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# IS TALIBAN 2.0 CLOSING THE GATES TO *IJTIHAD* AGAIN?

ERIK G. JENSEN\* & KAZUMI HOSHINO-MACDONALD\*\*

*After almost two years since the Taliban’s return to power in Afghanistan, the international community is coming to terms with the nature of the new regime in Kabul. This Article explores the nature of Taliban 2.0, assessing evidence of both change and disturbing continuity in the new leadership of Afghanistan. Importantly, Taliban 2.0 has demonstrated persistent inflexibility in its imposition of a puritanical form of Islamic rule, exemplified by its treatment of the rights of women and girls. This inflexibility is in direct conflict with its goal of becoming a formally recognized member of the international community. Its lack of international recognition hampers the Taliban’s ability to stabilize the Afghan economy and provide even minimal levels of public goods to its people. Yet, in light of this growing humanitarian crisis, the United States and its allies face a delicate balancing act: decreasing the suffering of the Afghan people while maintaining pressure on the Taliban regime. This Article argues that the United States should consider using a mix of carrots and sticks to achieve this delicate balance and test the ultimate flexibility, cohesion, and staying power of Taliban 2.0.*

I.	INTRODUCTION.....	76
II.	TALIBANISM: CUSTOM, RELIGION, AND PURE FIAT.....	76
III.	PERFORMANCE OF THE TALIBAN: SUCCESSES, CHALLENGES, AND FAILURES	78
	A. Assessing the Performance of the “State” .....	78
	B. Significant Challenges and Failures .....	81
IV.	INCENTIVES, CARROTS, AND STICKS.....	84
	A. Core Impediments to Incentives Working .....	84
	B. Carrots.....	85
	C. Sticks.....	87
V.	CONCLUSION .....	88

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## I. INTRODUCTION

*Ijtihad* is the independent interpretation of problems in Islam that are not precisely covered by the Quran or the Hadiths. The original ‘closing of the gates to *ijtihad*’ was an attempt to limit this high interpretive act to the most qualified Islamic scholars.<sup>1</sup> So, it was not an entirely negative effort. However, over time, the colloquial ‘closing the gates’ has obtained a negative connotation associated with inflexible, literal, and regressive interpretations of the sacred texts of Islam. The title of this Article is inspired by the colloquial, not the academic context.

Inflexibility is a hallmark characteristic of the Taliban, most recently made manifest by its near-total ban on women’s education through the following edict on December 20, 2022:

To all Governmental and Private Universities  
May Allah give you success in all jobs . . . .  
Based on the decision of cabinet meeting # 28 year 1443 HQ this is a  
notice to all, that the female education is suspended till further notice.  
We hope you implement this and confirm to the Ministry of Higher  
Education.

Shaikh Mawlai Nida Mohammad Nadim  
Higher Education Minister<sup>2</sup>

This article explores the degree of flexibility in Taliban 2.0’s approach to governance. Is Taliban 2.0 simply the old nectar of Taliban 1.0 in new vessels that survive twenty years of military conflict and systemic transitions? Or is there evidence of change in its seemingly changeless persona and praxis? After reviewing the customary, religious, and what may be termed ‘pure fiat’ foundations of Taliban practice, this Article will assess the change in and continuity of the performance of Taliban 2.0 in the context of both its modest successes and significant challenges and failures. Finally, this Article will analyze incentives—both carrots and sticks—that the international community can employ and, in some cases, already is employing to stimulate better performance by the Taliban. Currently, the Taliban’s ideological leadership in Kandahar appears intractable, begging the question of whether there is anything the United States and its allies can do to leave ajar the doors of *ijtihad*.

## II. TALIBANISM: CUSTOM, RELIGION, AND PURE FIAT

Strictly defining Talibanism is academically difficult. The Taliban is frequently referred to journalistically as a group that follows a “harsh interpretation” of

<sup>1</sup> See Sherman A. Jackson, *Ijtihad and Taqlid, Between the Islamic Legal Tradition and Autonomous Western Reason*, in ROUTLEDGE HANDBOOK OF ISLAMIC LAW 255, 256–60 (Khaled Abou El Fadl et al. eds., 2019).

<sup>2</sup> See *The Taliban Suspended the Continuation of Girls’ Education in Public and Private Universities*, BBC (Dec. 29, 2022), <https://perma.cc/9ZSD-JDVG>.

Islamic law.<sup>3</sup> In fact, Talibanism is a mixture of custom, religion, and pure fiat, with pure fiat unsupported by the authority of either custom or religion. It is impossible to fully grasp Taliban practice without understanding the Pashtun custom and culture in which it is embedded. Confusion about the interaction of Islamic law with customary law is common—despite considerable friction between the two.<sup>4</sup> While Talibanism is derived to a certain extent from Deobandism, a conservative form of Hanafi Islam founded in the nineteenth century in India, much of its practice combines its Hanafi roots with Pashtun custom, Salafist Islam (following exposure to and collaboration with al-Qaeda since the 1980s), and pure fiat in what has been described as an “unwritten mixture of puritanical beliefs wrapped up in Islamic sharia.”<sup>5</sup>

To the extent that the Taliban received religious education, this occurred in madrassas in Pakistan and, more recently, in Afghanistan. The quality of that religious education was rudimentary and flawed.<sup>6</sup> Indeed, when Egyptian jurists visited Mullah Omar, the Taliban’s founder and former leader of Afghanistan, in 2001 and unsuccessfully tried to convince him that Islamic law did not mandate the destruction of the Bamiyan Buddhas, these jurists left Afghanistan highly critical of the Taliban’s knowledge of Islam: “[B]ecause of [the Taliban’s] circumstances and their incomplete knowledge of jurisprudence they were not able to formulate rulings backed by theological evidence.”<sup>7</sup> Apart from religion, custom obviously did not support the destruction of the Bamiyan Buddhas, which were carved in the sixth century and peacefully co-existed with customary life for 1,500 years. Instead, the ‘authority’ that led to the destruction of these iconic sculptures was the Taliban’s reasoning by pure fiat.

Therefore, Taliban justice involves placing the Taliban—not tribal elites or non-Taliban religious figures—in charge of all interpretation of sharia law questions, including those involving Pashtun customs. In other words, absent any religious or customary precedent, pure fiat disguised as sharia or custom acts as a viable alternative—one based on coercive force.

Sometimes, this trilogy of variables—custom, religion, and pure fiat—is conflated to justify the legitimacy of virtually any of the regime’s views and policies. Take, for example, the frayed logic of Taliban triumphalism. This triumphalism represents a kind of victor’s morality, tied to a theory of Pashtun exceptionalism

<sup>3</sup> See Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELS. (Jan. 19, 2023, 10:45 AM), <https://perma.cc/55M5-V3VR>.

<sup>4</sup> See MATTHEW J. NELSON, IN THE SHADOW OF SHARI’AH: ISLAM, ISLAMIC LAW, AND DEMOCRACY IN PAKISTAN 4–7 (Columbia Univ. Press ed., 2011) (2008) (noting that “the laws of custom” gave way to “the laws of Islam” in Pakistan and that local Muslim communities attempted to “preserve the terms of ‘tribal’ custom even within a set of ostensibly ‘religious’ institutions”).

<sup>5</sup> Javid Ahmad, *The Taliban’s Religious Roadmap for Afghanistan*, MIDDLE E. INST. (Jan. 26, 2022), <https://perma.cc/UAG2-3PGS> (noting that the Taliban’s “framework for their new ideological state” consists of “fleshing out a state religious ideology, burnishing their ‘originalist’ religious credentials, and channeling Afghan nationalism into religious nationalism”). Pure fiat can be understood as a form of rule backed by nothing but the arbitrary power of the rulers themselves. In the case of the Taliban, this is ultimately achieved through its military dominance of the country, along with the mixture of Pashtun custom and its distorted interpretation of conservative Islamic beliefs. See also Vanda Felbab-Brown, *Afghanistan in 2023: Taliban Internal Power Struggles and Militancy*, BROOKINGS INST. (Feb. 3, 2023), <https://perma.cc/RDC7-9SP8> (noting the Taliban leadership’s publication of its own interpretation of Hanafi Islam and its concurrent rejection of criticism from other Islamic countries, organizations, and conservative scholars).

<sup>6</sup> See THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* 262 (2010).

<sup>7</sup> Thomas Barfield, *Idol Threats*, 4 RELIGION NEWS 4, 28 (2001).

following the 2021 withdrawal of U.S. forces, which is interpreted as Allah's 'ratification' of the Taliban.<sup>8</sup> Proponents of Taliban triumphalism, such as the Taliban's Minister of Higher Education, Nida Mohammad Nadim, argue that the Taliban's victory over the United States and its allies was due to the superiority of Pashtun customs.<sup>9</sup> Compared to non-Taliban Arab communities, which the Taliban sees as either compliant with or conquered by Western interests, the Taliban's historical victories over 'infidels' (the British Empire, the Soviet Union, and now the United States and NATO) validate its religious convictions.<sup>10</sup> This provides Taliban 2.0 further insulation from critique or advice from outside Islamic scholars on the 'proper' practice of Islamic traditions.<sup>11</sup> Consequentially, Taliban triumphalism supports an ideology that is largely inflexible in the face of external pressure, especially as it concerns some of the most regressive aspects of Taliban rule. So, while the international community perceives 2021 as a rather pyrrhic victory—the Taliban regime now faces mounting internal governance issues such as economic growth, fiscal impropriety, and food insecurity—Taliban leadership remains emboldened.

### III. PERFORMANCE OF THE TALIBAN: SUCCESSES, CHALLENGES, AND FAILURES

#### A. *Assessing the Performance of the "State"*

A useful set of criteria on which to judge Taliban performance is a blend of statehood characteristics derived from the 1933 Montevideo Convention and Weberian requirements. Under the traditional Montevideo view, a state requires a permanent population, defined territory, government, and the capacity to conduct international relations.<sup>12</sup> Here, with the first two criteria of permanent population and defined territory clearly met, the Taliban should primarily be judged on its ability to maintain a government and function within international society. From the far less formalistic Weberian perspective, successful states monopolize the legitimate use of force within their territory—typically by providing some public services, maintaining a framework for economic activity, collecting taxes, and gaining recognition by other states.<sup>13</sup> Both perspectives offer critical insights into the Taliban's performance and its ability to maintain its rule in the face of mounting challenges—both domestic and international.

Regarding the criterion that the Taliban control the territory, Afghanistan has always been a transit state with a modest capacity to protect its borders. Parts of Afghanistan today are controlled by pockets of the National Resistance Front of

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<sup>8</sup> E-mail from David Sedney, Former President, Am. U. of Afgh. & Senior Assoc., Ctr. for Strategic & Int'l Stud., to author Erik G. Jensen (Mar. 12, 2023, 1:34 PST) (on file with authors).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>13</sup> See MAX WEBER, *POLITICS AS A VOCATION* (1921), reprinted in MAX WEBER'S COMPLETE WRITINGS ON ACADEMIC AND POLITICAL VOCATIONS 155, 160 (John Drieffmanis ed., Gordon C. Wells trans., 2008).

Afghanistan (NRF) and the Islamic State Khorasan (IS-K).<sup>14</sup> But by and large, the Taliban does control the territory. Likewise, the Taliban does generally monopolize the legitimate use of violence and provide security. This is important for the Taliban’s domestic legitimacy, as many of the major issues with U.S. and NATO forces centered upon their inability to end the violence, as well as the methods by which they pursued counterterrorism operations for years.<sup>15</sup> Today, partly due to the United States’ pullout, levels of violence are much lower.

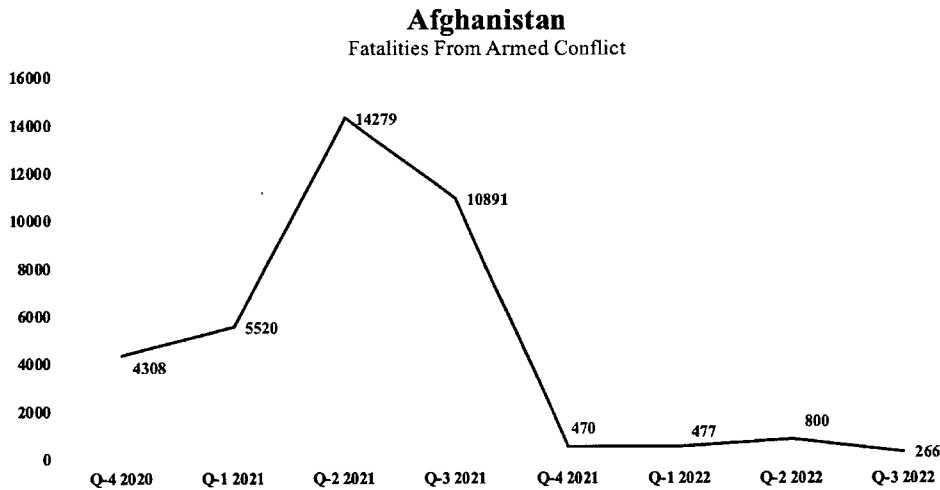


Figure 1: Afghanistan—Fatalities from Battles (2020–22).<sup>16</sup>

While the Taliban controls the territory, many layers of insecurity have worsened over the last year, not least of which is food insecurity. The World Food Program asserted in January 2023 that ninety percent of the Afghan population does not have sufficient food.<sup>17</sup> That is up from eighty percent before the Taliban

<sup>14</sup> INT’L CRISIS GRP, AFGHANISTAN’S SECURITY CHALLENGES UNDER THE TALIBAN 4 (2022), <https://perma.cc/TRW9-ED3N>.

<sup>15</sup> See RJ Reinhart and Julie Ray, *Inside Afghanistan: Law and Order Becomes a Casualty of War*, GALLUP (Aug. 19, 2019), <https://perma.cc/7QA9-Y88Y> (noting only thirteen percent of Afghans “[felt] safe walking alone at night” in 2018, the lowest at any point over the past decade); see also Emma Graham-Harrison, *NATO’s Afghan Night Raids Come with High Civilian Cost*, REUTERS (Feb. 24, 2011), <https://perma.cc/AW3U-C2FP> (citing Erica Gaston, an expert on Afghanistan, who called night raids “the single biggest cause of outrage among Afghans”). See generally OPEN SOC’Y FOUNDS., THE COST OF KILL/CAPTURE: IMPACT OF THE NIGHT RAID SURGE ON AFGHAN CIVILIANS 2 (2011) (citing U.S. officials who in 2011 stated that as many as forty raids could take place in one night and noting the “tremendous backlash among the Afghan population”).

<sup>16</sup> *Afghanistan Fatalities from Battles – Excluding Non-State Actors’ Takeover of Territory* (illustration), in ACLED Dashboard (last visited May 14, 2023), <https://perma.cc/E9FY-UFGA> (the relevant data is based on the following filters: “FATALITIES” not “EVENT COUNT”; Start Date = Nov. 1, 2020; End Date = Aug. 1, 2022; Event Type = “Battles”; Region = “Afghanistan”; Fatalities = “All”; Actor Type = “State Forces”).

<sup>17</sup> See CLAYTON THOMAS, CONG. RSCH. SERV., R45122, AFGHANISTAN: BACKGROUND AND U.S. POLICY 10 (2023).

takeover.<sup>18</sup> Taken as a whole, this criterion for statehood—improved provision of basic services—has proved elusive under the Taliban. The Taliban does not have the human resources or the international support to deliver basic services, a central function of any legitimate state.

Providing a framework for economic activity is a third distinct challenge. The economy has shrunk by twenty to thirty percent since August 2021, and inflation is rampant—as much as thirty to seventy-five percent on basic commodities.<sup>19</sup> However, revenue collection at border crossings has been surprisingly strong despite a steep drop in imports. This is a positive aspect of the performance of the Taliban. But it also is a stunning indictment of the previous regime’s level of corruption. Outside groups estimate that as much as \$767 million was paid annually in bribes at border control points and as much as \$650 million at checkpoints within Afghanistan during the previous regime.<sup>20</sup> The dismantling of bribery checkpoints and centralization of tax collection is a success of Taliban 2.0, as it was in the 1990s when Taliban 1.0 came to power, reduced banditry, and secured trucking routes.<sup>21</sup> Additionally, there are credible reports that the Taliban engages in *zakat*—a form of de-facto tax collection in which the Taliban collects commodities or chattel from farmers and businesspeople.<sup>22</sup> *Zakat*’s informal nature makes estimating its impact on the overall finances of Taliban 2.0 difficult, but it is another form of income nonetheless.

This increased revenue collection allowed the Taliban to present a nearly balanced budget for 2023 that included no foreign aid.<sup>23</sup> But the budget did not take into account the cost of maintaining the group’s fighters.<sup>24</sup> Taliban fighters are completely off-budget, and their expenses are non-transparent. Because of the presumably substantial cost of maintaining these fighters, the relatively balanced budget that the Taliban leadership presented for 2023 should be taken with a large pinch of salt. For example, the Taliban recently paraded its ostensibly well-equipped military through the streets of Kabul and Kandahar, demonstrating its ability to maintain a range of U.S. military assets that require expensive refueling and maintenance.<sup>25</sup> With the economy in freefall, the new, less corrupt, yet still opaque budget will continue to be strained and the Taliban will remain utterly incapable of ensuring the Afghan people their “economic, social and cultural rights at the minimum base level.”<sup>26</sup>

<sup>18</sup> See CLAYTON THOMAS, CONG. RSCH. SERV., R46955, TALIBAN GOVERNMENT IN AFGHANISTAN: BACKGROUND AND ISSUES FOR CONGRESS 32 (2021).

<sup>19</sup> William Byrd, *One Year Later, Taliban Unable to Reverse Afghanistan’s Economic Decline*, U.S. INST. OF PEACE (Aug. 8, 2022), <https://perma.cc/7QS7-JRNH>; SHAHMAHMOOD MIAKHEL, FOR THE TALIBAN, GOVERNING WILL BE THE HARD PART 10 (2021), <https://perma.cc/URP6-TCNN>.

<sup>20</sup> DAVID MANSFIELD, CHANGING THE RULES OF THE GAME: HOW THE TALIBAN REGULATED CROSS-BORDER TRADE AND UPENDED AFGHANISTAN’S POLITICAL ECONOMY 1 (2022), <https://perma.cc/X4KF-3KFL>.

<sup>21</sup> AHMED RASHID, TALIBAN: THE POWER OF MILITANT ISLAM IN AFGHANISTAN AND BEYOND 27–28 (3d ed. 2022) (describing how truckers supported the Taliban in an effort to “clear the roads of chains and bandits and guarantee the security for truck traffic”).

<sup>22</sup> See e-mail from David Sedney to author, *supra* note 8 (describing the practice of *zakat*, a form of religious almsgiving practiced differently across the Islamic world).

<sup>23</sup> William Byrd, *Taliban Are Collecting Revenue—But How Are They Spending It?*, U.S. INST. OF PEACE (Feb. 2, 2022), <https://perma.cc/4KTB-L48J>.

<sup>24</sup> *Id.*

<sup>25</sup> See e-mail from David Sedney to author, *supra* note 8; see also *Afghanistan’s Taliban Mark Anniversary of US-Led Force Withdrawal*, AL JAZEERA (Aug. 31, 2022), <https://perma.cc/A7C6-7UYB>.

<sup>26</sup> See Richard Bennett (Special Rapporteur on the Situation of Human Rights in Afghanistan), *Situation of Human Rights in Afghanistan*, at 6, U.N. Doc. A/HRC/52/84. (Feb. 9, 2023).

Afghans are the least happy people in the world and the reasons for their unhappiness are palpable.<sup>27</sup> For now, however, no significant domestic pushback seems likely with the Taliban wielding immense coercive capacity domestically and nearly half of the population weakened by acute food insecurity.<sup>28</sup>

Overall, on measures of statehood, there are two conditional successes amidst a host of failures and challenges: lower levels of violence and more efficient and less corrupt revenue collection. Those were the strengths of Taliban 1.0 as well. On every other measure—the state’s delivery of basic goods, services, and economic opportunity—Taliban 2.0 has failed. These domestic weaknesses make it even harder for the Taliban to maneuver diplomatically, as it seeks to gain formal recognition from the international community, particularly the United States.

### B. Significant Challenges and Failures

The largest challenges to the Taliban 2.0 are twofold: gaining international recognition abroad and maintaining internal cohesion at home. The Taliban’s abject failure to gain international recognition undermines its capacity to resolve several domestic challenges. Formal recognition, therefore, acts as a potential means to influence Taliban policies and practices. There is a debate as to whether an obligation exists to recognize a foreign government—as distinct from recognizing the sovereign state it governs—based on differing sets of doctrinal characteristics.<sup>29</sup> But in practice, many states treat recognition of regimes as a national prerogative. The United States adheres to this practice and the recognition of regimes falls within the sole discretion of the president.<sup>30</sup>

The story of U.S. non-recognition begins with the Peace Agreement entered into by the Trump administration and the Taliban on February 29, 2020.<sup>31</sup> The contents of the agreement made it abundantly clear that the document itself did not constitute recognition. Indeed, the phrase “the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban” occurs fifteen times in the brief document.<sup>32</sup>

<sup>27</sup> See JOHN F. HELLIWELL ET AL., WORLD HAPPINESS REPORT, at 37 (Richard Layard et al. eds., 11th ed. 2023), <https://perma.cc/Z6TY-FRFF>.

<sup>28</sup> See Riazat Butt, *Taliban Ban on Women Workers Hits Vital Aid for Afghans*, AP NEWS (Jan. 11, 2023), <https://perma.cc/MNK3-G4KS> (“Almost half of Afghanistan’s 41 million people are projected to be acutely food insecure between November 2022 and March 2023, including more than 6 million people on the brink of famine . . .”).

<sup>29</sup> See Anne Schuit, *Recognition of Governments in International Law and the Recent Conflict in Libya*, 14 INT’L CMTY. L. REV. 381, 383–95, 381–402 (2012) (discussing the debate on whether recognition of a foreign government is solely a political act and detailing the different doctrines and criteria that underpin the modern state practice of recognition); see also Philip C. Jessup, *The Estrada Doctrine*, 25 AM. J. INT’L L. 719 (1931) (discussing the debate on recognizing foreign governments under international law); Ian Brownlie, *Recognition in Theory and Practice*, 52 BRIT. Y.B. INT’L L., 197, 201 (1983) (discussing the legal versus political nature of the practice of state recognition of foreign governments).

<sup>30</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELS. OF THE U.S. § 204 (AM. L. INST. 1987).

<sup>31</sup> Agreement for Bringing Peace to Afghanistan Between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, Taliban-U.S., Feb. 29, 2020, <https://perma.cc/7RLH-4RCD> [hereinafter Taliban-U.S. Deal].

<sup>32</sup> *Id.* at 1–4.



The United States' interests in Afghanistan are often stated as preventing terrorist groups in Afghanistan from threatening the United States or its allies; maintaining regional stability; encouraging inclusive governance; and protecting human rights, particularly the rights of women and girls.<sup>33</sup> The so-called Peace Agreement set up a timetable for the withdrawal of U.S. troops, and it focused primarily on the assurance that no terrorist attack would be launched on the United States from Afghan soil. The agreement references "intra-Afghan negotiations" nine times.<sup>34</sup> But let's be clear: It does not mention even once "inclusive government," "women," "girls," "minorities," or "human rights."<sup>35</sup> The U.S. interests outlined above have become conditions for recognition of the Taliban regime. But it is particularly shameful that there was absolutely no mention of women, minorities, and human rights in the Peace Agreement itself. The most prominent failure of the Taliban is the repression of women in all dimensions of life outside the home—in employment, education, freedom of movement, and public as well as daily life. This includes the ongoing exclusion of women and girls from parks, gyms, and public baths, along with a ban preventing them from working for domestic or international NGOs.<sup>36</sup> In this respect, Taliban 2.0 looks very much like Taliban 1.0.

Non-recognition internationally creates downstream problems domestically. The Taliban faces a crisis of domestic legitimacy because of its failure to deliver basic goods, services, and economic opportunity.<sup>37</sup> While the Ghani government was marked by corruption and bad governance, there was freedom of speech, freedom of the press, and the ability to pursue a better education and life. Those freedoms, despite governance failures, provided something that is in short supply under the Taliban today: hope for a better future. This hopelessness is why young Afghans are increasingly voicing their discontent on social media.<sup>38</sup> Reforming its restrictive education policy would be low-hanging fruit to buttress the Taliban's domestic as well as international legitimacy with the public at large, but such reform would run counter to the convictions of the Kandahar Shura—the consultative body of leading Taliban elders in Kandahar.

Factionalism within the Taliban ranks constrains its ability to win both international and domestic legitimacy. The Taliban is not unitary, and its command

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<sup>33</sup> See Kate Bateman, *A Year After the Taliban Takeover: What's Next for the U.S. in Afghanistan?*, U.S. INST. OF PEACE (Aug. 11, 2022), <https://perma.cc/U29R-YSCU>.

<sup>34</sup> Taliban-U.S. Deal, *supra* note 31, at 1, 2, 4.

<sup>35</sup> *Id.* at 1–4.

<sup>36</sup> See Bennett, *supra* note 26, at 2; see also *Afghanistan: UN Human Rights Council Must Address Taliban's Ongoing 'Relentless Abuses'*, AMNESTY INT'L (Mar. 5, 2023), <https://perma.cc/RL9L-5SDH> (noting the continued crackdown on women, girls, and ethnic minorities, including the arbitrary arrest of three prominent women human rights defenders); *Taliban Launches Annual Polio Vaccination Drive in Afghanistan*, AL JAZEERA (Mar. 14, 2023), <https://perma.cc/Y3MF-WE5R> (stating that an ostensible exception had been made for female workers on polio vaccination campaigns and that "female vaccinators were working on the [polio] campaign... [who] were crucial to accessing children who were often at home with their female caregivers who were usually not comfortable interacting with male vaccinators").

<sup>37</sup> See Julie Ray, *Afghans Lose Hope Under the Taliban*, GALLUP (Dec. 1, 2022), <https://perma.cc/5MBV-NXXV> (stating that ninety-eight percent of Afghans self-reported scores that classify them as "suffering"); see also Julie Ray, *Taliban Returns, Majority of Afghans Seek an Exit*, GALLUP (Apr. 4, 2022), <https://perma.cc/B48W-U2NC> (reporting that fifty-three percent of Afghans said they wanted to leave the country for good); Justin McCarthy & RJ Reinhart, *Afghanistan's Failing Economy Taking Afghans with It*, GALLUP (Apr. 4, 2022), <https://perma.cc/8DL2-G8PX> (estimating that ninety-seven percent of Afghans were below the poverty line in mid-2022).

<sup>38</sup> See MIAKHEL, *supra* note 19, at 4.

structure is constantly strained by friction between shifting factions. The dominant faction, the Kandahar Shura (led by Amir Haibatullah), must share control with the political wing (led by Mullah Abdul Ghani Baradar) and the Haqqani Network (led by Sirajuddin Haqqani).<sup>39</sup> These three groups disagree over ethnic and ideological matters, as well as rank and file issues.<sup>40</sup> For internal cohesion, distribution of benefits to these three factions must be viewed as fair. The most militant wings dominated the first cabinet appointed under the Taliban 2.0, making a mockery of any claim to inclusive government.

This intra-Taliban factionalism itself is a potential security threat. The Taliban 1.0 arose from the ashes of Afghanistan's post-Soviet civil war—a reality to which the group is not eager to return. Any possibility of an inter-factional militarized conflict raises the risk of reversing the limited gains already made since its return to power and would make the country only more ungovernable.<sup>41</sup>

Factionalism within the Taliban is illustrated on the issue of girls' and women's rights. Little has changed since one of the authors last assessed the status of Afghan women and girls a year ago,<sup>42</sup> as the Taliban continues to outwardly profess support for, yet stifle internally, women's access to education. New restrictions on women's access to higher education have resulted in additional domestic pressure on the new regime, as supporters of female students protested the new ban.<sup>43</sup>

On the promise not to allow international terrorist organizations to operate within its borders, the Taliban has clearly violated the Peace Agreement by sustaining its ties to Al-Qaeda. Those ties were graphically laid bare by the killing of Al-Qaeda

<sup>39</sup> Thomas, *supra* note 17, at 2 (stating the Haqqani network is a U.S.-designated foreign terrorist organization operating in Afghanistan, whose leader, Sirajuddin Haqqani, is the acting Interior Minister of Afghanistan). The Haqqani network is a semi-autonomous component of the Taliban that controls a sizeable cohort of militant fighters and often has friction with other elements of Taliban leadership, including the Taliban's political wing. For example, in February 2023, Haqqani criticized "power monopolization" within the Taliban, prompting other Taliban leaders to state that the criticisms should be voiced privately. *Id.* at 3.

<sup>40</sup> See Sabawoon Samim, *New Lives in the City: How Taleban Have Experienced Life in Kabul*, AFGHAN ANALYSIS NETWORK (Feb. 2, 2023), <https://perma.cc/P4CP-AWEW> (describing former Taliban fighters' somewhat difficult transitions to the post-conflict political environment); Ali M Latifi, *How Deep Are Divisions Among the Taliban*, AL JAZEERA (Sept. 23, 2021), <https://perma.cc/728B-9EKB> (quoting hardline fighters' discontentment and expectations, stating that they "feel they are owed things for 20 years of fighting"); Ben Farmer & Hannah McCarthy, *Taliban Facing Grumbles over Pay from Rank-and-File Troops as Fighting for God Is No Longer Enough*, TELEGRAPH (Dec. 19, 2021, 8:39 PM), <https://perma.cc/T6GP-QD9Y> (quoting Taliban fighters who stated, "We fought for the past 20 years without salaries and we can do that again in future if we need to. But I can say that continuing like this is difficult.").

<sup>41</sup> A fragmented and weakened Taliban would face threats from the NRF (the most organized armed resistance in the country) as well as IS-K, which is currently only able to disrupt, not overthrow the Taliban. However, concerns over troop defection to IS-K remain.

<sup>42</sup> See Erik G. Jensen, *Seven Myths About Afghanistan*, AM. PURPOSE (Sept. 17, 2021), <https://perma.cc/X3AW-MDEG> ("On an issue closely watched by the international community, the Taliban's chief negotiator, silver-tongued Sher Mohammed Abas Stanekzai, has said all the right things about women's education from his perch in Doha, Qatar. Simultaneously, on the ground, Taliban military commanders have shown that they are no more tolerant of girls' and women's education than they were two decades ago. Among many things, I am very worried about the future of girls' and women's education and, more broadly, the status of women under a Taliban regime.").

<sup>43</sup> See Radio Azadi, *'Teach Everyone or No One': Afghan Men Join in Protests Against Taliban's Ban on Women's Education*, RADIO FREE EUR. (Dec. 29, 2022), <https://perma.cc/R4WA-L6LD>.

leader Ayman al-Zawahiri by a U.S. drone strike in Kabul.<sup>44</sup> Clearly, the regime has not cut its ties with transnational terrorist groups.<sup>45</sup>

The promise of inclusive government has also rung hollow. Apart from thin consultations with former President Hamid Karzai and former Foreign Minister Abdullah Abdullah in August of 2021, the Taliban has resisted any hint of inclusivity or power-sharing. Instead, the administration is overwhelmingly Taliban and Pashtun, as well as entirely male.

A review of the Taliban's record shows failure or woeful underperformance on nearly every measure regarding U.S. interests, making recognition less likely in the face of mounting challenges. This places the Taliban at a difficult crossroads, vis-à-vis both its domestic and international legitimacy. Cooperation with the United States risks unacceptable factionalism at home, while the international status quo ensures a sustained economic pariah status. This provides the United States and its partners a limited and highly contingent set of options moving forward.<sup>46</sup>

#### IV. INCENTIVES, CARROTS, AND STICKS

##### *A. Core Impediments to Incentives Working*

The Taliban's internal cohesion currently depends upon placating the Kandahar Shura's interest in puritanical governance. This creates a basic stumbling block to implementing any framework of incentives, as the Taliban prioritizes "internal cohesion over compromises that might appeal to foreign actors."<sup>47</sup> Indeed, the "greater influence of the group's traditionally conservative leaders, and the unwillingness or inability of more pragmatic figures to assert themselves, suggests that external actors may have limited leverage over Taliban decisions."<sup>48</sup>

Prioritizing internal cohesion helps to explain why the Taliban reneged on its promise to open schools and universities to girls and women in the lead up to a major donor conference for Afghanistan in Doha in March 2022. This event on girls' education at the Doha Forum was supposed to be attended by the Taliban and was intended to set it on a path to diplomatic recognition by the United States. Instead, the Taliban abruptly reversed its decision on girls' education and announced that girls' high schools would remain closed "until officials draw up a plan for them to reopen in accordance with Islamic law."<sup>49</sup> Further prioritizing the conservative

<sup>44</sup> See Mohammad Yunus Yawar, Idrees Ali & Jeff Mason, *U.S. Kills Al-Qaeda Leader Zawahiri in Kabul Drone Missile Strike*, REUTERS (Aug. 2, 2022, 7:19 PM), <https://perma.cc/8BZ9-MZ9H> (noting al-Zawahiri's death from a U.S. drone strike in Kabul).

<sup>45</sup> See Bateman, *supra* note 33, at 1.

<sup>46</sup> See Press Release, U.S. Dep't of State, Joint Statement on Afghanistan, para. 1–7 (Mar. 7, 2023), <https://perma.cc/7N7P-EL82> (noting the shared assessment of the Special Representatives and Envoys for Afghanistan of Australia, Canada, the European Union, France, Germany, Italy, Norway, Switzerland, the United Kingdom, and the United States on the "increasing deterioration and multiple violations of human rights" as well as the "deterioration of the economic and humanitarian situation" in Afghanistan).

<sup>47</sup> Thomas, *supra* note 18, at Summary.

<sup>48</sup> Thomas, *supra* note 17, at 8.

<sup>49</sup> Saffullah Padshah & Christina Goldbaum, *Taliban Renege on Promise to Open Afghan Girls' Schools*, N.Y. TIMES (Mar. 23, 2022), <https://perma.cc/P79N-RAB5>.

faction, on December 20, 2022, the Taliban’s Minister of Higher Education Nida Mohammad Nadim announced a ban on women’s education in all universities.<sup>50</sup> Minister Nadim claimed the ban was necessary to prevent the mixing of genders and because he believed some subjects “violate Islamic principles.”<sup>51</sup> U.S. Secretary of State Antony Blinken responded to the announcement, stating, “[T]he Taliban cannot expect to be a legitimate member of the international community until they respect the rights of all in Afghanistan.”<sup>52</sup> Clearly, intra-Taliban internal cohesion trumps the Taliban’s urgent need for economic assistance, even in the face of a humanitarian crisis. Even with these major impediments to meaningful reform, the United States and its allies do still have several tools available to them that may be of use.

Taliban 2.0 Incentives	
Carrots	Sticks
<b>Formally Recognizing the Taliban 2.0</b> <ul style="list-style-type: none"><li>Formal recognition by the United States offers international legitimacy and rights under international and U.S. domestic law.</li></ul>	<b>Penalizing States for Recognizing and Supporting the Taliban 2.0</b> <ul style="list-style-type: none"><li>The United States could apply primary and secondary sanctions to those that support or formally recognize the Taliban.</li></ul>
<b>Releasing Funds Provided by International Financial Institutions (IFIs)</b> <ul style="list-style-type: none"><li>Currently, the Taliban is excluded from accessing funds from the IMF and other such IFIs.</li></ul>	<b>Implementing Foreign Terrorist Organization (FTO) Status</b> <ul style="list-style-type: none"><li>The United States could designate the Taliban as an FTO. This would make it unlawful to provide “material support or resources” to the Taliban.</li></ul>
<b>Providing Access to Funds Frozen by the United States</b> <ul style="list-style-type: none"><li>The United States and its allies have frozen over \$7 billion of Afghan funds held at central banks and other financial institutions.</li></ul>	<b>Decreasing U.S. Aid and Removing General Licenses</b> <ul style="list-style-type: none"><li>The U.S. Treasury could limit its official aid to Afghanistan as well as impose restrictions on aid from third parties.</li></ul>
<b>Decreasing Sanctions</b> <ul style="list-style-type: none"><li>The United States is empowered to designate and block the assets of foreign “terrorist” entities.</li></ul>	<b>Supporting Anti-Taliban Forces</b> <ul style="list-style-type: none"><li>The Taliban fears both internal and external actors with diverging interests, such as the National Resistance Front (NRF).</li></ul>
<b>Increasing U.S. Aid and Aid Waiver Designations</b> <ul style="list-style-type: none"><li>The U.S. Treasury can issue licenses that allow the provision of humanitarian assistance to Afghanistan without violating sanctions.</li></ul>	
<b>Reconnecting Afghanistan to the SWIFT Network</b> <ul style="list-style-type: none"><li>The Taliban is effectively shut out of the global financial system.</li></ul>	

B. Carrots

The United States possesses six carrots to incentivize an inflexible Taliban to comply with its conditionalities for economic relief and engagement with the Taliban. For each, some degree of progress or even confidence-building would result in a commensurate benefit for the Taliban. Even though the Taliban occasionally whips up anti-United States sentiment in Afghanistan over the release of funds, the Taliban

<sup>50</sup> See *Afghanistan: Taliban Ban Women from Universities amid Condemnation*, BBC (Dec. 21, 2022), <https://perma.cc/J8ML-HM9P>.  
<sup>51</sup> See *Radio Azadi, UN Afghan Envoy Makes Urgent Plea for Taliban to Lift Recent Restrictions on Women*, RADIO FREE EUR. (Dec. 29, 2022), <https://perma.cc/FG68-KRFU>.  
<sup>52</sup> See *Afghanistan: Taliban Ban Women from Universities amid Condemnation*, *supra* note 50.

is—to paraphrase William Earnest Henley’s classic poem—the master of its fate and the captain of its soul.<sup>53</sup>

- Formal Recognition of the Taliban 2.0 by the United States. Outside recognition is the greatest incentive for the Taliban to honor U.S. conditionalities. To date, no country has recognized the Taliban as the legitimate regime in power in Afghanistan.<sup>54</sup> The Taliban also rightly sees that the United States is the most significant obstacle to recognition by other foreign countries.<sup>55</sup> As of December 14, 2022, the U.N. General Assembly has postponed making a decision on whether to recognize the Taliban as the government of Afghanistan.<sup>56</sup> Lack of recognition importantly deprives the Taliban of a seat at the United Nations, access to funds at the International Monetary Fund (IMF), and the ability to sue in U.S. courts as the recognized government of Afghanistan.
- Releasing Funds Provided by International Financial Institutions (IFIs). IFIs blocked Afghanistan’s access to funds after the Taliban takeover. An IMF spokesperson noted “a lack of clarity within the international community regarding recognition of a government in Afghanistan, as a consequence of which the country cannot access the Special Drawing Rights (SDRs) or other IMF resources.”<sup>57</sup> Instead, the United States and its partners have used \$3.5 billion of Afghan central bank funds to establish a Swiss-based “Afghan Fund,” shielded from the Taliban, that could provide greater stability to the Afghan economy.<sup>58</sup>
- Providing Access to Funds Frozen by the United States. The United States has frozen Afghan Central Bank assets including \$1.3 billion in gold held at the Federal Reserve Bank of New York; \$6.2 billion in investments, including U.S. Treasury bills at the Federal Reserve Bank of New York; and funds managed by the International Reconstruction and Development Bank.<sup>59</sup> Da Afghanistan Bank also has approximately \$1.9 billion in assets deposited at other foreign banks.<sup>60</sup>
- Decreasing Sanctions. Since August 2021, no new sanctions have been imposed on the Taliban and no new attacks have been launched against the Taliban.<sup>61</sup> Additionally, the United States has not changed the Taliban’s status, conferred

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<sup>53</sup> WILLIAM EARNEST HENLEY, *To R.T.H.B.*, in *A BOOK OF VERSES* 56, 57 (Scribner & Welford, 1891) (1888) (commonly known as “Invictus”).

<sup>54</sup> See Ayaz Gul, *Taliban Says U.S. is ‘Biggest Hurdle’ to Diplomatic Recognition*, VOICE OF AM. (June 18, 2022, 2:03 PM), <https://perma.cc/P48A-RQDX>.

<sup>55</sup> *Id.*

<sup>56</sup> Michelle Nichols, *Afghan Taliban Administration, Myanmar Junta Not Allowed into United Nations for Now*, REUTERS (Dec. 14, 2022, 5:29 PM), <https://perma.cc/4D4P-Q9RD>.

<sup>57</sup> David Lawder, *IMF Blocks Afghanistan’s Access to SDR Reserves over Lack of Clarity in Government*, REUTERS (Aug. 18, 2021), <https://perma.cc/7VRN-TREG>.

<sup>58</sup> See *Taliban Condemn U.S. Move to Form Swiss-Based Trust for Afghan Central Bank Funds*, REUTERS (Sept. 15, 2022, 1:25 PM), <https://perma.cc/5229-BZB4> (citing U.S. sources that stated that the “Afghan fund, managed by a board of trustees, could pay for critical imports like electricity, cover debt payments to international financial institutions, protecting Afghanistan’s eligibility for development aid, and fund the printing of new currency”).

<sup>59</sup> See Thomas, *supra* note 18, at 38–39.

<sup>60</sup> *Id.* at 39.

<sup>61</sup> See Bateman, *supra* note 33, at 3.

in 2002, as a Specially Designated Global Terrorist (SDGT).<sup>62</sup> This official status blocks the group's access to U.S.-based property and transactions while risking secondary sanctions for those who do business with an SDGT.<sup>63</sup>

- Increasing U.S. Aid and Aid Waiver Designations. The U.S. Treasury can issue waivers like General License 20 to expand authorization for commercial and financial transactions in Afghanistan.<sup>64</sup> Moreover, the United States Agency for International Development (USAID) remains the largest humanitarian donor to the country, providing more than \$774 million in assistance since the withdrawal—though this will not be sufficient to prevent further humanitarian crises.<sup>65</sup>
- Re-connecting Afghanistan to the SWIFT Network. The Society of Worldwide Interbank Financial Telecommunication (SWIFT) is the primary financial clearing system for international cross-border transactions. SWIFT has suspended Afghan financial institutions from the system, effectively paralyzing the Taliban's international connections.<sup>66</sup> The United States could push for the reconnection of Afghan financial institutions to SWIFT.

### C. Sticks

In addition to carrots, there are non-mutually exclusive sticks that the United States and its allies could use to disincentivize certain Taliban behavior. These sticks focus primarily on the inverse logic of the carrots—decreasing aid and institutional support to the fledgling regime in Afghanistan.

- Penalizing States for Recognizing and Supporting the Taliban 2.0. The United States could expand its sanctions on the Taliban or apply secondary sanctions on third-party states that recognize or aid the Taliban. Such sanctions would depend on how the United States designates the Taliban as a terrorist organization or whether the United States removes waiver exemptions for humanitarian aid.
- Implementing Foreign Terrorist Organization (FTO) Status. The United States could upgrade the Taliban from SDGT to Foreign Terrorist Organization (FTO) status. FTO status makes it unlawful to provide “material support or

<sup>62</sup> CLAYTON THOMAS, RHODA MARGESSON & EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., IF12039, AFGHANISTAN: HUMANITARIAN CRISIS, ECONOMIC COLLAPSE, AND U.S. SANCTIONS 2 (2022).

<sup>63</sup> *Id.* (“Restrictions imposed on SDGT designees include blocking access to their U.S.-based property and interests in property and prohibiting U.S. persons from engaging in transactions with designees. Foreign financial institutions found to have conducted or facilitated any significant transaction on behalf of SDGT designees may be prohibited from using the U.S. banking system.”).

<sup>64</sup> See Byrd, *supra* note 19 (detailing how Western aid is not a long-term solution for the humanitarian crisis in Afghanistan); see also Paulina Smolinski & Eleanor Watson, *New Report on Afghanistan Reconstruction Shows Bleak Outlook for Women*, CBS NEWS (Aug. 2, 2022, 12:00 AM), <https://perma.cc/877W-LZBJ> (noting that the United States was the largest donor, providing “\$774 million in contributions since August 2021”).

<sup>65</sup> Max Boot, *The U.S. Holds Limited Influence in the Taliban's Afghanistan*, COUNCIL ON FOREIGN RELS. (Aug. 16, 2022), <https://perma.cc/WG9Z-8JLS>.

<sup>66</sup> See LIANA WONG & REBECCA NELSON, CONG. RSCH. SERV., R4684, INTERNATIONAL FINANCIAL MESSAGING SYSTEMS I, 13–15 (2021); see also Anamaria Silic, *Afghans Turn to Cryptocurrencies Amid US Sanctions*, BBC (Mar. 16, 2022), <https://perma.cc/SLS3-6Z7H> (“[SWIFT], which underpins international financial transactions, suspended all services in Afghanistan.”).

resources” to the designated group and prohibits designated members from entering the United States.<sup>67</sup> “Material support” is defined broadly and could apply extra-territorially.<sup>68</sup>

- Decreasing U.S. Aid and Removing General Licenses. By withdrawing general licenses, the United States could effectively suspend the remaining outside assistance flowing into the country by humanitarian groups such as USAID.<sup>69</sup>
- Supporting Anti-Taliban Forces. Supporting anti-Taliban forces, such as the National Resistance Front (NRF), has received some support from U.S. members of Congress who cite the ‘Charlie Wilson Playbook’—a reference to the Texas Congressman who galvanized aid for the Afghan anti-Soviet forces in the 1980s. Such support could compound the Taliban’s perceived insecurity vis-à-vis regional powers like Iran, Pakistan, and Tajikistan.<sup>70</sup>

## V. CONCLUSION

Ultimately, these international incentives are only as compelling as their ability to affect the domestic concerns of the new leadership in Kabul and Kandahar. The inflexibility of the Taliban 2.0—closing the gates to *ijtihad* again—prevents the Taliban from gaining international recognition and shuts the door on opportunities to grow its domestic legitimacy through the delivery of basic goods, services, and opportunities to Afghans. Unless and until the Taliban changes its repressive position on women’s education, women in the workplace, and women in public spaces generally, one can hardly imagine a scenario in which the Taliban achieves the international recognition it desperately seeks. Recently, the international community has shown distinct cohesion on the issue of women and girls’ rights. Frequent antagonists Russia, China, and the United States, along with the other twelve members of the U.N. Security Council, unanimously condemned the Taliban for banning women from the workplace. The international recognition that the Taliban seeks could not seem further from its grasp.<sup>71</sup> In turn, it is hard to envision that the Taliban will gain the domestic legitimacy it needs.

The authors believe that the Kandahar Shura is currently in firm control and that an internal regime change via factionalism is less than likely. For one, the Haqqani Network, along with other major power brokers in the political wing (such as Baradar) and other military commanders (e.g., acting Minister of Defense Mullah

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<sup>67</sup> See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE (2022), <https://perma.cc/6YFG-298S> (noting that the Haqqani Network is designated as a FTO, unlike the broader Taliban).

<sup>68</sup> See Peter Machtiger, *Legally Available Options: A Case for Indicting Russian Officers for Providing Material Support to the Taliban*, JUST SEC. (Jul. 29, 2020), <https://perma.cc/N98J-XWQR>.

<sup>69</sup> See Press Release, U.S. Dep’t of Treasury, U.S. Treasury Issues General License to Facilitate Economic Activity in Afghanistan (Feb. 25, 2007), <https://perma.cc/URL4-HSNH> (“The GL [General Licenses] aims to ensure that U.S. sanctions do not prevent or inhibit transactions and activities needed to provide aid to and support the basic human needs of the people of Afghanistan and underscores the United States’ commitment to working with the private sector, international partners and allies, and international organizations to support the people of Afghanistan.”).

<sup>70</sup> See Ali Maisam Nazary, *What the Taliban Really Fear*, FOREIGN AFFS. (Aug. 19, 2022), <https://perma.cc/L73D-TQ34>.

<sup>71</sup> See S.C. Res. 2681, ¶ 1 (Apr. 27, 2023) (condemning “the decision by the Taliban to ban Afghan women from working for the United Nations in Afghanistan, which undermines human rights and humanitarian principles”).

Yaqub) would all have to turn on the central leadership simultaneously, risking civil conflict that none of them can easily afford. Additionally, such a conflict would also risk thwarting certain common goals, such as improving Afghanistan's international standing and domestic fiscal situation. Reportedly, some Taliban leaders have attempted ultimately futile negotiations with the Kandahar Shura over rescinding the bans on girls' education and women's employment.<sup>72</sup> Currently, it appears that ideological purism trumps practical considerations of governance. As the Taliban obsesses over its "unwritten puritanical beliefs," the opportunity for it to improve the daily lives of Afghans seems to be on hold indefinitely, begging the question of how long its internal cohesion can last in the face of a humanitarian crisis.

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<sup>72</sup> See Felbab-Brown, *supra* note 5.



