



# Chapter 15: Funding U.S. Military Operations





## FUNDING U.S. MILITARY OPERATIONS

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# FUNDING U.S. MILITARY OPERATIONS

## I. INTRODUCTION.

## II. CONSTITUTIONAL PREDICATE.

### A. President's Power.

1. "The President shall be the Commander in Chief of the Army and Navy of the United States . . . . " U.S. Const. Art. II, § 2, cl. 1.
2. "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." U.S. Const. Art. II, § 2, cl. 2.
3. "[H]e shall receive Ambassadors and other public Ministers . . . ." U.S. Const. Art. II, § 3.

### B. Congress' Power.

1. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ." U.S. Const. Art. I, § 9, cl. 7.
2. "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." U.S. Const. Art. IV, § 3, cl 2.

"An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development assistance, security support programs and U.S. participation in

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international organizations. . . . Hardly any important executive branch decision is taken without consideration of the reaction in Congress.”

Trimble, *The President's Foreign Affairs Power*, 83 AM. J. INT’L. LAW 750 (1989)

### **III. THE NEED FOR EXPRESS LEGAL AUTHORITY.**

#### A. General.

“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”

*United States v. MacCollom*, 426 U.S. 317 (1976).

- B. “Article II Operations”: Inherent Authority? *See, e.g.*, R. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998) and W. Banks & P. Raven-Hansen, *NATIONAL SECURITY LAW & THE POWER OF THE PURSE* 166 (1994).

Traditional vs. Non-Traditional Missions

### **IV. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS.**

#### A. Policy. Presidential Decision Directive (PDD) 25 (May 3, 1994).

##### 1. *General.* PDD 25 addresses the following areas:

- a. Choosing which operations to support.
- b. Defining U.S. policy regarding command and control. *See also* H.R. 1530, § 1301, 104th Cong., 1st Sess. (1995); 31 Pres. Doc. 2234 (Dec. 28, 1995) (Presidential veto of Defense Authorization Bill prevented additional Congressional restrictions on C2 policy in UN operations.)
- c. Reducing U.S. costs for UN peace operations.

- d. Reforming/improving UN management of peace operations.
- e. Improving U.S. management and funding of peace operations.
- f. Creating better cooperation between the Executive & Legislative branches.

2. Funding Provisions.

- a. *Reimbursement.* U.S. will generally seek either direct reimbursement for provision of goods and services or credit against UN assessment. In rare circumstances, U.S. may contribute goods, services, and funds on a voluntary basis. *But see, paragraph B.1.b., infra.*
- b. *Oversight & Management.*
  - (1) Department of State has responsibility for oversight and management of Chapter VI peace operations in which U.S. combat units are not participating.
  - (2) Department of Defense has responsibility for oversight and management of Chapter VI operations in which U.S. forces are participating and for all Chapter VII operations.
- c. *UN Assessments.* No DoD funds may be expended, directly or indirectly, to make a financial contribution to the UN for the cost of a UN peacekeeping activity or for payment of U.S. arrearages to the UN.  
10 U.S.C. § 405.

B. Authorities.

- 1. UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.

- a. *Scope.* Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of the armed forces under Chapter VII of the UN Charter --
- (1) Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.
  - (2) Supplies, Services, & Equipment. Furnishing of facilities, services, or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.
- b. *Reimbursement.* Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. **This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to an assessed peacekeeping operation.**
- c. *Delegation of Authority.* The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206, ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

2. Drawdowns.

- a. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1)* - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to \$100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from \$75M to \$100M).

- b. *FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2)* - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance, antiterrorism, and non-proliferation assistance. (The Security Assistance Act of 2000 increased the amount from \$150M to \$200M and added antiterrorism and non-proliferation to the permissible uses of this authority.) Of that amount, not more than \$75M may come from DoD resources; not more than \$75M may be provided for counternarcotics; and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY 2001 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).
- c. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2)* - Authorizes the President to direct the drawdown of up to \$25,000,000 in any fiscal year of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.
- d. *Iraq Liberation Act of 1998, P.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998)* – Authorizes the President to direct the drawdown of defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations. This assistance may not exceed \$97 million and requires 15 days notice to Congress. President Bush subsequently directed \$92 million in drawdown assistance in 2002. *See*, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002).
- e. *Afghanistan Freedom Support Act of 2002, P.L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002)* – Authorizes the President to direct the drawdown of up to \$300 million of defense articles, defense services, and military education and training for the Government of Afghanistan, eligible foreign countries, and eligible international organizations. This authority is carried out under section 506 of the Foreign Assistance Act. The assistance may also be provided by contract.

3. Details of Personnel.
  - a. *FAA § 627, 22 U.S.C. § 2387.* When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. *FAA § 630, 22 U.S.C. § 2390.*
  - b. *FAA § 628, 22 U.S.C. § 2388.* When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or professional advice or service to the organizations. May be with or without reimbursement. *FAA § 630, 22 U.S.C. § 2390.*
  - c. *22 U.S.C. § 1451.* Authorizes the Director, USIA, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.
  - d. *10 U.S.C. § 712.* Authorizes President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Details may be on a reimbursable or nonreimbursable basis.
4. *Excess Defense Articles (EDA).* Defense articles no longer needed by the U.S. may be made available on a grant basis.

- a. *FAA § 516, 22 U.S.C. § 2321j.* Authorizes both lethal and nonlethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO and non-NATO Southern-flank allies, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518- 520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999)(extending legislation four years).
- b. *Amount* - An aggregate ceiling of \$350M per year. Cost is determined using the depreciated value of the article.
- c. *Transportation:* No-cost space available transportation is authorized for countries receiving less than \$10M FMF or IMET in any FY if a determination is made that it is in the national interest of the United States to do so.

5. *Reimbursable Support.*

- a. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.
- b. *FAA § 632, 22 U.S.C. 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.
- c. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.*, Department of State).

- d. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.
- e. *Leases - AECA §§ 61-62, 22 U.S.C. § 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.
- f. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350* - DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

## **V. DOD HUMANITARIAN & DISASTER RELIEF OPERATIONS.**

- A. Appropriations. \$59M in FY 2004 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under §§401 [only for humanitarian demining], 402, 404, 2557, and 2561 of Title 10 (increase of approx. \$9M from FY 2002 and \$600K from FY 2003). However, funding for activities other than demining under §401 of Title 10 is provided through the general service O&M appropriations. *See*, section 8009 of the FY 04 Defense Appropriations Act, Pub. L. No. 108-87, (Sep. 30, 2003).
- B. Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401 *See also* DOD Dir. 2205.2, 6 Oct. 1994; DOD Instr. 2205.3, 27 Jan. 1995.
  - 1. *Need for Express Authority.*

- a. *41 U.S.C. § 12*: “No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury *appropriated for the specific purpose*.”
  - b. *63 Comp. Gen. 422 (1984)*: “[I]t is our conclusion that DoD’s use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a).”
2. *Scope of Authority*. Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote -
- a. the security interests of the U.S. and the country where the activities will be carried out; and
  - b. the specific operational readiness skills of the servicemembers who will participate in the activities.
3. *Limits*.
- a. May not duplicate other forms of U.S. economic assistance.
  - b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.
  - c. SecState must specifically approve assistance.
  - d. Must be paid out of funds appropriated for HCA.

- e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces.
  - f. Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations" 6 October 1994, para. D.9.
4. *Definition.* HCA means --
- a. medical, dental, veterinary care in rural or underserved areas;
  - b. construction of rudimentary surface transportation systems;
  - c. well drilling and construction of rudimentary sanitation facilities;
  - d. rudimentary construction and repair of public facilities; and
  - e. detection and clearance of landmines, including education, training, and technical assistance.
5. *De minimis* HCA. 10 U.S.C. § 401(c)(4) and DOD Dir. 2205.2, para. E1.1.1.
- a. Provides authority for commanders to react to HCA "targets of opportunity" during the course of a military operation. Such activities must be modest in scope and involve only "minimal expenditures for incidental costs."
  - b. All costs incurred in executing a *De minimis* HCA action are funded from the unit's O&M account.

c. Rule of Thumb: A few soldiers, a few dollars, for a few hours. CINC's may have promulgated specific guidance regarding the level of effort/funding that falls under the definition of *De Minimis* HCA in their AORs.

d. *Examples:*

(1) A unit's doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.

(2) The opening of an access road through the trees and underbrush for several hundred yards, but not the asphaltting of a roadway.

e. *Appropriations.* *De minimis* HCA is funded from the unit's O&M account.

6. *Exercise-Related Construction (ERC) distinguished.*  
10 U.S.C. § 2805(a)(2).

“[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program.*”

S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

7. *Appropriations* Specifically fenced O&M for HCA. Demining, however, uses OHDACA. *De minimis* HCA is funded from the unit's O&M account.

C. Transportation of Humanitarian Relief Supplies for NGOs – 10 U.S.C. § 402.

1. *Scope of Authority.* SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.
2. *Preconditions.* Before transporting supplies, SecDef must determine --
  - a. the transportation of the supplies is consistent with U.S. foreign policy;
  - b. the supplies to be transported are suitable for humanitarian purposes and are in usable condition;
  - c. a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;
  - d. the supplies will, in fact, be used for humanitarian purposes; and
  - e. adequate arrangements have been made for the distribution of the supplies in the destination country.
3. *Limits.* Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

D. Foreign Disaster Assistance - 10 U.S.C. § 404.

1. *Scope of Authority.*
  - a. *General.* President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.



- a. *General.* To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and **other humanitarian purposes worldwide.**
  - b. *Availability of Funds.* To the extent provided in the appropriations acts, OHDACA funds usually remain available for two years.
- 2. *Reports.* Statute contains detailed annual reporting requirements.
  - 3. *Appropriations.* Funded from the OHDACA appropriation.
  - 4. *§2561/401 Distinguished.* If it fits 401 in each and every particular, it's 401 HCA. If not (but humanitarian purpose) it's 2561 HA.

## **VI. CONTACTS AND EXERCISES WITH FOREIGN MILITARIES.**

### **A. Bilateral & Multilateral Conferences, Seminars, & Meetings.**

- 1. *The Need for Express Authority.*
  - a. 31 U.S.C. § 1345: “Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting.”
  - b. 62 Comp. Gen. 531 (1983): “[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word ‘specifically’ Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated.” *See also* B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).
- 2. *Authorities.*

- a. *U.S. Civilian Employees & Military Personnel. See, e.g., 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412.*
- b. *Individuals Performing Direct Services for the Government. GAO, I Principals of Federal Appropriations Law 4-40 to 4-42 (2d ed. 1991); see also B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.*
- c. *Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050. Authorizes the service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.*
- d. *Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051.*

(1) *Scope.*

- (a) *Travel Expenses.* SecDef may pay travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with attendance at bilateral or regional conferences, seminars, or similar meetings if SecDef deems attendance in U.S. national security interest.
- (b) *Other Expenses.* SecDef may pay such other expenses in connection with the conference, seminar, or meeting as he considers in the national interest.

- (c) *Additional Funding Authority.* The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. See DoD Authorization Act for FY 97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.
- (d) *Asia-Pacific Center for Security Studies.* SecDef may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. See § 8081 of the DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2001). See § 1306 of the FY 95 NDAA for similar authority to waive costs for participation of personnel from PfP and EAPC countries in activities of the George C. Marshall European Center for Security Studies.

- (2) *Limits.* Payments under section 1051 are limited to travel within the combatant commander's AOR in which the developing country is located or in connection with travel to Canada or Mexico, but when the combatant command headquarters is in the U.S., expenses may be paid for travel to the U.S.

B. Bilateral & Multilateral Exercise Programs.

- 1. *Developing Countries Combined Exercise Program (DCCEP)* - 10 U.S.C. § 2010.
  - a. *Scope.* After consulting with SecState, SecDef may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --
    - (1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SecDef determines the participation of the participating country is necessary to achieve the “fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . .”

b. *Definition.* “Incremental expenses” are reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country’s participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country’s personnel.

2. Special Operations Force (SOF) Training - 10 U.S.C. § 2011.

a. *Scope.* CINCSOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command --

(1) Expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country.

(2) Expenses of deploying SOF for the training.

(3) The incremental expenses incurred by the friendly foreign country incurred as the result of the training.

b. *Definitions.*

(1) SOF. Includes civil affairs and psychological operations forces.

- (2) Incremental Expenses. The reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

C. Regional Cooperation Programs.

1. *Partnership for Peace (PFP) - DoD Authorization Act for FY 1995, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994) (See also H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994).)* \$30 million appropriated in FY 1995 to Joint Staff to “use existing authorities to the greatest extent possible” to provide assistance to and cooperate with PFP countries. \$40 million in FY 96 and again in FY97. \$44 million appropriated in FY 1998, but to OSD, not Joint Staff.
2. *Cooperative Threat Reduction (CTR) with States of Former Soviet Union (FSU) (“Nunn-Lugar”) - DoD Authorization Act for FY 2002, Pub. L. No. 107-107 §§ 1301-1309 (2001). (See also DoD Authorization Act for FY 1997, Pub. L. No. 104-201, 110 Stat. 2731(1996) (50 U.S.C. § 2362 note) (specifies activities that make up the CTR program). \$400 million of “no-year” money provided for FY 1994 and FY 1995 for various programs to dismantle FSU’s arsenal of weapons of mass destruction. \$300 million appropriated in FY 1996. \$327.9M appropriated in FY 97. \$440.4M for FY 1999, \$460.5M for FY 2000, \$443.4M for FY 2001, and \$403M for FY 2002; all “three-year” money. §§ 1303-1309 of the DoD Authorization Act for FY 2002 retains various limitations including reporting requirements and prohibitions against the use of the funds.*

D. Military-to-Military Contact Program - 10 U.S.C. § 168. Authorizes SecDef to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

E. International Military Education & Training (IMET) - FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d). Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

## VII. SPECIAL AUTHORITIES.

- A. CinC Initiative Funds (CIF) - 10 U.S.C. § 166a. *See* DoD Appropriations Act for FY 2004, Pub. L. 108-87 (2003) (\$30M for CIF in FY 2004 in Defense-wide O&M); Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01A, "CINC Initiatives Fund," 30 January 1999.
1. *Scope.* CJCS may provide to Unified Commanders (including NORAD) sums appropriated for the following activities --
    - a. Force training.
    - b. Contingencies.
    - c. Selected operations.
    - d. Command and control.
    - e. Joint exercises (including the participating expenses of foreign countries).
    - f. Humanitarian and Civil Assistance.
    - g. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).
    - h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.
    - i. Force protection.

2. *Priorities.* CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a Combatant Commander's AOR that would reduce threats to, or enhance, U.S. national security.
3. *Relationship to Other Funding.* Any amount provided as CinC initiatives funds for an authorized activity are “in addition to amounts otherwise available for that activity during the fiscal year.”
4. *Limits.* 10 U.S.C. § 166a(e) Of funds made available --
  - a. No more than \$7 million may be used to buy end items with a cost greater than \$15,000;
  - b. No more than \$1 million may be used to pay the expenses of foreign countries participating in joint exercises;
  - c. No more than \$2 million may be used for education and training to military and related civilian personnel of foreign countries; and
  - d. No funds may be used for any activity for which Congress has denied authorization.

B. Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127.

1. *General.* Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated).

2. *Congressional Notification.* DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of \$1 million and five days advance notice for expenditures or obligations between \$500,000 and \$1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).
  3. *Appropriations.* \$11M for Army; \$4.4M for Navy and Marine Corps; \$7.8M for Air Force; and \$40M for SecDef. DoD Appropriations Act for FY 2004, Pub. L. No. 108-87 (2003).
- C. Contingency Operations Funding Authority. 10 U.S.C. § 127a (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 415 (1996))
1. *Applicability.* Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed \$50 million, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of \$100 million. Does *not* apply to operations with incremental costs not expected to exceed \$10 million.
  2. *Consequences.*
    - a. *Waiver of Working Capital Fund (WCF) Reimbursement.* Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if an activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)
    - b. *Transfer Authority.* Authorizes SecDef to transfer up to \$200 million in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

3. Congressional Notification & GAO Compliance Reviews. Statute contains provisions for both.
  4. Overseas Contingency Operations Transfer Fund. DoD Appropriations Act for FY 2004, Pub. L. No. 108-87 (2003). Appropriates \$5M of “no-year” funds “for expenses directly relating to Overseas Contingency Operations by United States military forces.” These funds may be transferred to O&M accounts, military personnel accounts, Defense Health Program appropriation, procurement accounts, RDT&E accounts, and working capital funds. See DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 12, Special Accounts Funds and Programs, ch. 23, Contingency operations (Feb. 2001).
- D. Combating Terrorism Readiness Initiative Funds. 10 USC § 166b; CJCSI 5261.01B, July 1, 2001.
- a. Section 1512 of the FY 2002 National Defense Authorization Act amends Title 10 to add a new Section 166b. Section 166b codifies the longstanding practice of making funds available for high-priority unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.
  - b. Funds may be used for the following activities:
    - (1) Procurement and Maintenance of physical security equipment;
    - (2) Improvement of physical security sites;
    - (3) Under extraordinary circumstances, funds may be used for physical security management planning, procurement and support of security forces and security technicians, security reviews and investigations and vulnerability assessments, and any other activity related to physical security.
  - c. Priority should be given to emergency or emergent unforeseen high-priority requirements for combating terrorism.

**VIII. SECTION 8065 NOTIFICATION. DOD APPROPRIATIONS ACT FOR FY 2004, PUB. L. NO. 108-87, § 8065 (2003).**

- A. General. Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in conjunction with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation.
- B. Notice Requirement. The notice required includes:
1. A description of the articles or services to be transferred;
  2. The value of the equipment, supplies, or services; and
  3. With respect to a proposed transfer of supplies and equipment, a statement of
    - a. whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and
    - b. whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.
- C. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126), which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about *the diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in “essentially non-defense activities in support of foreign policy.” H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).

D. President's Interpretation. In "acquiescing" in Appropriations Act, President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

E. Scope.

1. *Included Activities.* Section 8065 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include --
  - a. *Acquisition & cross-servicing agreements* during peace and humanitarian assistance operations (10 U.S.C. §§ 2341-2350).
  - b. *Drawdowns* for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).
  - c. *Humanitarian & Civic Assistance* (HCA) (10 U.S.C. §§ 166a(b)(6), 401).
  - d. *Humanitarian Assistance* to the extent the assistance is provided to another nation or an international organization (10 U.S.C. § 2561).
  - e. *Excess nonlethal supplies* for humanitarian relief (10 U.S.C. § 2557).
  - f. *Reimbursable support* to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent that the transfer results in DoD transferring articles or services to another nation or international organization (31 U.S.C. § 1535; FAA § 632).
  - g. Landmine clearance activities (FY 1995 DoD Authorization Act, Pub. L. 103-337, §1413 (1994)).

2. *Excluded Activities.* Section 8065 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include --
  - a. *Exercises* in which the DoD pays the incremental expenses of participating developing countries -- including Partnership for Peace (PFP) exercises (10 U.S.C. § 2010).
  - b. *SOF training* (10 U.S.C. § 2011).
  - c. *Bilateral/regional conferences* and seminars unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1051).
  - d. *LATAM Coop* unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1050).
  - e. *Military-to-military contacts* (10 U.S.C. § 168).
  - f. *EDA authorities* (FAA §§ 516), which already have congressional notice requirements equal to or in excess of 15 days.
  - g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (*e.g.*, coalition operations in time of war).

F. Compliance. DoD complies with section 8065 by --

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or
2. Transferring supplies and services in such operations without congressional notification when --
  - a. Providing disaster relief;

- b. Providing support *without* using funds appropriated to DoD (*e.g.*, “advance-of-funds” basis); or
- c. Providing support under an FMS case.

## **IX. DOMESTIC OPERATIONS.**

- A. Stafford Disaster Relief & Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5204c.
  - 1. Federal Emergency Management Agency (FEMA) has lead. Executive Order 12673, 54 Fed. Reg. 12573 (March 23, 1989).
  - 2. State Governor must request assistance to trigger Act.
  - 3. 42 U.S.C. § 5191.
  - 4. DoD *may* receive reimbursement for assistance provided. 42 U.S.C. §§ 5147-5192(a)(1).
  - 5. DoD may give emergency aid to preserve life and property. 42 U.S.C. § 5170b(c).
- B. DoD Directive 3025.1.
  - 1. Currently, Secretary of the Army is SecDef’s executive agent for managing and executing DoD’s response. *Id.* ¶ D.3.a.
  - 2. The Secretary of Defense must approve the deployment and employment of any combatant command forces. DoD Directive 3025.15, February 1997.

3. The Secretary of the Army, acting through the Directorate of Military Support (DOMS), manages responses. *Id.* ¶ E.7.b.
4. USJFCOM and PACOM are the “DoD Planning Agents.” *Id.* ¶ D.3.c.(3).
5. Responsibilities are currently under review and modification.

## **X. CONCLUSION.**

