, WASH. POST (Jan. 5, 2004), <https://www.washingtonpost.com/archive/politics/2004/01/05/afghan-delegates-approve-charter/5ea4e0dd-1beb-4e2d-8272-957df06a2961/> [<https://perma.cc/UT9N-RE4K>].

¹⁵⁰ Zawab et al., *supra* note 140.

¹⁵¹ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, art. 121.

Nor does it clarify who precisely can request review.¹⁵² Most problematically, Article 121 does not explicitly grant the Supreme Court authority to interpret the Constitution itself, only “laws, legislative decrees, international treaties as well as international covenants.”¹⁵³

Nevertheless, some analysts maintain that there was never any dispute over the interpretive authority of the Supreme Court. Mohammad Qasim Hashimzai, former Deputy Minister of Justice and Chair of the ICOIC, stated before he was appointed to the Commission that “[n]either the drafters of the constitution nor the members of the *Lōya Jirga* intended to provide [the ICOIC] with the mandate of constitutional interpretation or adjudication.”¹⁵⁴ At a workshop in 2008, several legal scholars who participated in the drafting agreed that Article 121 granted powers of interpretation to the Supreme Court.¹⁵⁵ Khalilzad agreed that his understanding at the end of the Jirga was that the Supreme Court had the authority to interpret the constitution, but added that the inclusion of Article 157 allowed debate on the issue to be delayed since delegates could not come to consensus.¹⁵⁶ Other members of the Constitutional Loya Jirga, including Sayyaf, disagreed.¹⁵⁷

¹⁵² MOHAMMAD HASHIM KAMALI, U.S. INST. OF PEACE, AFGHANISTAN’S CONSTITUTION 2004: AN ISLAMIC PERSPECTIVE ON INTERPRETATION 3 (2008); Timory, *supra* note 78, at 238; cf. GHIZAAL HARESS, JUDICIAL REVIEW IN AFGHANISTAN: A FLAWED PRACTICE 23 (2017) (explaining that the Court accepted a case referred by the President but rejected one referred by an individual minister and arguing that neither case should have been accepted because individuals cannot make referrals).

¹⁵³ In the official Dari text, the grammatical structure is similar to the translation above – the pronoun “*aanha*” meaning “their” follows the list of items over which the Supreme Court has jurisdiction. Due to its placement in the sentence, the Constitution is not explicitly encompassed within the list of items to be interpreted. See Mohammad Hashim Kamali, *The Relationship Between Executive and Parliament and the Problem of Constitutional Interpretation and Adjudication During the Karzai Years* 17 (Hamida Barmaki Organization for the Rule of Law, Working Paper No. 2015/01, 2015).

¹⁵⁴ Hashimzai, *supra* note 79, at 678.

¹⁵⁵ Kamali, *supra* note 153, at 17. In addition to Hashimzai, this group included Sarwar Danesh, member of the Constitutional Drafting Commission, participant in the Constitutional Loya Jirga, and former Vice President.

¹⁵⁶ Interview with Zalmay Khalilzad, *supra* note 14.

¹⁵⁷ Pasarlay, *supra* note 63, at 253 n.318.

Khalilzad referred to the final text as a “compromise.”¹⁵⁸ Rubin called it a “last-minute power grab.”¹⁵⁹ In either case, the process by which the article was added suggests that the new commission would have some real power, however ill-defined. An institution tasked only with monitoring the technical implementation of the Constitution could hardly be described as a meaningful concession to Sayyaf and Rabbani, who sought greater checks on presidential power. Accordingly, the *Associated Press* described it as “another potential power base for a rival [to Karzai].”¹⁶⁰ Furthermore, the deletion of the portion of Article 121 granting the Supreme Court explicit authority to interpret the Constitution suggests that the ICOIC would take on this role. However, the text of both Article 157 and Article 121 was sufficiently vague as to support a multitude of understandings.¹⁶¹

The indeterminacy was allowed to remain because it did not cross any substantive U.S. redlines, such as those regarding formal gender equality, and it preserved the broad contours of centralization and executive power favored by the United States. But it did not reflect a considered compromise reached among Afghan factions. The speed of the vote and lack of debate favored the foreign goal of a quick resolution.

III. POLITICAL POWER STRUGGLES

Though the Constitutional Loya Jirga marked the close of the two-year drafting period, it was only the beginning of the struggle for authority to interpret the Constitution and review government action for compliance. The dispute played out in the National Assembly, the Office of the President, and the press. The heart of the conflict remained a fundamental disagreement about institutional

¹⁵⁸ Interview with Zalmay Khalilzad, *supra* note 14; Pasarlay, *supra* note 63, at 253 n.318.

¹⁵⁹ Email from Barnett Rubin, Senior Fellow and Assoc. Dir., Afg. Pak. Regional Program, Ctr. on Int'l Coop., *supra* note 112.

¹⁶⁰ Stephen Graham, *Afghans Agree on New Constitution Aimed at Underpinning Fragile Peace*, ASSOCIATED PRESS, Jan. 4, 2004.

¹⁶¹ Further complicating the interpretation of Article 157, after the Constitutional Loya Jirga approved the text but before Karzai signed the document, a number of small errors were corrected and a few substantive changes were introduced. One of these affected Article 157. Originally, the members of the commission were to be appointed by the president. In the final text, they must be approved by the Wolesi Jirga. Pasarlay, *supra* note 63, at 259.

checks on executive power, but the parameters changed. With the selection of Commissioners left to the President, and confirmation required by the lower house of the National Assembly (the Wolesi Jirga),¹⁶² there was no great fear that a specialized commission would impose a religious litmus test on legislation.¹⁶³ Instead, the commission became a battleground between the President and the Wolesi Jirga, each seeking to use it to advantage. U.S. involvement receded as Afghan factions dealt with the fallout of contested institutional arrangements.

a. Enabling Legislation and the Spanta Affair

The Commission did not come into existence immediately after the adoption of the Constitution. From 2004 to 2008, the Supreme Court issued several opinions that “appeared for a time to establish it as the preeminent arbiter of the law.”¹⁶⁴ Article 157 was still occasionally invoked as a potential threat to the legitimacy of the constitutional interpretations of the Supreme Court.¹⁶⁵ But it was not until 2007 that a major rift between Karzai and the Wolesi Jirga brought the ambiguity into the forefront. The Wolesi Jirga held a vote of no-confidence in two government ministers, including Foreign Minister Rangin Dadfar Spanta, for failing to prevent Afghan refugees from being expelled from Iran. When counting the ballots, two were found to be blank. This irregularity affected the outcome of the vote. The Wolesi Jirga then held another vote, which went against Spanta. Karzai, who had been elected President in 2004, objected to the second vote and referred the situation to the

¹⁶² The Afghan parliament consists of two chambers: the Wolesi Jirga, or House of the People, and the Meshrano Jirga, or House of the Elders. Members of the Wolesi Jirga are elected by popular vote. Members of the Meshrano Jirga are elected or appointed by the president, regional councils, and district councils. THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, arts. 82-84.

¹⁶³ Compliance with Islamic law has not been a major issue for either the Supreme Court or the ICOIC, though the Supreme Court issued one interpretation finding that Afghanistan could withdraw from any international treaty that violated Islamic Law. See Timory, *supra* note 78, at 262.

¹⁶⁴ Int’l Crisis Grp., *Afghanistan: The Long, Hard Road to the 2014 Transition*, Report 236/Asia, at 13 (Oct. 8, 2012); see also KAMALI, *supra* note 13, at 11 n.38 (referencing three instances before 2007 where the Supreme Court interpreted the Constitution).

¹⁶⁵ Telephone interview with John Dempsey, Senior Advisor, U.S. Dept. of State (May 9, 2015).

Supreme Court. The Court held that Spanta could not have been expected to prevent Iran from expelling the refugees and the vote of no confidence was therefore invalid. Former President Burhannudin Rabbani, who was assassinated in 2011, suggested that Karzai pressured the Supreme Court into reaching that decision.¹⁶⁶ Regardless, the Court was perceived to be allied with the President.¹⁶⁷ The Wolesi Jirga disregarded the Supreme Court ruling, arguing that it did not have jurisdiction to invalidate the vote,¹⁶⁸ and passed enabling legislation creating the ICOIC. Karzai vetoed the legislation, arguing that it violated the Constitution and that the Supreme Court already had powers of judicial review. The Wolesi Jirga then passed the legislation again with the two-thirds margin of support necessary to override a presidential veto. The legislation unequivocally gave the ICOIC authority to interpret the Constitution, though it did not clarify if the ICOIC's opinions would be advisory or binding: "For effective implementation of the provisions of the constitution, the Commission shall have the following authorities and responsibilities (including): Interpretation of the constitution on the request of President, National Assembly, Supreme Court and the Executive."¹⁶⁹

Karzai referred the law to the Supreme Court, which predictably ruled that the Court itself had authority to interpret the Constitution. In an in-depth analysis,¹⁷⁰ the Court reviewed the constitutional drafting history in an effort "to put an end to the questions and prove itself as the final authority on Constitutional interpretation."¹⁷¹ The Court modified the legislation without input from the Wolesi Jirga, deleting the sections that gave the ICOIC unambiguous authority to interpret the Constitution, as well as other sections related to the Commissioners' ability to remove a

¹⁶⁶ Kamali, *supra* note 13, at 11.

¹⁶⁷ Int'l Crisis Grp., *supra* note 123, at 2; *See also* Pasarlay, *supra* note 63, at 274-75 ("The Supreme Court was indeed under the thumbs of the executive, and Karzai used it to resolve constitutional disputes in a way that favored his own interests.").

¹⁶⁸ Kamali, *supra* note 13, at 10-11.

¹⁶⁹ *Id.* at 12.

¹⁷⁰ Timory, *supra* note 78, at 254 (summarizing the Court's reasoning).

¹⁷¹ *Id.* at 258.

fellow Commissioner.¹⁷² The modified version was published as law.¹⁷³

The published version was far less explicit about the responsibilities of the Commission. It emphasized its oversight role, rather than any interpretive functions. The omitted sections reflect the articles which were removed by the Supreme Court:¹⁷⁴

The Commission, in order to better oversee the implementation of the provisions of the Constitution shall have the Following duties and authorities:

1. . . .
2. Overseeing observance and implementation of the provisions of the Constitution by the president, Government, National Assembly, Judiciary, administrative units, governmental and non-governmental organizations.
3. Providing legal advice to the President and Parliament regarding issues arising from the Constitution.
4. . . .
5. Providing specific recommendations to the President and National Assembly, in order to take necessary measures for development of legislative affairs, in the areas stipulated by the Constitution.
6. Presenting report to the President, in case of observing violations and infringements of provisions of the Constitution.
7. Approval of relevant rules and procedures.¹⁷⁵

The revised legislation did not reflect the intention of the Wolesi

¹⁷² ALI YAWAR ADILI, ROHULLAH SORUSH & SAYED ASADULLAH SADAT, *THE STAGNATION OF AFGHANISTAN'S STATE INSTITUTIONS: CASE STUDIES OF THE SUPREME COURT, SENATE, PROVINCIAL COUNCILS AND THE CONSTITUTIONAL OVERSIGHT COMMISSION 2* (2021); Timory, *supra* note 78, at 256.

¹⁷³ *MPs Approve Members of Constitution Commission Amidst Legislative-Executive Standoff on Interpretation Powers*, LEGIS. NEWSL. (USAID Afg. Parliamentary Assistance Project), June 14, 2010, at 2.

¹⁷⁴ Timory, *supra* note 78, at 249.

¹⁷⁵ Law on Independent Commission for Overseeing the Implementation of the Constitution, 2009 art. 8 (Afg.).

Jirga, nor did it resolve the conflict over institutional authority, continuing the uncertainty over which institution had ultimate authority.

b. Undermining the ICOIC

From its inception, the ICOIC was a challenge by the Wolesi Jirga to the association between Karzai and the Supreme Court. Karzai dominated the Court through his appointment powers and relationships with several of the justices,¹⁷⁶ and he (and future President Ashraf Ghani) sought to influence or hobble the ICOIC. The first tactic was simply to delay the formation of the Commission. According to its enabling legislation, members of the Commission were to be appointed by the President and confirmed by the Wolesi Jirga.¹⁷⁷ The executive stalled, however, only putting forth nominees in June 2010 in response to an ultimatum from the Wolesi Jirga.¹⁷⁸ For the previous two years, the Wolesi Jirga had sent draft legislation to the non-existent commission in a farce to highlight executive delay. Upon receiving nominees, the Wolesi Jirga ensured that potential commission members shared the view that their role was to interpret the Constitution. During confirmation hearings, Speaker Yunus Qanooni posed the question bluntly, asking the nominees: "Does the authority to interpret the Constitution lie with the Supreme Court or the Commission?" After some evasion, all five nominees agreed that the Commission had the right to interpret the Constitution as stated in the ICOIC law as drafted by the Wolesi Jirga.¹⁷⁹ As MP Abdul Kabir Ranjibar noted in an interview with the International Crisis Group:

¹⁷⁶ Pasarlay, *supra* note 63, at 275-77; Int'l Crisis Grp., *supra* note 123, at 15; see also Int'l Crisis Grp., *supra* note 164, at 14 (noting that Karzai declined to remove several Supreme Court justices from office once their terms expired).

¹⁷⁷ Law on Independent Commission for Overseeing the Implementation of the Constitution, art. 4 §1 (Afg.).

¹⁷⁸ Martine van Bijert, *Continuing Tug of War Between the Parliament and Karzai*, AFG. ANALYSTS NETWORK (June 20, 2010), <https://www.afghanistan-analysts.org/en/reports/political-landscape/continuing-tug-of-war-between-the-parliament-and-karzai/> [https://perma.cc/B27G-58XY].

¹⁷⁹ MPs Approve Members of Constitution Commission Amidst Legislative-Executive Standoff on Interpretation Powers, Legis. Newsl. (USAID AFG. PARLIAMENTARY ASSISTANCE PROJECT), June 14, 2010, at 3.

Commission nominees were confirmed after heated debate in parliament and were placed under considerable pressure by several MP's to publicly promise to implement their constitutional review power. This marked a clear effort by opposition parliament members to check the president's power and further politicised the commission's establishment.¹⁸⁰

These nominees were approved, bringing the ICOIC into being, though Karzai had only nominated five commissioners—the minimum number of members to establish a quorum.¹⁸¹

Karzai and Ghani continued to hamper the operation of the ICOIC by appointing only a partial slate of commissioners. This made it more difficult for the Commission to function, especially as many of the lawyers, judges, and professors who were qualified to serve had other opportunities that regularly took them abroad. The ICOIC should have seven members; however, it was only fully staffed for two years during the period between 2010 and 2021.¹⁸² For most of its existence, the ICOIC had between two and six members, and their roles were often contested. Presidents allowed their terms to expire without re-appointment, asked nominees who were rejected by the Wolesi Jirga to serve as acting members (which was not constitutional), and refused to appoint new members to replace those who died, were appointed to other government positions, or simply stopped performing their duties.¹⁸³

In 2017, President Ghani initiated a more direct effort to curtail the independence of the Commission. In April 2017, six of the Commissioners had voted to expel their chairman, Mohammad Qasem Hashimzai, due to corruption and impairment from old age.¹⁸⁴ The Commissioners acted in accordance with the ICOIC enabling legislation as it was passed by the Wolesi Jirga, but those provisions had been altered by the Supreme Court. No subsequent

¹⁸⁰ Int'l Crisis Grp., *supra* note 123, at 16 n.130.

¹⁸¹ Law on Independent Commission for Overseeing the Implementation of the Constitution, art. 10 §1 (Afg.).

¹⁸² ADILI ET AL., *supra* note 172.

¹⁸³ *Id.*

¹⁸⁴ Ali Yawar Adili & Ehsan Qaane, *The Constitutional Oversight Commission in a Standoff with President Ghani: Defending Their Independence or Covering up Mistakes?*, AFG. ANALYSTS NETWORK (Aug. 4, 2017), <https://www.afghanistan-analysts.org/en/reports/rights-freedom/the-constitutional-oversight-commission-in-a-standoff-with-president-ghani-defending-their-independence-or-covering-up-mistakes/> [https://perma.cc/N6VG-24WL].

legislation had clarified when commissioners could remove one of their own.¹⁸⁵ The President rejected the Commissioners' decision and established a committee to investigate not only the effort to remove Hashimzai, but all the work of the Commission. The six Commissioners rejected this request, seeing it as a threat to their independence. Though the Commissioners may have, in fact, overstepped their constitutional and legislative authority in trying to oust Hashimzai, the subsequent presidential intervention was perceived to be a continuation of the dispute over the authority of the ICOIC. The Commission had taken several steps that aroused presidential ire, including issuing an opinion arguing that some aspects of a peace agreement between the government and Hezb-e-Islami, a political and military group led by Gulbuddin Hekmatyar, were unconstitutional.¹⁸⁶ The ICOIC had also recently drafted a report detailing several constitutional violations, including those by the President.¹⁸⁷ With presidential support and some ambiguity around who could legally remove commissioners, Hashimzai remained in his post.

c. Institutional Alliances

From its inception at the Constitutional Loya Jirga, the ICOIC was considered a vehicle to challenge presidential power. The Commission was commonly assumed to be sympathetic to the Wolesi Jirga, while the Supreme Court was more favorable to the President. However, the ICOIC did not immediately become a strong voice against presidential interests.¹⁸⁸ Its findings and investigations pointed to many government institutions and actors who had allegedly violated the Constitution.¹⁸⁹ However, the competition between the Supreme Court and ICOIC allowed the President and Wolesi Jirga to take advantage of the situation by

¹⁸⁵ Timory, *supra* note 78, at 251, 256.

¹⁸⁶ Adili & Qaane, *supra* note 184.

¹⁸⁷ *Id.*

¹⁸⁸ Telephone interview with John Dempsey, *supra* note 165.

¹⁸⁹ Adili & Qaane, *supra* note 184.

seeking multiple opinions.¹⁹⁰ Different actors sought to pit the institutions against each other,¹⁹¹ leading to unpredictability.

IV. CONSTITUTIONAL REVIEW IN PRACTICE

The conflict over the responsibilities of the Supreme Court and the ICOIC was never resolved, but in practice both institutions carried out some elements of judicial review and constitutional interpretation. This could have resulted in a durable—even more democratic—resolution of the dispute as the institutions over time developed a political culture of shared responsibility. In fact, however, the continuing uncertainty stifled potential alternative power bases to the presidency and further weakened trust in the central government.

While upholding or striking down legislation is the core of judicial review, other activities can include a priori review of legislation, a priori or ex post review of international treaties, review of executive action, resolution of disputes between governmental actors, and issuing advisory opinions. Ghizaal Haress, a former ICOIC Commissioner, notes that many constitutional courts are tasked with an even broader list of responsibilities, including “resolving electoral disputes, certifying electoral results, conducting impeachments for senior public officials or validating such impeachments and adjudicating issues related to political parties.”¹⁹² These activities may be carried out at the request of individual citizens, lower courts, government agencies, the legislature, or at the initiative of the reviewing body itself. Even as the Supreme Court and the ICOIC sparred over who had the authority to review legislation, they engaged in a range of other activities that could have encouraged constitutional compliance.

Article 121 provided two clear pathways for the Supreme Court to “review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution.”¹⁹³ They could be referred either by the Government

¹⁹⁰ SCOTT WORDEN & SYLVANA Q. SINHA, U.S. INST. OF PEACE, CONSTITUTIONAL INTERPRETATION AND THE CONTINUING CRISIS IN AFGHANISTAN 3 (2011).

¹⁹¹ Pasařlay, *supra* note 63, at 283-86.

¹⁹² HARESS, *supra* note 152, at 11.

¹⁹³ THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN Jan. 3, 2004, art. 121.

or the courts. In practice, however, lower courts did not refer legislation for review, though they asked for clarification on abstract issues of constitutional interpretation.¹⁹⁴ Haress found that lower court judges did not consider themselves empowered to refer specific legislation for review and that some considered Article 121 to grant the Supreme Court powers of constitutional interpretation only, not authority to strike down laws.¹⁹⁵ This cut off one of the main avenues that ordinary litigants would have had to seek judicial review of legislation. The Supreme Court, however, reviewed legislation at the request of the President and other executive offices. In addition to the ICOIC legislation, it evaluated laws on parliamentary influence over state media and whether certain diplomatic employees could be dual citizens.¹⁹⁶ This pathway to review reinforced the perception that the Supreme Court was aligned with the President and executive branch. The President only referred the ICOIC and media laws after his veto was overcome by a two-thirds vote of support for the laws in the Wolesi Jirga. The Ministry of Foreign Affairs referred the law prohibiting certain diplomatic and consular employees from holding dual citizenship. In each case, the Supreme Court resolved the question in a manner favorable to the executive, contributing to the impression that "judicial review had become a tool for advancing executive interests."¹⁹⁷ It essentially became a court of last resort for the executive branch.

While the Supreme Court conducted *ex post* review of legislation at the request of the President and other executive officials, the ICOIC took on a range of complementary responsibilities. From 2012-2013, the Commission largely responded to requests for guidance from government departments. It addressed the legality of the detention of prisoners under the Memorandum of Understanding between Afghanistan and the U.S., the status of contracts voided by the Wolesi Jirga, and jurisdictional conflicts over the role of government offices.¹⁹⁸ By 2015, the ICOIC was reviewing statutes for constitutional compliance before promulgation and advising the President and the National

¹⁹⁴ HARESS, *supra* note 152, at 19-20 (finding that not a single lower court had referred a statute to the Supreme Court from 2004 to 2016).

¹⁹⁵ *Id.* at 20-21.

¹⁹⁶ *Id.* at 24-27.

¹⁹⁷ *Id.* at 27-28.

¹⁹⁸ Kamali, *supra* note 153, at 23.

Assembly on issues of constitutional implementation.¹⁹⁹ Between 2010 and 2017, the ICOIC issued 80 opinions. At least 29 of these were initiated by the ICOIC itself; 31 were in response to requests from institutions listed in the Commission's enabling legislation; and 14 were in response to other institutions.²⁰⁰ Legal scholar Shamshad Pasarlay argued that "[w]ith these three kinds of functions, it appears that the Constitutional Supervision Commission [ICOIC] almost acts as the proposed constitutional court would have done under the earlier drafts of the Constitution,"²⁰¹ though these responsibilities were split between the Supreme Court and the ICOIC. The Supreme Court reviewed laws for constitutionality *after* they were promulgated while the ICOIC provided a range of other functions. The ICOIC did not, however, have the institutional clout to limit, or even rigorously monitor, actions of the other branches. Efforts to actively supervise the courts or the legislative branch were rebuffed. The status of its opinions was unclear, so the President and Parliament could easily ignore them. In 2016, the Wolesi Jirga demonstrated how the ICOIC could be diminished. After members of the Commission declined to appear to explain an opinion, the ICOIC found its budget cut and its powers reduced.²⁰² Both the President and Wolesi Jirga ignored inconvenient rulings of the ICOIC.²⁰³ The Commission's limited ability to serve as a reliable check on executive and legislative power stemmed from these political maneuvers and the constitutional ambiguity surrounding the ICOIC's authority.

The *de facto* division of labor between the two institutions was not as neat as it might appear. Though the Supreme Court seemed to have a monopoly on rewriting existing laws to conform with the Constitution, the overlapping responsibilities allowed executive officials to 'forum-shop' and endorse the constitutional interpretation that suited them. The indeterminate status of ICOIC opinions allowed them to be ignored, and the association between the Supreme Court and the executive branch imperiled the

¹⁹⁹ Shamshad Pasarlay, *Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?*, INT'L J. CONST. L. BLOG (Mar. 18, 2015), <http://www.iconnectblog.com/2015/03/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis> [<https://perma.cc/R4MU-ZNPR>].

²⁰⁰ HARESS, *supra* note 152, at 37.

²⁰¹ Pasarlay, *supra* note 199.

²⁰² HARESS, *supra* note 152, at 37.

²⁰³ *Id.*

legitimacy of its opinions. There were practical drawbacks to this arrangement as well. Individuals had no ability to access judicial review, leaving gaps in protections for individual rights,²⁰⁴ which did nothing to counter the widespread public sense that the central government was corrupt and inaccessible.

V. IMPLICATIONS FOR THE RULE OF LAW

Judicial review could have played an important role—both substantively and symbolically—in demonstrating that disputes could be resolved through peaceful, legal means. Instead, the dispute between the Supreme Court and the ICOIC is one example of how the Constitution of 2004 failed to create a viable, effective system of governance. While some jockeying for power among institutions may have been inevitable and even desirable, the lack of clear division of authority led to gridlock affecting the ICOIC, Supreme Court, Wolesi Jirga, and executive branch. It eroded confidence in the ability of the Supreme Court and independent institutions to operate free from presidential influence. By concentrating so much power in the executive and not providing adequate formal opportunities to challenge that power, the United States and its allies undermined efforts to create an effective, stable governmental structure.

a. Unpredictability

The inability of any institution to effectively curb unconstitutional action is not merely a theoretical problem. It introduces a high level of uncertainty in lawmaking and governance. While there is always some level of unpredictability when it comes to judicial review and constitutional interpretation, clear procedures and legislative guidance can create a predictable process with a limited range of substantive outcomes. The alternative can lead to delay, illegitimacy, and distrust. In Afghanistan, the cost of uncertainty was high:

The vagueness of the constitutional text, self-serving interpretations of the constitution by the Supreme Court and

²⁰⁴ *Id.* at 31.

the [ICOIC], and uncompromising attitudes toward conflict are preventing the effective operation of constitutional mechanisms. As a result, numerous pieces of critical legislation have been significantly delayed, and intragovernmental conflict is high, even if it has not resulted in internal violence.²⁰⁵

In addition to delays, conflict over interpretive authority left legislation in limbo. The IOCIC legislation, for example, was published in an edited form after the Supreme Court struck down several portions of it, but the Wolesi Jirga never accepted the redacted version.²⁰⁶ The executive and legislative branches fundamentally disagreed about the substance of the law, and no institution could resolve the debate. Furthermore, the dispute exacerbated the consolidation of power in the hands of the executive, leading to more instability.

b. Weak Constitutionalism

Though there was a partial functional division of work between the Supreme Court and the ICOIC, the result was a weak institutionalization of judicial review. The ICOIC struggled to be an effective check on unconstitutional action, and the mandate of the Supreme Court was limited to a small number of issues important to the executive branch. The ICOIC itself was insecure, with inconsistent staffing and a budget subject to the whims of the Wolesi Jirga. Without a strong constitutional mandate, and little support from the President, the ICOIC became a shadow of the court envisioned by many drafters. The lack of a legitimate body that could oversee the other branches of government undermined even a formal commitment to constitutional governance.

The other side of weak constitutional enforcement is that it leaves political actors maximum flexibility to negotiate solutions that reflect the facts on the ground at the time, not those of 2004. For example, neither the Supreme Court nor the ICOIC raised an objection to the creation of a National Unity Government in 2014, which ushered in an extra-constitutional governing structure

²⁰⁵ Aziz Huq & Tom Ginsburg, *What Can Constitutions Do?: The Afghan Case*, J. DEMOCRACY, Jan. 2014, at 116, 126.

²⁰⁶ HARESS, *supra* note 152, at 16.

consisting of a power-sharing agreement between the president and a newly created chief executive officer.²⁰⁷ The agreement called for a *loya jirga* to amend the constitution and create a prime minister, but these reforms never materialized.²⁰⁸ Another extra-constitutional power-sharing agreement in March 2020 saw two presidents claim electoral victory; both were sworn in.²⁰⁹ Clearly the structural arrangements contemplated in the Constitution could not bind political actors. Pasarlay argues that the original breakdown occurred because Karzai moved aggressively to interpret and implement the Constitution in a way that strongly favored the executive, ending the ability of the 2004 Constitution to coordinate disparate elements of the Afghan political elite.²¹⁰ After Karzai's tenure ended, it was increasingly clear that the Constitution did not create the structures necessary to resolve disputes and adequately limit executive power. This fluidity of political arrangements could have been an asset, but extra-constitutional solutions to political problems do not lay a foundation of respect for the rule of law.

Vague and ambiguous constitutional provisions are common and have not necessarily led to failure. The American Constitution, for example, does not explicitly grant the Supreme Court powers of judicial review.²¹¹ It was a full thirteen years after ratification that the Court definitively claimed this authority in *Marbury v Madison*.²¹² Historically, constitutional vagueness has allowed intractable disputes to be resolved over time, through political compromise and maneuvering. Vagueness can even be a strategy to delay forcing a decision on controversial issues.²¹³ Deferral of this type is fairly

²⁰⁷ See Ghizaal Haress, *Did Politics Compromise Afghanistan's Constitution?*, FOREIGN POL'Y (Oct. 23, 2014), <https://foreignpolicy.com/2014/10/23/did-politics-compromise-afghanistans-constitution/> [<https://perma.cc/CE7F-VPX7>] (summarizing the power-sharing agreement and the events surrounding it).

²⁰⁸ Shamshad Pasarlay & M. Basher Mobasher, *Electoral Crises, Peace Process with Taliban and Constitutional Reform in Afghanistan*, CONSTITUTIONNET (June 12, 2020), <https://constitutionnet.org/news/electoral-crises-peace-process-taliban-and-constitutional-reform-afghanistan> [<https://perma.cc/8T6U-AJM8>].

²⁰⁹ *Id.*

²¹⁰ See Pasarlay, *supra* note 63, at 263.

²¹¹ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 207 (3d ed. 2000).

²¹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178-80 (1803).

²¹³ Constitutional clarity is not always advantageous, especially in divided societies. Hanna Lerner advocates using an "incrementalist" approach in which drafting a constitution is seen as "one stage in a long-term evolutionary process of collective redefinition." LERNER, *supra* note 24, at 39. However, "[t]he incrementalist approach does not mean that decisions regarding the structure of governmental institutions are deferred to the future. Rather, decisions on the institutions of

common, and strategic deferral may contribute to constitutional longevity.²¹⁴

In the Afghan case, however, deferral was not necessarily “strategic” in the sense that the drafters agreed to postpone a decision on judicial review; rather, the ambiguous provisions were the product of haste and foreign pressure. The ambiguity garnered a broader base of support for the Constitution and allowed the issue to be addressed through subsequent political debate and institutional competition.²¹⁵ Negotiations might have broken down entirely at the CLJ without some type of forced compromise, but the resulting institutional design ensured ongoing conflict while contributing to the creation of the extra-constitutional governing arrangements and the breakdown of constitutional order.²¹⁶ The 2020 power sharing agreement called for “the Constitution [to] be amended to restructure the government, break the hold of the president on power, reform the electoral system, and empower local governments.”²¹⁷ These reforms never occurred, and eventually direct U.S. negotiations with the Taliban sidelined the Afghan government.

CONCLUSION: THE LONG SHADOW OF U.S. INFLUENCE

From the vantage point of 2022, the international effort to create a constitutional government in Afghanistan was an abject failure. But the failure is not the lifespan of the Constitution itself. Constitutional longevity is not, necessarily, a normative good on its own, and in fact the Afghan Constitution outlasted most

government and regulation of power are clear, and they allow for the democratic order to function.” *Id.* In the Afghan case, failing to establish clear institutional roles made it more difficult to resolve substantive conflicts later on.

²¹⁴ Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design*, 9 INT’L J. CONST. L. 636, 648 (2011). Dixon and Ginsburg analyzed constitutions containing “by law” clauses delegating decisions to future legislatures. This case differs because deferral was achieved implicitly through constitutional ambiguity rather than explicitly through a “by law” clause.

²¹⁵ See Pasarlay, *supra* note 63, at 261.

²¹⁶ See Int’l Crisis Grp., *Afghanistan: The Future of the National Unity Government*, Report N°285 Asia, at 2 (Apr. 10, 2017).

²¹⁷ Pasarlay & Mobasher, *supra* note 208.

constitutions adopted over the past 200 years.²¹⁸ No, the failure of the Afghan constitution came in its inability to foster a political culture of legitimate, independent institutions. The “original sin of this intervention was to resurrect old institutions that had their roots in the country’s authoritarian past rather than giving Afghans the opportunity to build something new that embodied the norms of self-governance which characterized most parts of the country.”²¹⁹ That original sin was rooted in the substance of the 2004 Constitution, including its provisions on judicial review, but also the process of writing it.

The United States entered the Afghan constitutional drafting process with several specific goals; achieving a particular arrangement regarding judicial review and constitutional interpretation was not one of them. Instead, the United States focused on ensuring legal protection for certain individual rights, including formal gender equality, and—most importantly—securing a strong executive branch for ally Hamid Karzai. On the surface, it appeared as if the United States and United Nations stepped back from many other areas, allowing these decisions to be made by the Afghans themselves. But a closer look at international influence over the entire process shows that American priorities echoed throughout the entire text with lasting consequences for Afghan political actors.

The 2004 Constitution reflected the hybrid nature of contemporary imposed constitutions. Foreign control over the process and, especially, demand for an agreement at any cost pushed the drafters towards ambiguous compromises with limited efficacy. The United States had explicit requirements. Khalilzad acknowledged that the United States had red lines on several constitutional issues,²²⁰ and the resulting constitutional provisions were imposed regardless of Afghan views. The provisions related to judicial review, however, could not be easily categorized as foreign or local. They were the product of a long process shaped by foreigners and propelled forward by Afghans. President Karzai, who the United States backed at every turn, re-wrote the constitutional draft prepared by the drafting committees to enhance

²¹⁸ See generally ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) (analyzing the environmental and design factors that influence a constitution’s lifespan).

²¹⁹ Murtazashvili, *supra* note 4, at 42.

²²⁰ See Interview with Zalmay Khalilzad, *supra* note 14; KHALILZAD, *supra* note 11, at 194.

executive power. He eliminated the proposed constitutional court and transferred some of its authorities to the Supreme Court, which was friendly towards him. Even ignoring the speculation that Ambassador Khalilzad was directly involved, it is hard to imagine Karzai taking these steps without American support. The United States shared Karzai's preference for a strong presidential system with little judicial oversight. Karzai had the backing of some Afghan factions, so his position cannot be said to be externally created, but the process and outcome would have undoubtedly looked quite different without the efforts of the United States and the United Nations.²²¹

Foreign intervention into procedure and process had significant substantive implications. Foreigners controlled the timeline and structure of the process itself,²²² which led to inadequate public consultations and rushed decision-making. This was particularly clear at the Constitutional Loya Jirga where, according to Ghai, the United States and United Nations "used their positions to push for members to reach agreement on a draft."²²³ The Afghan case illustrates how foreign procedural interventions cannot be separated from substantive ones.

Without foreign pressure, negotiations might have broken down entirely over the constitutional court and other issues that threatened to derail the Constitutional Loya Jirga. Instead, the decision "not to decide" on judicial review meant that the issue played out in the political arena rather than in the VIP tents. The resulting conflict was messy, partisan, and public,²²⁴ though

²²¹ Cf. Pasarlay, *supra* note 63, at 220 (arguing that "the international community's influence on the Afghan constitution-making process was not as strong as some academic literature has claimed, literature that has painted the 2004 Afghan Constitution as an externally imposed document").

²²² Thier, *supra* note 3, at 544 ("Concerns about the appearance of foreign interference did not, however, extend to foreign support for designing the procedural aspects of the constitution-making process The U.S. Agency for International Development (USAID) funded the Asia Foundation to provide foreign experts and support staff, managed through UNAMA, to work with the constitutional commission secretariat on these issues. The staff was responsible for staging the delegate elections, conducting public outreach, organizing the CLJ, and drafting many of the key documents involved, including the rules of procedure.").

²²³ MICHELE BRANDT, JILL COTTRELL, YASH GHAI & ANTHONY REGAN, CONSTITUTION-MAKING AND REFORM 332 (2011).

²²⁴ Int'l Crisis Grp., *supra* note 164, at 13 ("The controversy surrounding the establishment of the Special Tribunal on Elections after the 2010 polls all but destroyed the credibility of the Supreme Court and exposed glaring defects in the legislative framework governing the Independent Commission for the Supervision of the Implementation of the Constitution (ICSIC). Unless the laws governing both

arguably more democratic than any solution that could have been reached at the Jirga. But in the intervening decade, the confusion over the responsibilities of the Supreme Court and the ICOIC looked like incompetence on the part of Afghan institutions as well as the constitutional drafters. It appeared to be the outcome of bad advice, poor planning, or neglect. Instead, as this Article has shown, the constitutional ambiguity was the product of last-minute bargaining forced by executive and foreign interference. Public opinions and expert advice, both foreign and Afghan, were disregarded in favor of making a deal, however imperfect.

The legacy of that deal, and of the past fifteen years of constitutional governance in Afghanistan, is bleak. Even in the heady days of 2004, one delegate to the CLJ from Kandahar described the final text as “poison.”²²⁵ But despite drawing from a poisoned well, the Wolesi Jirga was able to empower an institution other than the Supreme Court with some powers of constitutional interpretation—a feat that had eluded supporters of a constitutional court at several phases of the drafting. Nevertheless, the Constitution of 2004 and the resulting government institutions failed to gain a level of popular legitimacy that might have undermined future support for a return of the Taliban.

It is impossible to know whether a court with a clearer mandate for constitutional review would have yielded a more stable government, or whether conflicts between the President and the Wolesi Jirga would have simply played out along other lines. The failure of the Afghan government does not lie entirely, or even primarily, with the Constitution.²²⁶ Corruption, persistent foreign meddling, an active insurgency, the lack of infrastructure, and military failures paved the way for the collapse of the central government and the Taliban advance. For the past several years, the United States undermined the Afghan government in its

bodies are modified and incorporated into the constitution through an amendment process, their institutional rivalries will probably bedevil the political system for years to come.”).

²²⁵ Carlotta Gall, *Afghan Council Gives Approval to Constitution*, N.Y. TIMES, Jan. 4, 2004, at A1.

²²⁶ See generally SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, WHAT WE NEED TO LEARN: LESSONS FROM TWENTY YEARS OF AFGHANISTAN RECONSTRUCTION (2021) (identifying several reasons why the U.S. reconstruction efforts in Afghanistan failed significantly, including unsustainability, incoherent strategy, and unrealistic timelines).

negotiations with the Taliban.²²⁷ Militarily, the U.S. decision to build an Afghan force dependent on U.S. air support and then abruptly stop that support in 2021 ensured a quick collapse.²²⁸ Constitutional text, however, cannot be separated from the highly corrupt, centralized system of formal governance that ultimately failed the Afghan people. Nor can the text be separated from U.S. interests in a centralized state with its ally in charge.

The rise and fall of the Afghan Constitution illustrates the futility of trying to pretend that an occupying military force can establish a neutral process for drafting a new constitution without shaping the substance. It highlights the impossible position of foreign occupiers who seek to impose institutions of Western-style democracy that rely on, at the very least, the ideal of self-governance. Germany and Japan may have appeared as “beacons” of hope for twenty-first century state-builders, but Afghanistan should be a beacon of caution.

²²⁷ Steve Coll & Adam Entous, *The Secret History of the U.S. Diplomatic Failure in Afghanistan*, THE NEW YORKER (Dec. 20, 2021), <https://www.newyorker.com/magazine/2021/12/20/the-secret-history-of-the-us-diplomatic-failure-in-afghanistan> [<https://perma.cc/P8KJ-WEDA>].

²²⁸ *Id.*