

# CHAPTER 10:



# OPERATIONAL FUNDING

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**OPERATIONAL FUNDING**

<b>I.</b>	<b>OBJECTIVES .....</b>	<b>1</b>
<b>II.</b>	<b>INTRODUCTION AND ANALYTICAL FRAMEWORK .....</b>	<b>1</b>
<b>III.</b>	<b>THE CONSTITUTIONAL AUTHORITY TO FUND UNITED STATES MILITARY OPERATIONS .....</b>	<b>3</b>
	A. The President’s Commander-in-Chief Powers .....	3
	B. The Congressional Power of the Purse.....	3
	C. Beyond the Constitutional Framework.....	3
<b>IV.</b>	<b>THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING .....</b>	<b>4</b>
	A. Fiscal Legislative Controls .....	4
	B. Appropriations vs. Authorizations.....	4
	C. “Permanent” vs. “Temporary” Authorizations.....	5
<b>V.</b>	<b>DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS .....</b>	<b>6</b>
	A. The Military’s Role in Funding Foreign Assistance .....	6
	B. Framework for Defense Authorizations and Appropriations. ....	7
	C. Building and Funding Foreign Partners. ....	7
	D. DoD Aid and Assistance to Foreign Civilians .....	24
	E. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO).....	31
<b>VI.</b>	<b>PROPERTY DISPOSAL .....</b>	<b>39</b>
	A. Overview of DoD Property Disposal. ....	39
	B. General Authority and Mechanism for Disposal of DoD Property – 40 U.S.C. 574 and 701 et seq .....	39

C.	Foreign Excess Personal Property (FEPP) – 40 U.S.C. 701(b)(2)(B).....	43
D.	Excess Defense Articles (EDA) Transfers: See section VII.C.2.(c) <i>infra</i> .. <b>Error! Bookmark not defined.</b>	
E.	Iraq/Afghanistan Defense Articles and Services Transfer: 2010 NDAA § 1234 (current extension at 2012 NDAA § 1212).....	45
<b>VII.</b>	<b>DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS (TITLE 22).....</b>	<b>46</b>
A.	Introduction .....	46
B.	Framework for DoS Foreign Assistance Authorizations and Appropriations....	46
C.	Peace & Security Assistance (SA). .....	48
D.	Governing Justly & Democratically .....	55
E.	Humanitarian Assistance. ....	57
<b>VIII.</b>	<b>CONCLUSION. ....</b>	<b>57</b>
	<b>APPENDIX A: OPERATIONAL FUNDING ANALYSIS PART I .....</b>	<b>58</b>
	<b>APPENDIX B: OPERATIONAL FUNDING ANALYSIS PART II .....</b>	<b>59</b>
	<b>APPENDIX C: DOD FUNDING FOREIGN ASSISTANCE .....</b>	<b>60</b>

## **CHAPTER 10**

### **OPERATIONAL FUNDING**

#### **I. OBJECTIVES**

- A. Appreciate the roles and responsibilities of the Department of Defense (DoD) and the Department of State (DoS) in funding military foreign assistance.
- B. Develop tools to analyze and compare the “purpose” of proposed military foreign assistance operations with the “purpose” of particular appropriations and authorizations.
- C. Achieve general familiarity with past and current appropriations and authorizations for military foreign assistance operations.

#### **II. INTRODUCTION AND ANALYTICAL FRAMEWORK**

- A. “Military Operation”
  - 1. Joint Publication (JP) 1-02 defines a military operation as follows: a series of tactical actions with a common purpose or unifying theme; a military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission.
  - 2. JP 3-0, *Joint Operations*, identifies the realm of military operations including, but not limited to, major operations, homeland defense, civil support, show of force, enforcement of sanctions, peace operations, counterinsurgency operations, combating terrorism, foreign humanitarian assistance, and routine/recurring military activities. (see Figure I-2).
  - 3. Army Field Manual (FM) 3.0, *Operations*, is the cornerstone of Army operational doctrine. It discusses “full spectrum operations,” a concept requiring Judge Advocates to be able to assist commanders in understanding the various sources for funding the diverse missions confronting leaders.
  - 4. Joint Publication (JP) 1-02 defines combined, as in combined operations, as between two or more forces or agencies of two or more allies.

- B. Framework for Analysis: The 5 W's of Funding Military Operations with the correct appropriation.



1. Most fiscal issues concerning the funding of “operations” will follow the traditional Purpose-Time-Amount analysis. Primarily this is an in-depth analysis of the “purpose” prong with special emphasis on contingency operations and funding foreign militaries, foreign governments, and other entities not traditionally funded by the military departments’ Operation and Maintenance (O&M) funds.
2. Judge Advocates may find the tools located at Appendices A and B to be helpful when analyzing recommended projects and missions for their commanders in an operational environment. ***While both are intended to provide assistance to the practitioner, neither is a substitute for careful research based on unique facts for each situation.***

### III. THE CONSTITUTIONAL AUTHORITY TO FUND UNITED STATES MILITARY OPERATIONS.

#### A. The President's Commander-in-Chief Powers

Under the U.S. Constitution, the President has the power to conduct foreign affairs, to exercise the Commander in Chief authority, to enter into treaties with other nations, and to receive foreign ambassadors to the United States.

1. U.S. Const. Art II, § 2, cl. 1: "The President shall be the Commander in Chief of the Army and Navy of the United States . . . ."
2. U.S. Const. Art II, § 2, cl. 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 . . . ."

#### B. The Congressional Power of the Purse

Congress can indirectly affect the conduct of foreign affairs by restricting or expanding the appropriated funds available for foreign affairs activities conducted by the executive agencies, including the DoD.

1. *U.S. Const. Art I, § 9, cl. 7*: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ."
2. *U.S. Const. Art IV, § 3, cl. 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 . . . ."
3. *United States v. MacCollom*, 426 U.S. 317, 321 (1976). "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."

#### C. Beyond the Constitutional Framework.

While the Constitution provides the underlying foundation for understanding congressional authority to issue appropriations, Congress further relies upon a robust legislative framework for regulating how those appropriations are expended. In the field of foreign assistance, fully understanding the fiscal legislative framework is critical to determining how to properly fund certain military operations.

## IV. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING

### A. Fiscal Legislative Controls

**For military commanders, there is NO deployment exception to the fiscal law framework!** The same congressionally imposed fiscal limitations regulating the obligation and expenditure of funds for U.S. military forces still applies to funding training and operating with foreign military forces (See Deskbook chapters 2-4). However, Congress requires military commanders to only expend funding for foreign assistance when there is express authority to do so – even during contingency operations.

1. 31 U.S.C. § 1301(a): “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” However, appropriation and/or authorization acts may specifically authorize the secretary to transfer amounts appropriated to other programs, generally with intense congressional oversight.
2. Necessary Expense Doctrine (Three-Part Purpose Test).<sup>1</sup>
  - a. “[T]he expenditure must be reasonably related to the purposes for which the appropriation was made.” (commonly referred to as “necessary and incident”).
  - b. “[T]he expenditure must not be prohibited by law.”
  - c. “[T]he expenditure must not fall specifically within the scope of some other category of appropriations.” (note that this applies even where a more appropriate funding source is exhausted and unavailable).

### B. Appropriations vs. Authorizations

An appropriation is the statutory authority to incur obligations and make payments out of the U.S. Treasury for specified purposes. The appropriation draws the “pot of money” from the U.S. Treasury with a basic purpose attached to it, while an authorization may provide additional purposes for which that “pot of money” may be used.

1. Congress provides an annual National Defense Authorization Act (NDAA) as a vehicle to provide additional authorizations for the funds that are appropriated in

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<sup>1</sup> See *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984). In response to a request for an opinion by Congressman Bill Alexander, the General Accountability Office (GAO) Comptroller General reviewed the use of DoD O&M funds to fully fund the foreign assistance activities of DoD during combined joint military exercises with Honduras.

the yearly DoD Appropriations Act (DoDAA). Many of these additional authorizations exceed the basic purpose of the appropriation to which they were linked.<sup>2</sup>

2. Traditionally, Congress appropriates funds and authorizes additional purposes for those funds in three annual public laws:
  - a. National Defense Authorization Act (NDAA): provides the maximum amounts that may be appropriated to the DoD and additional purposes for which the funds drawn by the appropriations act may be used.
  - b. Department of Defense Appropriations Act (DoDAA): Appropriates funds for annual DoD military activities. These activities are often referred to as “baseline operations.” For FY 2012, DoD funding was enacted as part of a government-wide, consolidated appropriations act.
  - c. Military Construction Appropriation Act (MILCONAA): Appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD.
3. The current DoD authorization and appropriation acts are as follows (as of February 2013):
  - a. 2012 Consolidated Appropriations Act (CAA) [Division A – DoDAA]: Enacted by the President (POTUS) on 23 December 2011. Until a FY 2013 appropriation act is passed into law, DoD funding is being executed under Continuing Resolution Authority (CRA), House Joint Resolution 117.<sup>3</sup>
  - b. 2013 NDAA: Authorizes appropriations for FY 2013 DoD military activities. Enacted by the President on 2 January 2013.

### C. “Permanent” vs. “Temporary” Authorizations

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<sup>2</sup> For example, the FY 2013 NDAA, Sec. 1221, Commander’s Emergency Response Program (CERP) for Afghanistan authorizes military commanders to use available DoD O&M funding, up to \$200,000,000, for small scale projects, urgent humanitarian or urgent reconstruction needs that will benefit the Afghanistan civilian population.

<sup>3</sup> See Fiscal Law Deskbook, Chapter 9, Continuing Resolution Authority (CRA). The CRA, in the absence of an appropriation act, provides Agencies authority to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations. Enacted on 28 SEP 2012, available funding under H.J.Res. 117 will expire on 27 MAR 2013.

1. Permanent appropriations and authorizations are incorporated into U.S. statutory code (e.g., Title 10 for DoD authorities). These are presumed to be permanent until Congress modifies or eliminates the authorization in a later statute.
2. Unlike permanent funding authorities, temporary authorizations are not incorporated into the U.S. Code. Their period of availability is complete unless, or until Congress subsequently re-authorizes the specific funding authority.

## V. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS

### A. The Military's Role in Funding Foreign Assistance

1. **General Rule.** The DoS has the executive responsibility, legal authority, and congressional funding to conduct Foreign Assistance on the U.S. Government's behalf. Foreign Assistance includes Security Assistance to a foreign military or government, Development Assistance for the physical and governmental infrastructure projects benefiting a foreign nation, and Humanitarian Assistance benefiting a foreign population.
2. The DoD has the executive responsibility, legal authority and congressional funding to secure and defend U.S. interests at home and abroad with military forces. Absent express congressional authority, the Secretary of Defense (SECDEF) may only obligate defense funding when it benefits U.S. military forces. In limited circumstances, DoD may only conduct foreign assistance under the following two exceptions: (1) Little "t" training and (2) specific appropriation or authorization from Congress for the DoD to conduct foreign assistance.
  - a. **Little "t" training:** conducting training or instruction for foreign forces with the primary purpose of promoting interoperability, safety, and/or familiarization with U.S. military forces (i.e., interoperability training). Little "t" training primarily benefits U.S. military forces and may therefore be conducted using O&M appropriations.<sup>4</sup>
  - b. **Big "T" training:** Big "T" foreign military security assistance is primarily undertaken to improve a foreign military force's operational readiness; it must therefore be funded with DoS authorizations and appropriations.
    - (1) Evaluation factors: cumulative financial costs, training duration; size of foreign military training force; expected foreign military,

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<sup>4</sup> The Honorable Bill Alexander, *supra* note 1. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations."

training proficiency outcome, training location, and primary training beneficiary.

(2) Examples:

(a) Little “t” training: A two day, airborne insertion exercise involving a company sized element of foreign military paratroopers. The training is of short duration, costs are limited, unit size is small, and training will promote interoperability with U.S. military forces. Certain training expenses may be funded with O&M appropriations.

(b) Big “T” Training: Training a battalion’s worth of foreign military forces to become airborne paratroopers during a month-long airborne training program. The training duration and costs are likely significant, doesn’t promote interoperability/safety and the training primarily benefits the foreign paratroopers. Training expenses will have to be funded using DoS security assistance appropriations, unless DoD has express congressional authority to conduct this training.

c. Statutory Appropriation or Authorization. Express congressional authority for DoD to conduct foreign assistance training and operations under codified statutory authority or a temporary, annual authorization/appropriation.

B. Framework for Defense Authorizations and Appropriations.

Determine whether or not a military commander has authority to conduct foreign assistance operations, JAs should first assess the operation’s nature and type for funding purposes. Since Congress does not provide authorities and authorization in specified categories, it may be helpful to consider funding authorities in three general categories: 1. Building and Funding Foreign Partners, 2. DoD Aid and Assistance to Foreign Civilians, 3. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO). Within these three general categories, JAs will find both permanent and temporary authorities to fund foreign assistance operations. Judge Advocates should be engaged early in the operational planning process to identify how to properly fund these various mission types.

C. Building and Funding Foreign Partners.

Within this functional category, there are two general subgroups of funds. The first group funds joint exercises and training, while the second provides logistical support to

foreign forces. When foreign forces are our partners in contingency operations, Congress may provide temporary authorities that can fund both training and logistical support. The commander's legal counsel assists with determining the proper authority and funding source for providing security assistance to foreign military forces.

1. Combatant Commander Initiative Funds (CCIF): 10 U.S.C. § 166a.
  - a. Purpose: Enables the Chairman of the Joint Chiefs of Staff (CJCS) to act quickly to support the Combatant Commanders (COCOMs) when they lack the flexibility and resources to solve emergent challenges and unforeseen contingency requirements critical to joint war fighting readiness and national security interests.
    - (1) Limited by statute to (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises (including activities of participating countries), (6) humanitarian and civic assistance (including urgent and unanticipated humanitarian relief and reconstruction assistance), (7) military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses), (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities.
    - (2) CJCS priority consideration for:
      - (a) Activities that enhance war fighting capability, readiness, and sustainability of the forces assigned to requestor
      - (b) Activities not within the AOR of a commander that would reduce threat to or increase national security of the U.S.
      - (c) Urgent and unanticipated humanitarian relief and reconstruction- particularly where engaged in contingency operation.
  - b. Time: 1 year O&M funds
  - c. Amount: 2012 CAA (H.R. 2055) not to exceed \$47,026,000 of DoD O&M.

- d. Limitations:
  - (1) No more than \$20,000,000 may be used to buy end items with a cost greater than the expense/investment threshold of \$250,000.
  - (2) No more than \$10,000,000 may be used to pay the expenses of foreign countries participating in joint exercises.
  - (3) No more than \$5,000,000 may be used to provide military education and training to military and related civilian personnel of foreign countries.
  - (4) No funds may be used for any activity which Congress has denied authorization.
- e. Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.<sup>5</sup>
- f. Practitioner Notes:
  - (1) Funding: Funds are controlled by CJCS, and projects are competitively selected from amongst the COCOMs.
  - (2) Common Use: Unforeseen or emergent contingency operation requirements.

2. Subgroup One: Funding Joint and Combined Exercises and Training.

- a. Joint Combined Exchange Training (JCET): 10 U.S.C. § 2011
  - (1) Purpose: Primary purpose is to pay the training expenses for SOF forces assigned to a combatant command. (SOF includes civil affairs and psychological operations forces).
  - (2) Time/Amount: 1 year, Defense Wide, O&M funds; as authorized by Congress.
  - (3) Practitioner's Notes: Where available, the SOCOM Commander or commander of any other specified or unified combatant command may pay any of the following expenses:

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<sup>5</sup> CJCSA 7401.01E (1 July 2009): Combatant Commander Initiative Fund. NOTE: this is a limited release instruction and not for public release.

- (a) Expenses of SOF assigned to that command in conjunction with training, and training with, the armed forces and other security forces of a friendly foreign country.
  - (b) Expenses of deploying SOF for training.
  - (c) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.
  - (d) Includes reasonable and proper cost of goods/services consumed by a developing country as a result of direct participation, such as rations, fuel, training ammunition, and transportation.
  - (e) Does not include pay, allowances, and other normal costs of the country's personnel.
- b. Latin American Cooperation (LATAM COOP): 10 U.S.C. § 1050.
- (1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses considered necessary for Latin American cooperation.
  - (2) Time/Amount: 1 year O&M funds; limited by the services' individual implementing guidance.<sup>6</sup>
  - (3) Approval Authority: SECDEF or Service Secretaries.
- c. African Cooperation: Payment of Personnel Expenses: 10 U.S.C. § 1050a.
- (1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of African countries and other expenses considered necessary for African cooperation.
  - (2) Time/Amount: 1 Year O&M funds
  - (3) Approval Authority: SECDEF or Service Secretaries.

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<sup>6</sup> For the Army, the Deputy Chief of Staff, G 3/5/7, has responsibility for implementing this program. *See* AR 11-31 (24 October 2007).

d. Multilateral, Bilateral or Regional Cooperation Programs: 10 U.S.C. § 1051.

(1) Purpose: to fund the travel, subsistence, and similar personal expenses, of defense personnel from developing countries in connection with the attendance of such personnel at a multilateral, bilateral, or regional conference, seminar, or similar meeting if the SECDEF determines attendance is in the U.S. national security interests..<sup>7</sup>

(2) Approval Authority: SECDEF

(3) Practitioner's Notes:

(a) Authorized expenses may be paid on behalf of developing country personnel only in connection with travel to, from, and within the unified combatant commander's AOR in which the multilateral, bilateral, or regional conference, seminar, or similar meeting for which expenses are authorized is located in or in connection with travel to Canada or Mexico.

(b) In a case where travel is to a unified combatant command HQs located in the U.S., authorized expenses may be paid in connection with travel of personnel to the U.S. to attend a multilateral, bilateral, or regional conference, seminar or similar meeting.

(c) In the case of personnel from a developing country that is not a NATO member and that is participating in the NATO Partnership for Peace (PFP) program, expenses may be paid in connection with the travel of personnel to the territory of any PFP participating countries or territory of any NATO member country.

(d) Expenses paid may not exceed that which would be paid to a member of the U.S. Armed Forces of comparable grade for similar authorized travel.

(e) This authority is in addition to LATAM COOP.

- (f) Funds available to carry out this section shall be available, to the extent provided in an appropriations act, for programs and activities that begin in one fiscal year and subsequently end in the next fiscal year.
- e. Regional Centers for Security Studies (RSC): 10 U.S.C. § 184(f)(3) (DoD Directive 5200.41)
  - (1) Purpose: authorizes SECDEF to waive costs of RSC activities for foreign military officers and foreign defense and security civilian government officials if the Secretary determines that attendance of such personnel without reimbursement is in U.S. national security interests.
  - (2) Funds available for the payment of personal expenses under the LATAM COOP are also available for the operation of the Center for Hemispheric Defense Studies.
  - (3) Time/Amount: Waived costs are paid from appropriations available to the RSCs and funds made available, to the extent provided in an appropriations act, for programs that begin in one fiscal year and are completed in the subsequent fiscal year.
  - (4) Approval Authority: SECDEF
- f. Bilateral & Multilateral Exercise Programs (Developing Countries Combined Exercise Program (DCCEP): 10 U.S.C § 2010 (CJCSM 3500.03C, 15 JAN 2011, Appendix D))
  - (1) Purpose: authorizes the payment of incremental expenses incurred by a developing country as a direct result of participation in a bilateral or multilateral military exercise
  - (2) Time/Amount: funds are available for exercises that begin in a fiscal year and end in the following fiscal year
  - (3) Limitations:
    - (a) Exercise must be undertaken primarily to enhance U.S. security interests; and
    - (b) Secretary of Defense must determine that participation of the country is necessary to achieve the (a) fundamental

objectives of the exercise and (b) those objectives cannot be achieved unless the U.S. pays the incremental expenses

- (4) Approval Authority: SECDEF after consultation with SECSTATE.
- (5) Practitioner's Notes: "incremental expenses" are reasonable and proper costs of goods and services consumed as a direct result of participation in the exercise to include rations, fuel, training, ammunition, and transportation. Pay, allowances, and other normal costs are not included.

3. Subgroup Two: Providing logistical support to foreign forces.

a. Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. § 2341–2350<sup>8</sup> (DoDD 2010.9 and CJCSI 2120.01).

- (1) Purpose: bilateral agreements for the reimbursable mutual exchange of Logistical Supplies, Services, and Support (LSSS) excluding Significant Military Equipment (SME).<sup>9</sup> Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

(a) Two authorities/methods exist:

- (i) Acquisition Only Authority (AoAs) (10 U.S.C. § 2341): Limited authority for SECDEF to acquire LSSS for deployed forces from eligible countries and organizations.<sup>10</sup>
- (ii) Cross-Servicing Agreement (10 U.S.C. § 2342): Permits SECDEF, after consultation with

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<sup>8</sup> See DoDD 2010.9 (28 April 2003): Acquisition and Cross-Servicing Agreements; Implemented by CJCSI 2120.01 (27 November 2006): Acquisition and Cross-Servicing Agreements.

<sup>9</sup> See 10 U.S.C. § 2350, Authorized logistical support includes: food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Logistical support also includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List promulgated under the Arms Export Control Act.

<sup>10</sup> Eligible countries and organizations include: (a) NATO countries, (b) NATO subsidiaries, (c) UN or any other international organization of which the U.S. is a member, (d) any non-NATO member if it has a defense alliance with the U.S, permits stationing of U.S. Forces, allows preposition of U.S. materiel in their country, or serves as host for U.S. military exercises and operations in the country. The Joint Staff J-4 maintains a list of current ACSAs, as well as frequently asked questions and training tools. You may find info at: [https://www.intelink.gov/wiki/Acquisition\\_and\\_cross-servicing\\_Agreements\\_%28ACSA%29](https://www.intelink.gov/wiki/Acquisition_and_cross-servicing_Agreements_%28ACSA%29).

SECSTATE, to both purchase LSSS as well as provide LSSS on a reimbursable basis with eligible countries.

(2) Time:

- (a) Funds may not be obligated for acquisitions beyond or before the period of availability. ACSA orders may not be placed in one fiscal year for a future fiscal year unless a “subject to availability of funds” clause is inserted.
- (b) ACSA reimbursement must be by three methods and within the following time periods<sup>11</sup>:
  - (i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.
  - (ii) Example: DoD provides \$10,000 in tents to a foreign defense department and receives \$10,000 in currency.
- (c) Payment-in-Kind (PIK): Reimbursement must occur within 90 days of initial provision of LSSS.<sup>12</sup>
  - (i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.
  - (ii) Example: DoD provides \$10,000 in tents to a foreign defense department and receives \$10,000 in currency.
- (d) Replacement-in-Kind (RIK): Reimbursement must occur within 1 year of initial provision of LSSS.<sup>13</sup>
  - (i) Defined: the receiving defense department reimburses the providing defense department by providing the same type of LSSS.
  - (ii) Example: DoD provides tents to a foreign defense department and receives the exact same type of tents.

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<sup>11</sup> ACSA authority is the only congressional authorization for DoD to receive direct reimbursement from foreign nations for the costs of DoD-provided support in combined exercises and operations.

<sup>12</sup> DoD FMR, Volume 11A, Chapter 8, para. 080202A.

<sup>13</sup> *Id.* at para. 080202B.

- (e) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial provision of LSSS.<sup>14</sup>
  - (i) Defined: the receiving defense department reimburses the providing defense department by providing LSSS with the same value as the LSSS initially provided.
  - (ii) Example: DoD provides \$10,000 in tents and is reimbursed by the foreign defense department with \$10,000 of fuel.
- (3) Amount: during any fiscal year, DoD is limited to the following amounts in obligations and reimbursable (applies to PIK transactions only, not exchange transactions)
  - (a) Acquisitions from NATO countries, etc. may not exceed \$200,000,000 (with no more than \$50,000,000 for supplies other than petroleum, oil, and lubricants (POL)).
  - (b) Acquisitions from non-NATO countries may not exceed \$60,000,000 (with no more than \$20,000,000 for supplies other than POL).
  - (c) Transfers to NATO countries, etc. may not exceed \$150,000,000.
  - (d) Transfers to non-NATO countries may not exceed \$75,000,000.
  - (e) Waiver: the above limitations are not applicable during contingency operations or non-combat operations (including humanitarian or foreign disaster assistance and UN peacekeeping missions) for the purposes of that operation.
- (4) Approval Authorities:
  - (a) Authority to Enter/Revise Agreements: SECDEF (after consultation with SECSTATE for non-NATO members). Authority may also be delegated CJCS.<sup>15</sup>

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<sup>14</sup> *Id.*

- (b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions.
- (5) Practitioner's Notes:
  - (a) ACSA's may not be used to procure goods or services that are reasonably available from U.S. commercial sources.
  - (b) Size and scope of support under ACSA should be considered in relation to that nation's capability to reimburse the U.S. for the LSSS. Developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS provided there are available U.S. appropriations or authorizations to otherwise fund the request.
  - (c) Common Use: Providing food, transportation, and lodging.
- b. ACSA-Lend Authority: 2012 NDAA §1202 (amending §1203(a), FY 2011 NDAA by extending authority lending authority to 30 SEP 2016).
  - (1) Purpose: Temporary Authority exists to lend military equipment, on a non-reimbursable basis to our coalition partners (1) in Afghanistan; (2) when participating in combined UN peacekeeping operations; or (3) in connection with training for either of the first two categories.
  - (2) Time: This authorization is available until 30 September 2016.
  - (3) Approval Authority:
    - (a) SECDEF designates COCOM CDRs as approval authorities.
    - (b) When lending in connection with training, a notice and wait period is required. SECDEF must submit intent to congressional committees and wait 15 days.

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<sup>15</sup> DoDD 2010.9 para.5 allows Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) to delegate (with coordination) to the CJCS who may further delegate to lead agents. However, all new/revised agreements must still be referred to USD(AT&L) for review and provision of authority to conclude the agreements.

- (4) Practitioner Notes:
- (a) This may NOT be used to lend military equipment to the Afghan military.
  - (b) Requires COCOM determination of “no unfilled requirements” prior to lending.
  - (c) Lend period is for 1 year.
  - (d) Operates as a “reimbursement-in-kind” ACSA transaction, because equipment is returned. By policy, normal wear and tear is acceptable; however, recipient must sign agreement to cover non-routine damage or loss.

c. Global Lift and Sustain: 10 U.S.C. § 127d

- (1) Purpose:
- (a) To provide LSSS, including air-lift and sea-lift, to partner nation forces worldwide in support of the combined operations world-wide (defined below) with U.S. armed forces.
  - (b) To provide LSSS to allied forces solely for enhancing interoperability of logistics support systems of those military forces participating in combined operations with the U.S. Logistical supplies, support and services may also be provided to nonmilitary logistics, security, or similar agency of an allied government if such provision would benefit the U.S. Armed Forces.
- (2) Time: 1 year DoD O&M funds.
- (3) Amount: not to exceed \$100,000,000 per fiscal year (if to support interoperability only, may not exceed \$5,000,000 per fiscal year).
- (4) Approval Authority: Secretary of Defense
- (a) Requires Secretary of State concurrence.
  - (b) Secretary of Defense must determine:

- (i) Provision of LSSS is essential to the success of the combined operation, and
  - (ii) Partner forces would not be capable of participating without the LSSS support
- (5) Practitioner Notes:
  - (a) NOT for joint training exercises — may only be used for combined operations with U.S. forces during active hostilities, as part of a contingency operation, or noncombat operation (such as humanitarian/foreign disaster assistance, country stabilization operation, or UN peacekeeping operation).
  - (b) Not available for OEF/Afghanistan due to the availability of specific temporary authority—Afghanistan Lift and Sustain.
  - (c) DSCA managed program.
- d. Personnel Details: 10 U.S.C. § 712
  - (1) Purpose: authorizes the armed forces to assist in military matters in any foreign nation of North/Central/South America, Republics of Haiti and Santo Domingo, or in any other country during a war or declared national emergency.
  - (2) Time/Amount: on a reimbursable or non-reimbursable basis. No other limits provided.
  - (3) Approval Authority: the President.
- e. Authority to Support Office of Security Cooperation in Iraq (OSCI): 2013 NDAA § 1211
  - (1) Purpose: SECDEF may, with SECSTATE concurrence, conduct non-operational training activities supporting the Iraqi Ministry of Defense and Counter Terrorism Service personnel in an institutional environment
    - (a) To address capability gaps, integrate processes relating to intelligence, air sovereignty, combined arms, logistics and

maintenance and to manage and integrate defense related institutions

(2) Time/Amount: 1 year; \$508,000,000

f. Coalition Support Fund (CSF): (2013 NDAA § 1227; Extension and Modification of Authority for Reimbursement of Certain Coalition Nations for Support Provided to U.S. Military Operations)

(1) Purpose: reimburse key cooperating nations for logistical, military, and other support (including country access) provided to support the U.S. in OEF and OSCI security ops. Reimbursement may be monetary or through “in kind” reimbursement:

(a) Specialized training in connection with operations

(b) Procurement and provision of supplies

(c) Procurement of specialized equipment and loaning of equipment on a non-reimbursable basis

(2) Time: 1 year DoD O&M (Overseas Contingency Operating Budget)

(3) Amount: FY 2013 not to exceed \$1,650,000,000 (support to Pakistan may not exceed \$1.2B)

(4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior notice to Congress (unless reimbursement is for access based on international agreement); No amounts available for obligation before or after 2013 may be used for Pakistan reimbursements under 2008 NDAA § 1233, until SECDEF makes certain certifications to congress about Pakistan’s security cooperation achievements.

(5) Practitioner Notes:

(a) Notably, the CSF includes reimbursements for “access,” and also includes a provision for specialized training, or loan of supplies and equipment on a non-reimbursable basis known as the Coalition Readiness Support Program (CRSP). Thus, the CSF authorization contains components of both training and logistic support.

- (b) Prohibition on reimbursement to Pakistan for support during periods closed to transshipment when the ground lines from Pakistan to Afghanistan were closed to U.S. supply shipments.
  - (c) Funding administered by DSCA.
- g. Afghanistan Lift and Sustain: currently at 2013 NDAA §1216; 2012 CAA § 9006
  - (1) Purpose: Providing supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan. For FY 2013, authority for using these funds to support coalition military operations in Iraq is repealed.
  - (2) Time: 1 year, DoD O&M funds.
  - (3) Amount: not to exceed \$450,000,000.
  - (4) Reporting requirements: SECDEF must provide quarterly reports to the congressional defense committees.
  - (5) Practitioner Notes:
    - (a) Limitation: Separate funding authority to support coalition military operations in Afghanistan.
    - (b) Key distinction between coalition support and lift and sustain funds:
      - (i) CSF: used to reimburse countries for costs they incur.
      - (ii) L&S: used by the military departments to fund costs incurred for services provided to support eligible countries.
- h. Building Partner Capacity (BCP) and Equip Authority: currently at 2013 NDAA § 1201 (sometimes referred to as “Train and Equip” funding authority)

- (1) Purpose: provide equipment, supplies, training and small-scale military construction activities to:
  - (a) build the capacity of foreign military forces in order for that country to: (1) Conduct counterterrorist operations; or (2) Participate in or support military and stability operations in which the U.S. Armed Forces are a participant.
  - (b) build the capacity of a foreign maritime security forces to conduct counterterrorism operations (a new provision in the 2009 NDAA).
- (2) Time: 1 year DoD O&M funds
- (3) Amount: \$100M annually for FYs13 and 14
- (4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior Congressional notification. (NOTE: this has NOT been delegated).
- (5) Practitioner Notes:
  - (a) All programs MUST include elements that promote:
    - (i) observance and respect for human rights and fundamental freedoms and
    - (ii) respect for legitimate civilian authority within that country
    - (iii) available for military forces only, not security forces (though a subsequent amendment authorizes use for maritime security forces).
  - (b) This temporary authority can also be included in the general category of Counterinsurgency/terrorism and Overseas Contingency Operations.
  - (c) FY 2013 NDAA added small-scale military construction activities to the scope of permissible funding activities.

- (i) not more than \$750K may be obligated or expended for small-scale, authorized military construction activities (per project)
  - (ii) Not more than \$25M may be obligated or expended for small-scale military construction activities under all authorized programs (cumulative total)
  
- i. Special Operations Forces (SOF) Support: last reported in 2012 NDAA § 1203 (annual authority extension through FY 2015)
  - (1) Purpose: provides support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing operations by U.S. SOF combating terrorism
  - (2) Time: 1 year DoD O&M funds
  - (3) Amount: \$50,000,000 annually (FY 2012 amount)
  - (4) Approval Authority: SECDEF (may not be delegated)
    - (a) requires the concurrence of the relevant Chief of Mission assigned to the country where the forces, groups, or individuals supporting U.S. SOF are located prior to disbursing funds.
    - (b) SECDEF must notify congressional defense committees within 48 hours of use.
  - (5) Practitioner Notes:
    - (a) Though temporary funding authority exists through FY 2015, JAs need to review annual NDAA for any possible funding changes.
  
- j. Building Capacity of Certain Counterterrorism (CT) forces in Yemen and East Africa: currently in FY 2013 NDAA § 1203
  - (1) Purpose:
    - (a) Enhance Yemen's Ministry of Interior CT forces to conduct CT ops against al Qaeda in the Arabian Peninsula and its affiliates.

- (b) Enhance Djibouti, Ethiopia, and Kenyan the national military forces and security agencies serving a similar defense function, other CT forces, and border security forces to conduct CT ops against al Qaeda, al Qaeda affiliates, and al Shabaab.
  - (c) Enhance the capacity of national military forces participating in the African Union Mission in Somalia to conduct CT ops against al Qaeda, al Qaeda affiliates and al Shabaab.
- (2) Time: 1 year O&M funding
  - (a) Amounts available for a FY may be used for assistance under that authority that begins in such FY but ends in the next fiscal year.
  - (b) Authority under this section may not be exercised after the earlier of
    - (i) The date on which the Global Security Contingency Fund achieves full operational capability
    - (ii) 30 September 2014
- (3) Amount: not more than \$75M to provide assistance; minor military construction – not more than \$10M.
- (4) Authority: SECDEF with SECSTATE concurrence
  - (a) SECDEF shall submit notice to the appropriate congressional committees NLT 30 days before providing assistance under this funding authority
- (5) Practitioner's Notes:
  - (a) Assistance may include the provision of equipment, supplies, training and minor military construction
  - (b) Assistance shall be provided in a manner that promotes
    - (i) Observance of and respect for human rights and fundamental freedoms; and

- (ii) Respect for legitimate civilian authority in the country receiving such assistance
- (iii) SECDEF may not use this funding authority to provide any type of assistance that is otherwise prohibited by any other law provision

D. DoD Aid and Assistance to Foreign Civilians<sup>16</sup>

1. Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561.<sup>17</sup>
  - a. Purpose: The Overseas Humanitarian, Disaster and Civic Aid (OHDACA), <http://www.dsca.mil>, appropriation supports the SECDEF and COCOMs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners. The appropriation provides low cost, non-obtrusive and highly effective activities that help partners help themselves, improves access to areas not otherwise available to U.S. Forces, and build collaborative relationships with host nation's civil society.
  - b. Time/Amount: Generally 2 year funds.
    - (1) The FY 2013 OHDACA budget estimate requests a total of \$108.8 million to finance the humanitarian assistance and mine action programs as well as foreign disaster relief initiatives
    - (2) 2012 DoDAA: \$107,662,000 (available until 30 September 2013)
2. Individual Authorizations:
  - a. 10 U.S.C. § 401: Humanitarian and Civic Assistance (HCA)<sup>18</sup>
    - (1) Purpose: provide HCA in Conjunction with Military Operations.

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<sup>16</sup> See The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. general authority for humanitarian assistance for civilian populations.

<sup>17</sup> Defense Security Cooperation Agency (DSCA) manages the OHDACA appropriation. DoD 5105.38-M, Security Assistance Management Manual (SAMM) contains guidance for DoD's civilian assistance programs.

<sup>18</sup> See DoDI 2205.02, Humanitarian and Civic Assistance Activities, 2 December 2008 (establishing DOD policy and assigning responsibility for conducting HCA activities).

- (a) Secretary concerned must determine that HCA activities will promote both U.S security interests and the country where such activities will be carried out, while also utilizing specific U.S. servicemembers operational readiness skills to conduct the activities.
  - (b) U.S. Armed Forces personnel participate in HCA activities to create strategic, operational, and/or tactical effects that support a COCOM's objectives in theater security cooperation or designated contingency plans while concurrently reinforcing skills required for the operational readiness of the forces executing the HCA mission. U.S. military occupational specialists shall provide services relevant to their specialty.
  - (c) HCA activities include providing:
    - (i) Medical, surgical, dental, veterinary care in rural or underserved areas (includes training of such care);
    - (ii) Construction of rudimentary surface transportation systems;
    - (iii) Well drilling and construction of rudimentary sanitation facilities;
    - (iv) Rudimentary construction and repair of public facilities<sup>19</sup>
- (2) Funding: Section 401 requires “specific appropriations to carry out HCA activities. There are three sources of “specific” funding for section 401 projects:
- (a) The OHDACA appropriation expressly funds section 401.
  - (b) 2012 DoDAA §8011: O&M is appropriated for 401 purposes in two ways.

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<sup>19</sup> In FY07, DoD sought express language in 10 U.S.C. § 401 to authorize certain types of communications and information technology (IT) assistance. Although Congress did not add the language, the Joint Explanatory note to the FY07 NDAA noted that “restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance....rudimentary construction and repair of public facilities...includes information and communications technology as necessary to provide basic information and communication services.”

- (i) Annual DoD O&M HCA funding request:
- (ii) Incremental expenses incurred as a direct result of providing HCA (other than minimal cost HCA) to a foreign country shall be paid for with funds specifically appropriated for such purposes (included in Military Department O&M accounts)
  - (a) The 2012 DoDAA states that “funds may also be authorized for costs *incidental to authorized operations and pursuant to authority granted in section 401...*” (emphasis added).
  - (b) Funding “incidental” costs of HCA. Both section 401 and its annual appropriation from O&M contain language about funding “costs incidental to authorized operations ... in section 401.”<sup>20</sup> OHDACA or O&M funds may be expended for “incidental costs” associated with conducting HCA activities.
  - (c) Unauthorized HCA expenses that cannot be paid from HCA funds include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and equipment repair). These costs are covered by funds available for the military op.
  - (d) Other unauthorized expenses include salaries of host-nation participants and per diem expenses of U.S. Armed Forces conduct HCA activities.

(3) Approval Authority:

- (a) The Undersecretary of Defense for Policy’s is responsible for reviewing and approving proposed HCA project

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<sup>20</sup> The specific language in 10 USC 401(c)(4) is, “Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated..., except that funds appropriated to the [DoD] for operation and maintenance... may be obligated for humanitarian and civic assistance under this section *only for incidental costs of carrying out such assistance.*” (emphasis added).

submissions, in coordination with the Joint Chiefs of Staff Chairman to ensure regulatory compliance. COCOM's are responsible for ensuring that HCA projects costing more than \$10,000 are conducted with SECSTATE's approval.

- (b) Minimum cost HCA: Combatant commander's determination whether an expenditure is minimal:
  - (i) For activities within their respective AORs.
  - (ii) In the exercise of the Commander's reasonable judgment.
  - (iii) In light of the overall cost of the military operation in which such expenditure is incurred.
  - (iv) For an activity that is incidental to the military operation.
- (c) Minimum Cost HCA examples:
  - (i) A unit 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 purpose of providing mass inoculations to the local populace.
  - (ii) The opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of a roadway.
- (d) Practitioner's Notes:
  - (i) Must have SECSTATE approval (though DoDD 2205.10 does not require State's approval for "minimal cost HCA.")
  - (ii) Limitations: (1) cannot duplicate other forms of U.S. economic assistance; (2) not for military or paramilitary activities; (3) expenses may not include costs of the military operation that would have occurred regardless of the HCA.

(iii) Because HCA may be funded with O&M appropriations, the Defense Security Cooperation Agency (DSCA) does expend OHDACA funds on authorized HCA activities. However, all HCA projects are reported to DSCA for accountability purposes.

b. 10 U.S.C. § 402: Transportation of Humanitarian Relief Supplies to Foreign Countries (a.k.a., Denton program).

(1) Purpose: SECDEF may transport to any country, without charge,<sup>21</sup> supplies furnished by NGO's for humanitarian assistance on a space-available basis.

(2) Practitioner's Notes: Before transporting supplies, SECDEF must determine:

(a) The transport of the supplies is consistent with U.S. foreign policy;

(b) The supplies are suitable for humanitarian purposes and in usable condition;

(c) Legitimate humanitarian need exists for the supplies by the people for whom intended;

(d) 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.

(f) Coordinate with DoS during the application process.

(g) The program is not designed or intended for the transport of private sector commodity donations to disaster areas -- where civil systems, local infrastructure or logistics resources may be compromised due to a natural or civil disaster. USAID, DOS and DOD will review the circumstances in the destination country, and the application, to determine whether or not a commodity

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<sup>21</sup> 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for incurred transportation costs.

donation should be transported by the Denton Program to the area of the disaster

c. 10 U.S.C. § 404: Foreign Disaster Assistance

- (1) Purpose: POTUS 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 or serious harm to the environment. Assistance provided may include transportation, supplies, services, and equipment.
- (2) Approval Authority: SECDEF shall only provide HA at POTUS' direction; or with SECSTATE concurrence; or, in emergency situations in order to save human lives where there is not sufficient time to seek SECSTATE's prior initial concurrence. SECDEF shall seek SECSTATE's concurrence as soon as practicable.<sup>22</sup>
- (3) Practitioner's Notes:
  - (a) Within 48 hours of commencing relief activities, POTUS must transmit a report to Congress.
  - (b) Transportation under this authority may only be provided if other sources to provide such transportation are not readily available.

d. 10 U.S.C. § 407: Humanitarian Demining Assistance and Stockpiled Conventional Munitions Assistance<sup>23</sup>

- (1) Purpose: to carry out humanitarian demining and stockpiled conventional munitions assistance if a Service's Secretary determines that it will promote either U.S. security interests in a particular country, or the operational readiness skills of the armed forces who participate in the activities.
- (2) Time/Amount: No more than \$10,000,000 may be spent for equipment, services, and supplies for humanitarian demining activities per year.

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<sup>22</sup> Executive Order 12966 (60 Fed. Reg. 36949) (July 14, 1995).

<sup>23</sup> FY 2012 NDAA § 1092 amended 10 USC § 407 to include "stockpiled conventional munitions assistance."

(3) Approval Authority: Service Department Secretary with specific Secretary of State approval.

(4) Practitioner's Notes:

(a) Activities conducted under this authority shall complement, but may not duplicate other forms of social or economic assistance already being provided for in the receiving country.

(b) Expenses covered include: travel, transportation, and subsistence expenses of DoD personnel; equipment, supplies, and services acquired for the activities.

e. 10 U.S.C. § 2557: Excess Non-Lethal Supplies.

(1) Purpose:

(a) SECDEF may make available for humanitarian relief purposes any nonlethal, excess supplies. SECDEF may also make nonlethal, excess supplies available to support domestic emergency assistance activities.

(2) Practitioner's Notes:

(a) Excess supplies made available for humanitarian relief under this section will be transferred to SECSTATE for distribution.

(b) Excess supplies made available for domestic emergency assistance activities shall be transferred to Secretary, Department of Homeland Security.

(c) Nonlethal Excess Supplies = property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment/material designed to inflict serious bodily harm or death.

f. 10 U.S.C. § 2561: Humanitarian Assistance (HA).

(1) Purpose: Funds authorized to be appropriated to DoD for HA shall be used for providing humanitarian relief transportation and for other worldwide humanitarian purposes.

- (a) SECDEF may transport supplies intended for use or respond to or mitigate the effects of an event or condition that threatens serious environmental harm.
  - (i) ONLY if other transportation sources aren't readily available.
  - (ii) SECDEF may require reimbursement for incurred transportation costs.
- (2) Time/Amount: To the extent provided in appropriation acts, funds remain available until expended. FY 2013 NDAA authorizes \$108,759,000, OHDACA funding.
- (3) Practitioner's Notes:
  - (a) Authorized HA activities may include construction or refurbishment of local infrastructure facilities, disaster preparedness or refugee repatriation training, exercises or seminars, assessment visits, and technical and logistics assistance for foreign recipients.
  - (b) Activities and operations may be executed by contractors rather than Servicemembers. This authority distinguishes HA from HCA, because HCA is only authorized when the authorized activities are being conducted to train and develop U.S. Servicemembers MOS readiness skills.
  - (c) As a transportation authority, section 2561 is the primary means to ship goods and supplies donated by NGOs/private charities to foreign countries on a funded basis. OHDACA funds all costs of transportation, and there is no "space available" requirement.
  - (d) Section 2561's transportation authority is often used in conjunction with section 2557 to ship the non-lethal excess supplies to a recipient country.

E. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO).

- 1. Commander's Emergency Response Program in Afghanistan (CERP): 2013 NDAA §1221; 2012 DoDAA §9005

- a. Purpose:
  - (1) Authorizes U.S. military commanders in Afghanistan to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements and provides an immediate and direct benefit to the people of Afghanistan.”
  
- b. Time/Amount: 1 year funds
  - (1) FY 2013 NDAA: \$200M
  - (2) FY 2012 CAA: \$400M
  
- c. Implementing Guidance: DoD FMR Vol 12, CH. 27 (Note: the current version is from January 2009—Judge Advocates must ensure that guidance in the FMR, until updated, does not conflict with the most recent legislation.)
  - (1) Specific Purposes: includes, but not limited to:
    - (a) water & sanitation, food production & distribution, agriculture/irrigation, electricity, healthcare, education, telecommunications, economic, financial management improvements, transportation,
    - (b) rule of law & governance, civic clean-up, civic support vehicles, repair civic & cultural facilities, other humanitarian reconstruction projects, battle damage, condolence payments, temporary contract guards for critical infrastructure.<sup>24</sup>
  - (2) Specific Prohibitions:
    - (a) direct or indirect benefit to US or coalition military forces; goods/services/funds to national armies; entertainment; purchase of firearms/ammo/UXO;
    - (b) rewards; duplicative services; salaries/pensions for government employees; Psychological Operations; direct support for individuals or individual businesses.

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<sup>24</sup> Exhaustive list is contained in DoD FMR vol 12, chp 23 para 270104. Contains DoD guidance for CERP and primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures.

d. Approval Authority: as designated by theater specific policy in Afghanistan. Authority is tiered by level of command and dollar amount. Most recently, the following approval authority applied to higher dollar amount projects:

- (1) Projects up to \$100K, O-5 U.S. CDRs
- (2) Projects up to \$500K, O-6 CDRS
- (3) Projects up to \$1M: USFOR-A, CDR; USFOR-A, DCDR; USFOR-A, DCDR-S; SR U.S. CDR in each RC (except RC-C)
- (4) Projects \$5M: Commander, CENTCOM (may be delegated to the Commander, USFOR-A)

e. Limitations:

- (1) No CERP project, to include any ancillary or related elements of the project, may be in excess of \$20,000,000.
- (2) Projects  $\geq$ \$5,000,000:
  - (a) Require 15 days prior written notice to Congressional Defense Committees of:
    - (i) Location, nature, purpose of proposed project, including how it is intended to advance the military campaign plan
    - (ii) Budget and implementation timeline
    - (iii) Sustainment plan
  - (b) Require approval of the Afghanistan Resources Oversight Council (AROC) of the DoD. (see 2012 DoDAA §9009)
- (3) Construction: DoD FMR para 270102 no longer includes the concept of “build” and instead focuses on “reconstruction” and “restoration.” Judge Advocates should look to the most recent Money As A Weapon System-Afghanistan (MAAWS-A) SOP for guidance (USFOR-A, PUB 1-06, CERP SOP, March 2012).

- f. Practitioner's Notes:
  - (1) CERP focus is on small-scale projects that immediately assist the local population and are sustainable. DoD FMR describes small-scale projects as those that are less than \$500K per project.
  - (2) Urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action.
  - (3) Section 1201 of the 2012 NDAA contains authority for the Secretary of Defense to waive any other provision of law that would prohibit, restrict, limit, or otherwise constrain exercise of the CERP authority.

2. Reintegration Activities in Afghanistan: currently in 2013 NDAA §1218

- a. Purpose: to support the reintegration into Afghan society of those individuals who pledge—
  - (1) To cease all support for the insurgency in Afghanistan
  - (2) To live in accordance with the Constitution of Afghanistan
  - (3) To cease violence against the Government of Afghanistan and its international partners, AND
  - (4) Have no material ties to al Qaeda or affiliated transnational terrorist organizations.
- b. Time: authority through 31 December 2013
- c. Amount: no more than \$35M for FY 2013
- d. Limitations:
  - (1) 2012 NDAA §1219 requires that no more than 50% of funds available may be used until SECDEF, in consultation with SECSTATE, certifies to Congress that women are an “integral part of the reconciliation process” with GIRoA and the Taliban.
- e. Practitioner Notes:

- (1) This authority was initially created as an authorized use of CERP in FY 2010 NDAA §1222. The MAAWS-A includes a separate
3. Afghanistan Infrastructure Fund (AIF): currently at 2013 NDAA §1219
  - a. Purpose: to develop and carry out infrastructure projects in Afghanistan:
    - (1) Water, power, and transportation projects and related maintenance and sustainment costs;
    - (2) Other projects in support of the counterinsurgency strategy in Afghanistan
  - b. Time:
    - (1) FY 12 funds through 30 September 2013
    - (2) FY 13 funds through 30 September 2014
  - c. Amount: \$400M for FY 12 funds; \$350M for FY 13 funds
  - d. Limitations: SECDEF may not use more than 50% of amount authorized until submitting a plan, after consulting SECSTATE, to the appropriate congressional committees
  - e. Practitioner Notes:
    - (1) Projects will include an estimate of the financial and other requirements necessary to sustain such project on an annual basis after project completion.
    - (2) Congressional notification of 30 days prior is required before obligating or expending funds to carry out a project or transfer to DoS.
4. Assistance in Combating Terrorism Rewards Program: 10 U.S. C. § 127b
  - a. Purpose: SECDEF may pay a monetary amount, or provide a payment in kind, to a person as a reward for providing USG personnel, or allied forces, participating in a combined operation with U.S. armed forces, with information or non-lethal assistance is beneficial to:

- (1) An operation or activity of the armed forces, or an allied force, participating in a combined operation with U.S. forces, conducted outside the U.S. against international terrorism; or
  - (2) Force protection of the armed forces or of allied forces participating in a combined operation.
- b. Time: 2012 NDAA § 1033 reauthorizes O&M funding for this authority until 30 September 2013.
- c. Amount: An individual award cannot exceed \$5 million
- d. Approval Authority: SECDEF is the primary approval authority. (SECSTATE concurrence required for awards over \$2M.) Also by statute, SECDEF may delegate this authority as follows:
  - (1) To the Deputy, SECDEF or an Under SECDEF without further redelegation; and
  - (2) To the COCOM Commander authority to approve individual awards not in excess of \$1M. The COCOM Commander may further delegate (with SECDEF or primary delegate approval) authority to approve individual awards up to \$10,000 to his or her deputy commander or to a direct subordinate commander.
- e. Practitioner's Notes:
  - (1) Implemented in DoD FMR vol 12, ch 17
  - (2) Not a weapons buy-back program.
  - (3) U.S. citizens, U.S. officers/employees, or employees of a contractor of the U.S. are not eligible to receive rewards.
- 5. Theater regulations will provide delegation amounts to subordinate commanders.
- 6. Afghanistan Security Forces Fund (ASFF): currently in 2013 NDAA § 1531; 2012 CAA (Title IX Overseas Contingency Operations)
  - a. Purpose: Provide assistance, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, Facility and infrastructure repair, renovation, and construction, and funding.

- b. Time/Amount:
  - (1) 2012 CAA: \$11.2B (avail. thru 30 Sep 2013)
- c. Approval Authority: Commander, Combined Security Transition Command-Afghanistan (CSTC-A)
- d. Limitations:
  - (1) no funds may be obligated until approval of a financial and activity plan by the DoD's Afghanistan Resources Oversight Council (AROC).
  - (2) AROC must approve all annual service requirements over \$50,000,000 and any non-standard equipment request over \$100,000,000.
- e. Practitioner Notes:
  - (1) Funds available to the Department of Defense for the Afghanistan Security Forces Fund for FY 2013 shall be subject to the conditions contained in subsections (b) through (g) of section 1513 of the NDAA for FY 2008 (P.L. 110-181; 122 Stat. 428), as amended by section 1531(b) of the Ike Skelton NDAA for FY 2011.
  - (2) Security Forces of Afghanistan: those forces under the control of the GIRoA:
    - (a) Afghanistan National Army (ANA),
    - (b) Afghanistan National Police (ANP),
    - (c) Afghanistan Local Police (ALP)
    - (d) Afghanistan Public Protection Force (APPF)

7. Pakistan Counterinsurgency Fund (PCF): currently 2012 NDAA § 1228.

- a. Purpose: to build and maintain the counterinsurgency capability of Pakistan forces through the provision of "assistance (including program management and the provision of equipment, supplies, services, training,

facility and infrastructure repair, renovation, and construction) to the security forces of Pakistan (including military forces, police forces, and the Frontier Corps)”

b. Time/Amount:

- (1) 2011 DoDAA: \$800M through 30 September 2013.
- (2) 2010 NDAA § 1224 re-authorized appropriated funds in 2009 through Sept. 30, 2010. Authorized transfer authority:
  - (a) Additional amounts may be transferred to the fund by SECSTATE.
  - (b) SECDEF may transfer from the PCF to other funds where PCF will adopt the purpose of the fund to which transferred.

c. Limitations:

- (1) Assistance must be provided in a manner that promotes observance of and respect for human rights and fundamental freedoms and respect for legitimate civilian authority in Pakistan.
- (2) None of the funds authorized to be appropriated by the FY 2013 NDAA , or otherwise available for the PCF may be used to provide assistance to the Pakistan government until SECDEF, in consultation with SECSTATE, makes certain certifications expressed in the Act.

d. Approval Authority: SECDEF with SECSTATE concurrence

8. Office of Security Cooperation-Iraq (OSC-I) Support: 2013 NDAA § 1211 and 2012 CAA §9013

a. Purpose: life support, transportation and personal security, construction and renovation of facilities for

- (1) operations/activities of OSC-I;
- (2) operations and activities of security assistance teams in Iraq

- (3) Non-operational training activities supporting the Iraqi MoD and CT Service personnel in an institutional environment to address capability gaps, integrate processes relating to intelligence, air sovereignty, combined arms, logistics and maintenance, and to manage and integrate defense-related institutions.

b. Time/Amount: \$508M for FY 2013

c. Practitioner Notes:

- (1) SECDEF must provide 15 day prior written notice to the appropriate congressional defense committees with detailed justification and timeline for each proposed funding requirement.

## VI. PROPERTY DISPOSAL

A. Overview of DoD Property Disposal.

1. Statutory authority is required for any transfer or sale of government owned or purchased property, particularly if transferred to a foreign military, government, or population. The Federal Property and Administrative Services Act apply to both real and personal property; this outline focuses on personal property disposition.
2. Disposing excess personal property is a statutory driven process. This process involves reutilization, transfer, donation, and sale (R/T/D/S), and if none of these are possible, abandonment/destruction (A/D) through “donation” or disposal contracts. The order in which these various activities are executed and the priority assigned to potential recipients or transferees is also mandated. Reutilization screening within the DoD must occur before excess property can be considered for transfer, donation, or sale. Transfer to federal civilian agencies must also be considered before excess property can be offered for sale. Finally, no excess property can be put on a disposal contract unless the property is not eligible for a “higher priority” process, or the opportunities for such transfers have been exhausted, and the property is not wanted by a qualified higher priority transferee.

B. General Authority and Process: 40 U.S.C. § 501-574 and 701 et seq.

1. Purpose:

- a. Gives the GSA Administrator responsibility for managing USG-owned property, to include procurement, storage, use, and disposition.<sup>25</sup>
- b. Within DoD, excess property disposal authority has been delegated to the Defense Logistics Agency (DLA) Disposition Services to establish a standardized process for the disposal of durable (investment item) DoD property (including military equipment) purchased with appropriated funds.
- c. For property located overseas, agency heads are given responsibility for management of property owned by their agency subject to the requirement that such use and disposition be consistent with US foreign policy (*see* 40 U.S.C. §701).
- d. Relevant Statutory and Regulatory Definitions:<sup>26</sup>
  - (1) Surplus: excess property that is no longer required to meet the needs or responsibilities of *any* federal agency.
  - (2) Excess: property that is not required to meet the needs of the federal agency that initially procured the property, but may be required by other federal agencies. For example, with respect to DoD property, “excess” means property no longer needed by any DoD component. However, note that individual service regulations will define “excess” as property no longer needed by that individual service component, thus warranting turn-in to Disposition Services. From a statutory perspective; however, property is not “excess” unless it is not required by an component or activity within that Agency.
  - (3) Disposal: the reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.
  - (4) Foreign Excess Personal Property (FEPP): excess property that is not located in the States of the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands. FEPP includes all personal property held by the agency regardless of property class or type.

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<sup>25</sup> The Secretary of Defense may exempt itself for national security purposes (see § 501).

<sup>26</sup> 40 U.S.C. § 102.

- (5) Reutilization: when an element of a federal agency receives ownership of, and reuses, federal government property that was initially procured by another element of the same federal agency. Within DoD, “reutilization” means transfer to another military service or DoD component, or transfer under a program that has top level priority (Priority 1) per statutes applicable to DoD property.
- (6) Transfer: when a federal agency receives ownership of federal government property that was initially procured by another federal agency. Within DoD such transfers are referred to as Federal Civilian Agency (FCA) transfers.
- (7) Donation: when surplus federal government property is given to authorized state governments/agencies, or to a small group of designated private organizations.
- (8) Property: limiting definition which excludes certain real property and also expressly excludes certain military items such as “naval vessels that are battleships, cruisers, aircraft carriers, destroyers, or submarines.” Likewise, it excludes “records of the Government.”
- (9) Usable Sales: sales of federal government property to the general public for full use in the manner originally intended.
- (10) Scrap Sales: sales of federal government property to the general public for use of the components.
- (11) Abandoned: federal government property without any private or public value.<sup>27</sup>
- (12) Destroyed: federal government property that may not be sold or abandoned and must be destroyed. In cases where property is not appropriate to be transferred to other parties, or there are no eligible parties interested in a no cost transfer/abandonment, the agency must pay for property destruction (e.g., hazardous and non-recyclable wastes).

## 2. Limitations:

- a. The disposal procedure chosen for a specific piece of government property must conform to all DoD and USG statutory and regulatory restrictions.

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<sup>27</sup> Proper procedures for abandonment and destruction are found in DoD 4160.21-M, Chapter 8.

Although Disposition Services may “abandon” some types of government property, it may not “abandon” an article that is a defense article (for example: a nuclear warhead), because this would violate statutory and regulatory procedures for the disposal of such items. Before transfer or donating FEPP to a foreign government, world-wide DoD screening must fail to produce results unless the requirement to screen the property has been properly waived.<sup>28</sup>

- b. Property is requisitioned on an “as is/where is” basis.<sup>29</sup>
- c. Non-DoD requestors and purchasers must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the property. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

3. Practitioner Notes:

- a. Disposition Services co-locates its subordinate Disposition Services Officers (formerly DRMO’s) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.
- b. DLA Disposal Process: In accordance with statutorily mandated policies, Disposition Services assigns the following four priorities to government elements requesting Disposition Services –managed property (*See* DRMS-I 4160.14):
  - (1) Priority 1 – Reutilization: Initial 14-day window where DoD property that is turned into disposition services may only be requisitioned by another DoD component or designated non-DoD “Special Programs” such as the DoS Foreign Military Sales (FMS) program.<sup>30</sup>
  - (2) Priority 2 – Transfer: the next 21-day window where property not reutilized during priority 1 phase may be requisitioned by another USG agency.

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<sup>28</sup> DoD 4160.21-M, Ch. 9.

<sup>29</sup> *See* DRMS-I 4160.14.

<sup>30</sup> Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

- (3) Priority 3 – Donation: the next 5-day window where property not transferred to another USG agency may be donated to an approved state government or organization.
- (4) Priority 1-3 “Final Screening”: the 2-day window where property not donated undergoes a final screening and “last chance” requisition window for all priority 1-3 components, agencies, and approved governments and organizations.
- (5) Priority 4 – Sales: window of time where property not requisitioned during priority 1-3 periods may be now sold to the general public via “usable sales” or “scrap sales.” Property with military capabilities must be demilitarized to be eligible for sale. If unable to demilitarize, the property must be destroyed.
- (6) Abandonment or Destruction: property not requisitioned during priorities 1-4 may now be abandoned or destroyed. Abandonment includes the “donation in lieu of abandonment” process for property utilizing the Economy formula which essentially provides that property may be given away when efforts at sale have failed or the cost of its care and handling incident to sale would exceed any estimated proceeds. This is a “cost avoidance” principle. However, ordinary limitations on transfer apply precluding release of such items as defense articles or hazardous waste to the public.

C. Foreign Excess Personal Property (FEPP) – 40 U.S.C. 701(b)(2)(B).

1. Purpose: an overview of requirements and transfer
  - a. Authorizes the head of an executive agency to “dispose of foreign excess property in a manner that conforms to the foreign policy of the United States.”<sup>31</sup>
    - (1) SECDEF may dispose of foreign excess property by sale, exchange, lease, or transfer, for cash, credit or other property, with or without warranty, under terms and conditions set forth in DoD regulation.
  - b. Statutory and regulatory laws apply to FEPP disposal, regardless of whether these operations are conducted in an OCONUS garrison environment, or in a contingency operations location (e.g., a Forward Operating Base or Logistical Supply Area).

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<sup>31</sup> Defense Material Disposition Manual, DoD 4160.21-M, Chp. 9, provides DoD guidance on FEPP disposal.

- (1) There is greater ability to vary screening and reutilization processes in the operational setting in order to meet operational needs or due to resource limitations.
- c. Concurrence must be obtained from the DoS and potentially the host nation government prior to conducting public sales of surplus property on the local economy.<sup>32</sup> When DoD brings property into the territory of the host nation, it does so “duty free.” The later transfer or sale of excess property to private parties in the host nation ordinarily triggers the incidence of import taxes or duties as the property loses its agreed upon tax exemption status.
  - d. Examples of excess property that may become eligible for transfer to a foreign government include:
    - (1) A “donation of medical supplies to a non-profit medical or health organization” IAW 40 U.S.C. §703<sup>33</sup>;
    - (2) In “exchange for substantial benefits or the settlement of claims,” in accordance with 40 U.S.C. § 704(b)(2)(B), if properly approved by ASD (L&MR); or,
    - (3) As a donation in lieu of abandonment IAW 40 U.S.C. § 704(b)(3) and DoD 4160.21-M, Chp. 8.
2. Time/Amount for “Substantial Benefits” FEPP Transfers:
    - a. Implemented by delegation memorandum in response to specific FEPP transfer requests. Often such authorities provide “blanket” authority for a certain period or as long as certain conditions apply in the operational setting.
  3. Practitioner Notes:
    - a. FEPP is a distinct category of property not to be confused with “excess and surplus.”<sup>34</sup> This distinguishing definition is important to practitioners, as the process required by law and statute for “excess and surplus” and “FEPP” may be different. However, the standard R/T/D/S processes

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<sup>32</sup> See DoD 4160.21-M, ch. 9.

<sup>33</sup> The donation must be made to a nonprofit medical or health organization, which may be an organization qualified to receive assistance under section 214(b) or 607 of the Foreign Assistance Act of 1961 (22 U.S.C. 2174(b), 2357).

<sup>34</sup> DoD 4160.21-M, ch. 9, para. A(1).

should also apply to FEPP management and disposition unless waivers have been obtained.

- (1) Screening waivers are often granted in conjunction with the grant of specific FEPP transfer authority in the operational setting. This is often due to system and resource limitations for conducting federal civilian agency and state agency screening in a contingency operation environment.

D. Authority to Transfer Defense Articles and Provide Defense Services to Afghanistan Military and Security Services: 2013 NDAA § 1222

1. Purpose: Transfer non-excess defense articles from DoD stock levels w/o reimbursement to GoIRA and provide defense services in connection with the transfer of such defense articles to the Afghanistan military and security forces to restore and maintain peace and security. The transfer authority under this section is in addition to Foreign Assistance Act 1961, section 516 transfer authority (Authority to Transfer Excess Defense Articles).
2. Time: authority expires Dec. 31, 2014.
3. Amount: aggregate replacement value of articles transferred and services provided may not exceed \$250,000,000 in any fiscal year
4. Approval Authority: SECDEF with SECSTATE
5. Practitioner Notes:
  - a. Defense articles has the meaning given that term in Foreign Assistance Act 1961, section 644(d).<sup>35</sup>
  - b. Defense services has the meaning given that term in Foreign Assistance Act 1961, section 644(f).<sup>36</sup>
  - c. The term “military and security forces” means national armies, national air forces, national navies, national guard forces, police forces, and border security forces, but does not include nongovernmental or irregular forces (e.g., private militias).

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<sup>35</sup> See 22 U.S.C. § 2403(d)).

<sup>36</sup> See 22 U.S.C. § 2403(f)).

## VII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS

### A. Introduction

1. General Rule: The Department of State has primary responsibility to establish foreign policy and conduct Foreign Assistance on the USG's behalf – even during U.S. military operations.<sup>37</sup> The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.<sup>38</sup>
2. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to a foreign nation's population, including disaster relief).
3. Human Rights and Foreign Assistance.
  - a. The “Leahy Amendment,” first enacted in the 1997 Foreign Operations Appropriation Act,<sup>39</sup> prohibits the USG from providing funds to a foreign nation's security forces if there is credible evidence that the recipient nation or its agents have committed gross human rights violations. This restriction may be waived if SECSTATE determines and reports to the appropriate congressional committees that the offending nation is taking all necessary measures to hold the offending parties accountable for the violations. Comparable language is found in the FY 2012 CAA §8058.

### B. Framework for DoS Foreign Assistance Authorizations and Appropriations

1. As the primary agency responsible for foreign assistance, DoS, (through its Director for Foreign Assistance (DFA)) has identified five broad foreign assistance objectives: (1) Peace & Security; (2) Governing Justly & Democratically; (3) Investing in People; (4) Economic Growth; and (5) Humanitarian Assistance.

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<sup>37</sup> See *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984)

<sup>38</sup> The Director of U.S. Foreign Assistance within the Department of State is charged with directing U.S. foreign assistance in accordance with foreign policy objectives. See FY 2007-2012 Department of State and USAID Strategic Plan, Appendix I, Foreign Assistance Framework *available at* <http://www.state.gov/s/d/rm/rls/dosstrat/2007/html/82981.htm>.

<sup>39</sup> See Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, “Limitation on Assistance to Security Forces.”

2. Funding these objectives involves multiple funding authorities and sources. This outline focuses on those DoS foreign assistance authorizations and appropriations which periodically interface with DoD military operations.
3. “The Players”: Administering and performing foreign assistance missions under DoS policy and funding authority involves multiple agencies and/or departments.
  - a. DoS: The Director, U.S. Foreign Assistance coordinates foreign assistance programs of both DoS and the United States Agency for International Development (USAID).
  - b. USAID: An independent, federal government agency whose mission is to advance broad-based economic growth, democracy and human progress around the world. USAID administers the bulk of bilateral economic aid, including disaster relief, economic growth, global health, and food assistance.
  - c. DoD:
    - (1) Defense Security Cooperation Agency (DSCA): DoD organization charged with implementing multiple DoS funded and controlled security assistance programs involving defense article transfers and services.
    - (2) Military Departments and Combatant Commanders: execute many DSCA security assistance programs.
4. Accessing the DoS Appropriations and Authorizations. Properly coordinating for access to the DoS/USAID appropriations and authorizations is usually conducted at the COCOM or JTF headquarters level. In a non-deployed environment, a military commander normally coordinates with the Defense Security and Cooperation Agency (DSCA) and follows the Security Assistance Management Manual’s procedures (SAMM).<sup>40</sup>
5. Within this narrowed framework, DoS authorizations and appropriations for conducting foreign assistance that interact with DoD may be grouped into three general subcategories consistent with DoS objectives: (1) Peace & Security Assistance, (2) Governing Justly & Democratically, and (3) Humanitarian Assistance.

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<sup>40</sup> DSCA implements those security assistance programs involving the transfer of defense articles or services. Regulatory guidance can be found in DoD 5105.38-M, “Security Assistance Management Manual,” [hereinafter SAMM], *available at* <http://www.dsca.osd.mil/samm/>.

C. Peace & Security Assistance (SA).

The majority of interaction of DoD with the DoS SA programs falls under the authorizations within The Foreign Assistance Act of 1961 (FAA)<sup>41</sup> and The Arms Export Control Act of 1976 (AECA).<sup>42</sup> Congress frequently amends these Acts in the annual DoS and DoD appropriation acts. Judge Advocates may find it beneficial to consider these programs in two general subcategories: reimbursable and U.S.-financed.

1. Reimbursable Security Assistance
  - a. Foreign Military Sales (FMS) - 22 U.S.C. § 2761 (AECA §§ 21-27).
    - (1) Purpose: Contracts or agreements between an authorized foreign purchaser and the U.S. for the sale of DoD defense articles, services, and training from existing stocks or new procurements for the purpose of internal security, legitimate self-defense, participation in regional/collective arrangements consistent with the UN charter, or to enable foreign military contribution to public works and civic action programs.
    - (2) Time/Amount: FMS operate on a “revolving” or self-funded basis. No annual appropriation is required.
      - (a) DoS is authorized to charge an administrative fee to the foreign purchasing nation for each “case” (sale) to reimburse the U.S. for administrative costs.
      - (b) This fee allows DoS to generate the funds necessary to reimburse the appropriate DoD account via an Economy Act transaction, or other reimbursement authority in another statute.
      - (c) Unless an exception applies under the statute, payment must be made in advance of delivery of the defense article/service and must be made in U.S. dollars.
    - (3) Approval Authority:

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<sup>41</sup> 22 U.S.C. § 2151 et seq.

<sup>42</sup> 22 U.S.C. § 2751 et seq.

- (a) POTUS approves FMS country eligibility.<sup>43</sup> DoS determines individual FMS case approval. Current eligibility criteria include:
    - (i) Furnishing of defense articles / services must strengthen U.S. security and promote world peace.
    - (ii) No re-transfers without Presidential consent.
    - (iii) No use of articles / services for purposes other than for which furnished, unless consent of the President has first been obtained.
    - (iv) Recipient must maintain security of such article.
  - (b) The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on SECSTATE's via DSCA. Practitioners can find additional implementing guidance in the Security Assistance Management Manual (SAMM).
- (4) Limitations:
- (a) The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform to the restrictions of the DoS International Traffic in Arms Regulations (ITARs).<sup>44</sup>
  - (b) ITAR-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program.
- b. Foreign Military Lease Program (FML)- 22 U.S.C. § 2796-2796a (AECA §§ 61-62).
- (1) Purpose: Authorizes leases of defense articles to foreign countries or international organizations provided there is a compelling foreign policy and national security reason for lease rather than sale.

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<sup>43</sup> SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

<sup>44</sup> See 22 C.F.R. § 121.

- (2) Time/Amount:
  - (a) Leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program.
  - (b) Lessees must pay in U.S. dollars all costs incurred by the U.S. in leasing, to include depreciation amounts.
  - (c) Leases must be for a fixed duration not to exceed 5 years.
- (3) Practitioner's Notes: DSCA executed program on SECSTATE's behalf.

c. Direct Commercial Sales (DCS) Program: 22 U.S.C. § 2778

- (1) Purpose: Authorizes eligible governments to purchase defense articles or services directly from defense contractors.
- (2) Time/Amount: DoD is not involved in the management of the sale from the contractor to the foreign nation.
- (3) Practitioner Notes:
  - (a) A DoS review and "export license" is required from the Directorate of Defense Trade Controls before the contractor may provide the products to the foreign nation.<sup>45</sup>
  - (b) Some Significant Military Equipment (SME) must be purchased through FMS.

2. U.S. Financed DoS Security Assistance.

- a. Foreign Military Financing (FMF) Program - 22 U.S.C. § 2763 (AECA § 23); 22 U.S.C. § 2311 (FAA Part II, Ch. 2).
  - (1) Purpose: to finance, through grants or loans, the acquisition of defense articles, services, and training (through the FMS/FML or DCS programs) by friendly foreign countries to strengthen U.S. security and foreign policy.

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<sup>45</sup> See 22 C.F.R. § 123, for export defense articles licensing regulations and procedures.

- (2) Time/Availability: 30 September 2013. Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.
- (3) Amount:
  - (a) FY 2012 CAA, Title IV, International Security Assistance, Foreign Military Financing Program, \$5,210,000,000 (additional caveats and instructions do apply).
- (4) Practitioner's Notes:
  - (a) Responsibility of the Asst. Sec. for Political-Military Affairs/ Under Sec. for Arms Control & International Security.
  - (b) DSCA program conducted on SECSTATE's behalf.
  - (c) U.S. financing through Foreign Military is only approved on a limited case-by-case basis.<sup>46</sup>

b. Presidential Drawdown Authorities.

Directives by the President pursuant to the FAA or other special legislation authorizing SECDEF to transfer on-hand defense articles and services (including military education and training) to a foreign nation. The items need not be considered either surplus or excess for transfer purposes.

- (1) Emergency Drawdown Authority - 22 U.S.C. § 2318(a)(1)<sup>47</sup>
  - (a) Purpose: for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization that can't be addressed under AECA or any other law.
  - (b) Time/Amount: defense articles and services of an aggregate value of up to \$100,000,000 in any fiscal year.

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<sup>46</sup> See "Defense Security Cooperation Agency Guidelines for Foreign Military Financing of Direct Commercial Contracts," August 2009.

<sup>47</sup> Foreign Assistance Act (FAA) § 506(a)(1)

- (c) Limitations: Requires presidential determination (PD) and prior congressional notification (CN).
- (2) Nonemergency Drawdown Authority - 22 U.S.C. § 2318(a)(2).<sup>48</sup>
- (a) Purpose: for international narcotics control, disaster relief, antiterrorism assistance, nonproliferation assistance, and migration and refugee assistance.
  - (b) Time/Amount: articles and services of an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year.
    - (i) Of that amount, not more than \$75M may come from DoD resources;
    - (ii) not more than \$75M may be provided for counternarcotics;
    - (iii) and not more than \$15M to Vietnam, Cambodia and Laos for POW accounting.
  - (c) Limitations: Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.<sup>49</sup>
- (3) Peacekeeping Operations Drawdown Authority -, 22 U.S.C. § 2348a(c)(2).<sup>50</sup>
- (a) Purpose: provision of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the national security interest.
  - (b) Time/Amount: of an aggregate value up to \$25,000,000 in any fiscal year.
- (4) Special Legislation Drawdown Authorities.

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<sup>48</sup> FAA § 506(a)(2)

<sup>49</sup> 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).

<sup>50</sup> FAA § 552(c)(2).

- (a) Afghanistan Freedom Support Act of 2002 – 22 U.S.C. § 7532.
  - (i) Purpose: Presidential authority to drawdown defense articles and services, and military education and training for the Government of Afghanistan and other eligible foreign countries/ international organizations.<sup>51</sup>
  - (ii) Time/Amount: of an aggregate value not to exceed \$550,000,000. Amounts appropriated for reimbursement of this authority increase this limitation on aggregate value.
  
- c. Excess Defense Articles (EDA) - 22 U.S.C. § 2321j.
  - (1) Purpose: to offer, at reduced or no cost, lethal and non-lethal defense articles declared as excess by the military departments to foreign governments or international organizations in support of U. S. national security and foreign policy objectives.
  - (2) Time/Amount: the aggregate current market value of EDA transferred in a fiscal year may not exceed \$425,000,000.
    - (a) Prior to sale, the value of the item may be depreciated.
    - (b) EDA may be purchased by foreign nations, or they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. While both sales and grants are authorized, sales are rarely conducted under this authority – grants are the primary type of transfer.
    - (c) DoD procurement funds may not be expended in connection with the transfer.
  - (3) Limitations:
    - (a) 30 days prior congressional notification for transfer of any EDA or significant military equipment valued at \$7,000,000 or more.

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<sup>51</sup> See Foreign Assistance Act of 1961, section 506(a)(1), 22 U.S.C. § 2318(a)(1), vesting POTUS with drawdown authority.

- (b) Generally, DoD funds may not be expended for packing and transport of EDA. As an exception, where DoS determines it is in the U.S. national interest, no-cost space available transportation is authorized for countries receiving less than \$10M FMF or IMET in any fiscal year.
- (4) Practitioner Notes:
  - (a) EDA are those defense articles no longer needed by DoD, even if that type of item is still regularly used by DoD units.<sup>52</sup> The determination of excess is made by Defense Logistics Agency (DLA) Disposition Services.
  - (b) Articles must be drawn from existing stocks of DoD (for purposes of EDA, the Coast Guard is considered part of DoD).
  - (c) Transfer of articles must not have an adverse impact on military readiness.
  - (d) DSCA executed program on SECSTATE's behalf.

*d.* International Military Education & Training (IMET) - 22 U.S.C. §§ 2347-2347d.

- (1) Purpose: Funds foreign military training and certain related civilian personnel<sup>53</sup> at U.S. military schools in order to:
  - (a) Encourage effective relationships and understanding between the U.S. and foreign countries to further international peace and security;
  - (b) Improve ability of participating countries to utilize their resources for greater self-reliance; and
  - (c) Increase awareness of internationally recognized human rights.

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<sup>52</sup> SAMM, paragraph C11.5.1

<sup>53</sup> Foreign civilians who are not members of the government may only be provided training under this authority if it (1) would contribute to responsible defense resource management, (2) foster greater respect for and understanding of the principle of civilian control of the military, (3) contribute to cooperation between military and law enforcement personnel with respect to counternarcotics efforts, and (4) improve military justice procedures in accordance with internationally recognized human rights.

- e. Peacekeeping Operations (PKO) - 22 USC § 2348
  - (1) Purpose: necessary expenses for PKO in furtherance of the national security interests of the United States, to include enhancing the capacity of foreign civilian security forces.
  - (2) Time: 1 year funds.
  - (3) Amount: \$302,818,000 (see FY12 CAA).
  - (4) Practitioner's Notes: current focus for these programs is in Africa. Judge Advocates assigned to AFRICOM should be familiar with DoS PKO programs for which DoD provides military expertise and assistance.

D. Governing Justly & Democratically

DoS and USAID finance a number of Governing Justly & Democratically programs, including: Rule of Law and Human Rights, Good Governance, Political Competition and Consensus Building, and Civil Society. Several of these programs involve DoD planning, coordination and execution. The most prominent funding sources for these programs are the Economic Support Fund (ESF) and the Bureau of International Narcotics and Criminal Law Enforcement (INCLE), both of which provide DoS funds to Provincial Reconstruction Teams in Afghanistan.

- a. Economic Support Fund (ESF), 22 USC §2346.
  - (1) Purpose: to advance U.S. interests by helping countries meet short and long-term political, economic, and security needs. In other words, the primary function is to build a foreign country's governance capacity.<sup>54</sup>
- b. Limitations:
  - (1) Under §2346(e), these funds may NOT be used for military or paramilitary purposes.
  - (2) These funds are sometimes earmarked for certain countries within the appropriations act.

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<sup>54</sup> USAID is primarily responsible for budgeting, obligating and expending these funds.

- c. Practitioner Notes: ESF OCO funds are often used to fund PRT's and Rule of law activities.
2. International Narcotics and Criminal Law Enforcement (INCLE) Funds - 22 USC §2291.
- a. Purpose: to “furnish assistance to any country or international organization . . . for the control of narcotic and psychotropic drugs and other controlled substances, or for other anti-crime purposes.”<sup>55</sup>
  - b. Time: generally 2 year period of availability.
  - c. Amount:
    - (1) FY 2012 CAA: \$1,061,100,000 available through 30 September 2013
  - d. Practitioner Notes:
    - (1) The DoS Bureau of International Narcotics and Criminal Law Enforcement (INL) has a broad mandate to “(1) to reduce the entry of illegal drugs into the United States; and (2) to minimize the impact of international crime on the United States and its citizens. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of and supporting operations by foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission.”<sup>56</sup>
    - (2) The Office of Civilian Police and Rule of Law Programs (CIVPOL) falls under the INL umbrella. The CIVPOL has the broad mission of providing law enforcement, criminal justice, and corrections experts and assistance in “post-conflict societies and complex security environments.”<sup>57</sup>
    - (3) INL also receives funding Afghanistan Security Forces Fund (ASFF) appropriations via interagency acquisitions (IAs) and

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<sup>55</sup> 22 U.S.C. § 2291 (4) (emphasis added).

<sup>56</sup> Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, *available at* <http://www.state.gov/p/inl/>.

<sup>57</sup> See Office of Civilian Police and Rule of Law Programs, <http://www.state.gov/p/inl/civ/index.htm> (last visited on 20 Aug. 2009).

interagency fund transfer.<sup>58</sup> The ASFF contains congressional “transfer authority,” which authorizes SECDEF to transfer funds to other agencies to further the ASFF’s basic purpose.<sup>59</sup>

E. Humanitarian Assistance.

1. DoS and USAID are the U.S. agencies designated as the lead to provide humanitarian assistance in response to emergencies and natural disasters overseas. Judge Advocates should be generally aware that DoS/USAID has authority and appropriations to fund humanitarian assistance from several different accounts. These accounts include, but aren’t limited to: Development Assistance Funds, the Economic Support Fund, and International Disaster Assistance Funds.
2. Although DoS/USAID has the primary responsibility to carry out humanitarian assistance, DoD possesses the logistical capabilities and other resources necessary to conduct these missions.<sup>60</sup>
  - a. Iraq operations and presence in Iraq or Kuwait (as noted above) are met.

## VIII. CONCLUSION.

- A. The Department of State, and not the Defense Department, is primarily responsible for all foreign assistance.
- B. Department of Defense funds foreign assistance, including security and humanitarian assistance, by statutory exception only.

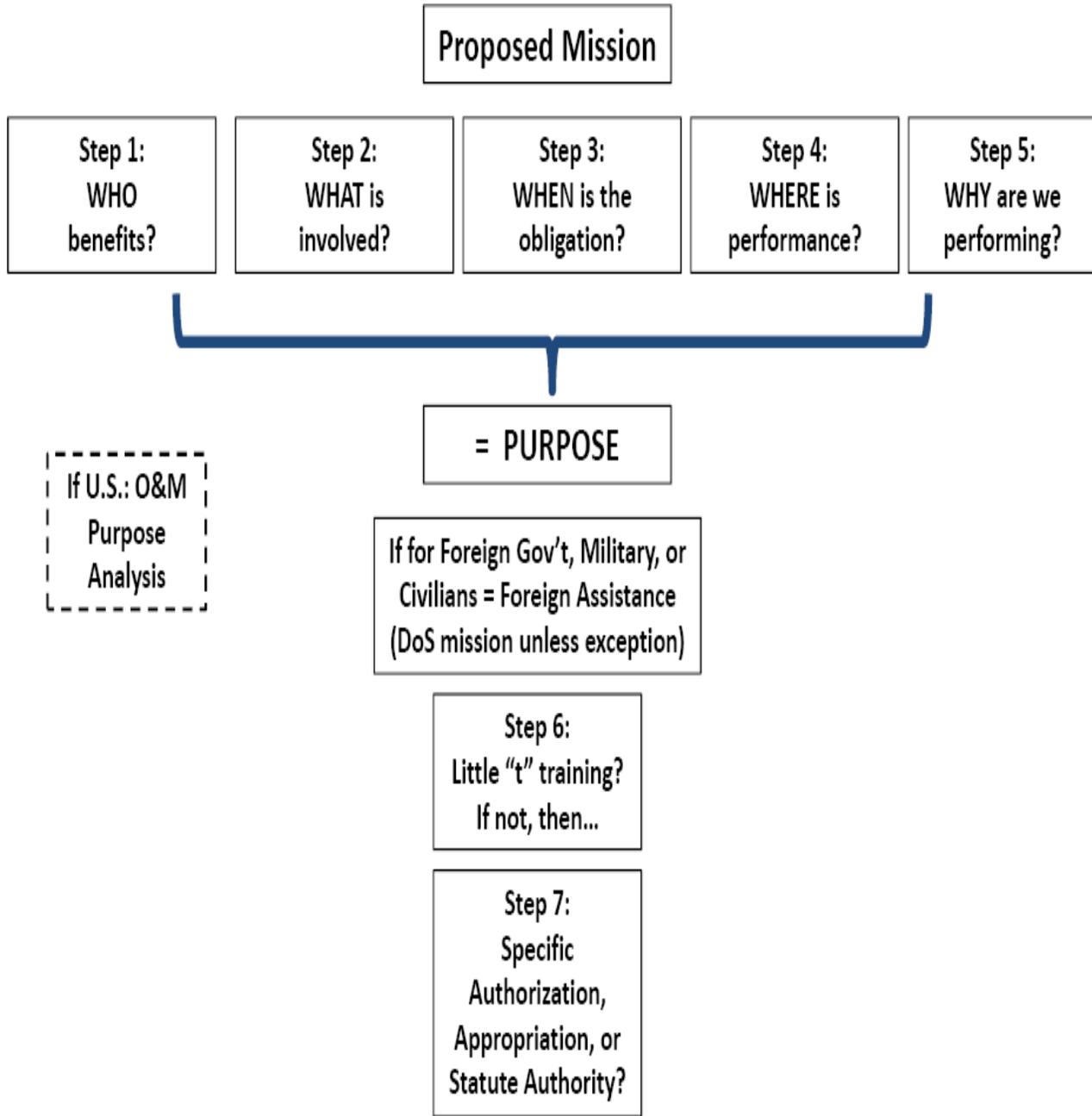
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<sup>58</sup> See, e.g., Fiscal Law Deskbook, ch 11, Interagency Acquisitions (IA), for additional information on the execution of ISFF/ASFF IAs.

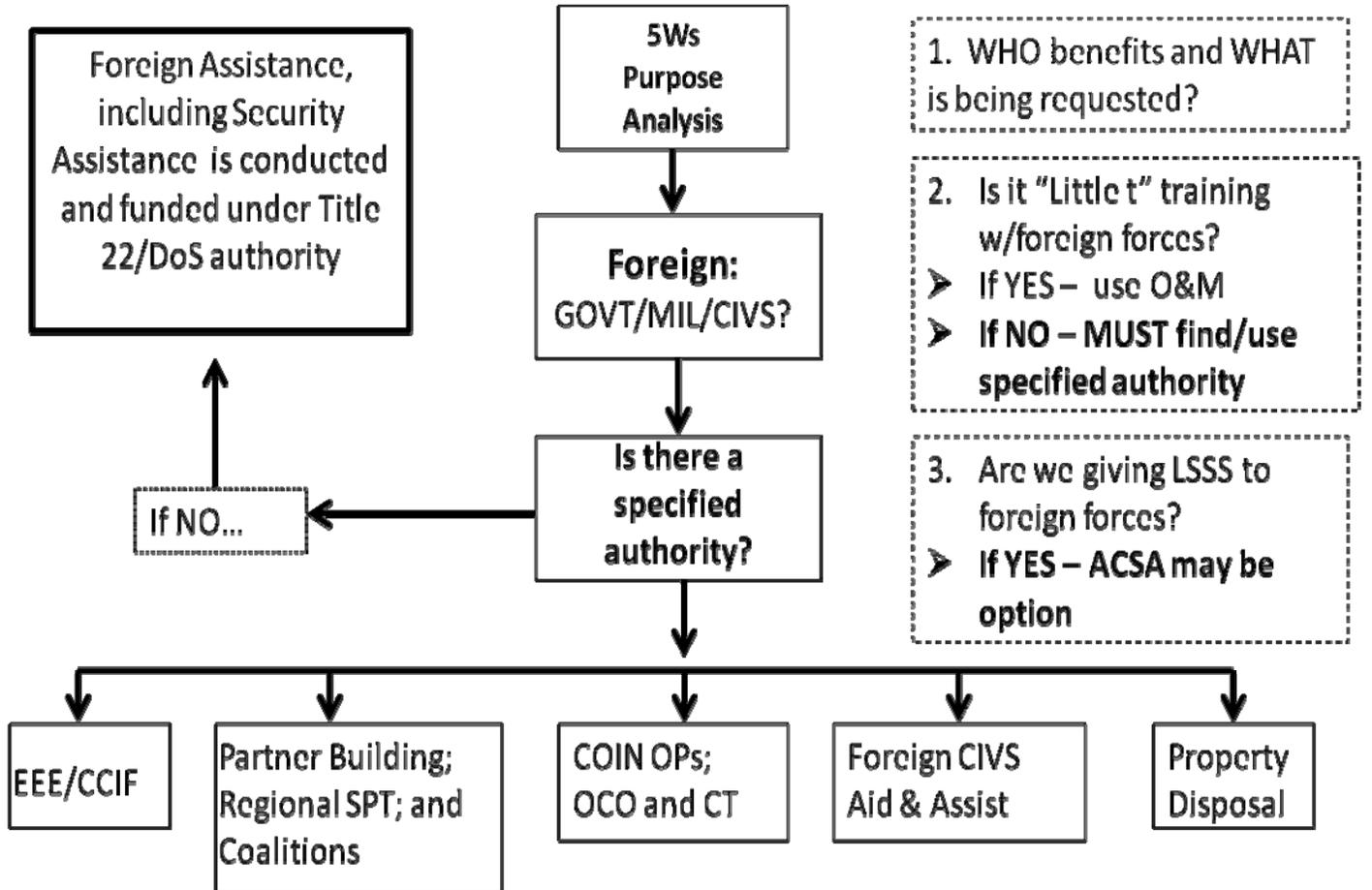
<sup>59</sup> See, e.g., Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005); see also 2008 Supplemental Appropriations Act, Pub. L. 110-252, Title IX, Ch. 2 (30 June 2008).

<sup>60</sup> DoS exceptional requests to DoD for Humanitarian and Disaster Assistance are initiated and coordinated Office of International Security Operations (falling within the Under Secretary for Arms Control and International Security’s Bureau of Political-Military Affairs). See <http://www.state.gov/t/pm/iso/c21542.htm#dos-ihada> (last accessed June 22, 2010).

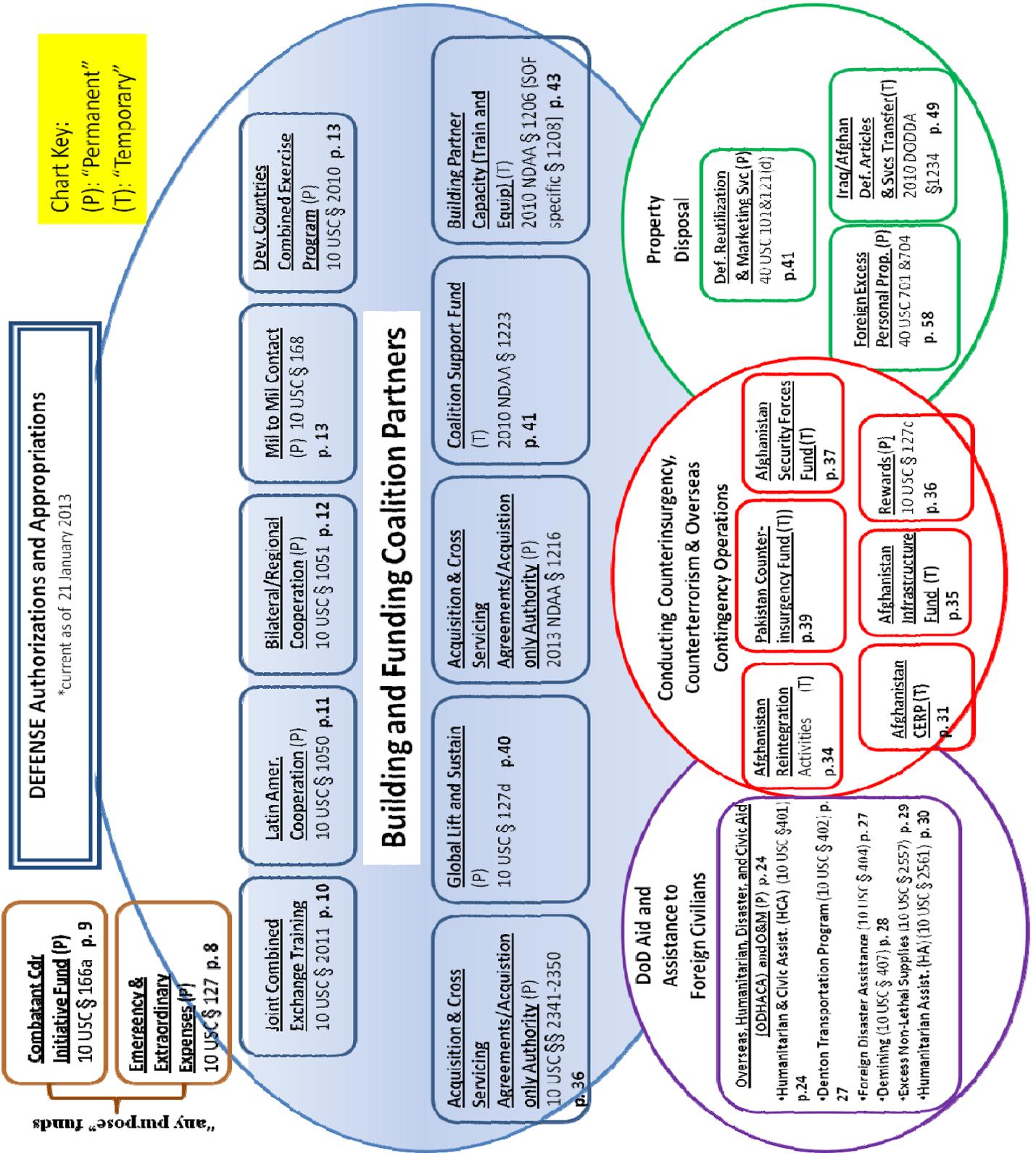
**APPENDIX A: OPERATIONAL FUNDING ANALYSIS PART I**



**APPENDIX B: OPERATIONAL FUNDING ANALYSIS PART II**



APPENDIX C: DOD FUNDING FOREIGN ASSISTANCE



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