

Cry “Humanitarian Assistance,” and Let Slip the Dogs of War

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Hence to fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.

—Sun Tzu, *The Art of War*

It is clear that the ongoing War on Terror is unlike any other war. The very objective of this war—stopping terrorists from preying upon the innocent while winning the hearts and minds of diverse populations throughout the world—requires the U.S. military to consider innovative operations and missions that reach far beyond traditional military objectives.

Indeed, in today's war, each member of the armed forces is a servicemember, a policeman, a diplomat, and an international aid worker. From a historical perspective, this development is to be expected given that today's wars stem from ethnic, religious, cultural, and social strife exacerbated by increasingly disparate economic climates.² When planning and executing operations on the modern battlefield, commanders spend significant time considering the impact their missions have on the lives and well-being of local, indigenous populations.³

To this end, Congress has seen fit to provide commanders with a powerful and expansive weapon that may prove to be significant in winning the Global War on Terror. Congress empowered the military with the ability to finance and execute humanitarian assistance (HA) projects throughout the world.⁴ Through HA operations the armed forces can conduct missions in diverse and challenging environments, providing local populations with the means to establish healthy and robust economies while promoting a positive image of the United States, bolstering international peace efforts, and, as a result, helping to defend the United States from potential attacks. In essence, if traditional military operations display how well the United States fights, HA missions display the causes for which the United States will fight.

Notwithstanding congressional intent to have the military execute HA operations, the framework Congress established⁵ fails to address certain practical considerations that military leaders face when conducting HA operations in connection with the War on Terror. Absent improvements to the framework, the military's ability to successfully accomplish HA missions is severely limited and the benefits Congress intended to provide to disadvantaged populations in militarily strategic areas worldwide may never come to fruition.

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² See generally THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA ii (Sept. 2002) [hereinafter NATIONAL SECURITY STRATEGY] (“Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can make weak states vulnerable to terrorist networks and drug cartels within their borders.”)

³ The media generally reports on military operations where such considerations have not been made or have failed, and it is an unfortunate popular misconception that military commanders are indifferent to the impact that a military mission might have regarding a particular location. Indeed, a responsible commander is cognizant of the importance of such considerations because they can, in practical military terms, directly impact the success and/or failure of a particular mission. See Colonel (Retired) Maxie McFarland, *Military Cultural Education*, MIL. REV. 62 (Mar.–Apr. 2005). See generally First Lieutenant David A. Tosh, *Engaging the Population and Local Leaders*, ARMOR 41 (Sept.–Oct. 2004) (for an honest account of at least one Soldier's command experiences in Iraq).

⁴ See, e.g., 10 U.S.C. §§ 401, 402, 2557, 2561 (2000). The military can and should execute HA missions throughout the world, so long as such missions are within the technical capability of military personnel and conducted in connection with strategic military goals and objectives. First, such missions are vital and essential to DOD's responsibility to keep the United States safe from international aggression and are generally conducted in “trouble spot” areas of the world where U.S. foreign policy dictates that a strong U.S. military presence exist. Second, DOD is fully capable of accomplishing HA objectives in an efficient and comprehensive manner if such missions are conducted in a way that appropriately utilizes military assets. The author acknowledges, however, that this premise is not necessarily an accepted one. See Jane Barry & Anna Jeffreys, *A Bridge Too Far: Aid Agencies and the Military in Humanitarian Response*, HUMANITARIAN PRACTICE NETWORK PAPER NO. 37 (Jan. 2002).

⁵ See, e.g., 10 U.S.C. §§ 401, 402, 2557, 2561 (1988).

This article sets forth: (i) the basis for military involvement in HA activities; (ii) the genesis of HA statutory authorities; (iii) an analysis of the current statutory regime; and (iv) some proposed amendments that should be made to the current statutory regime for the military to effectively achieve the noble goals of HA legislation.

I. The Strategic Basis for Military Involvement in HA Activities

The Department of Defense's (DOD) role in HA activities has steadily increased since the end of World War II (WWII). America's immediate, post-WWII military operations, many of which may be legitimately characterized as HA initiatives, centered largely around rebuilding political and economic infrastructure in war-ravaged Central and Southern Europe and Japan.⁶ From an HA planning perspective, the unconditional surrender of Axis forces at the end of WWII was fortuitous because: (i) it enabled lawmakers to clearly divide American post-war rebuilding efforts between DOD,⁷ on the one hand, and the Department of State (DOS), on the other; and (ii) allied efforts to rebuild Germany and Japan were comparatively easy to implement as they were both occupied countries after the war.

However, these advantages were of limited significance beyond the initial stages of the Cold War; the armed forces quickly learned that they would need to deal with what could be considered, at the time, "non-military" matters. A largely ideological struggle between Western democracies and the Soviet Union, the Cold War thrust the U.S. military into the position of having to provide a viable defense against the threat of Communist aggression while supporting U.S. political agendas intended to preserve fledgling democracies throughout the world, including in East and Central Asia and Latin America.⁸ To a degree, because the military was instrumental in the ideological battle, the armed forces were required to account for geo-political considerations when planning operations. Indeed, winning the hearts and minds of local populations (or the *failure* to do so) was, to some degree, decisive in the outcomes of the U.S. campaigns in Korea, Vietnam and Central America. Clearly, by the end of the Cold War, the U.S. military's role in foreign affairs had shifted.

Since the fall of the Soviet Union, the U.S. military's role as a provider of HA has only increased. The U.S. military has been involved in HA operations all over the world in the past thirty years and the military objectives relating to such operations have become increasingly more complex.⁹ For example, we have seen significant military HA operations

⁶ See, e.g., James Reston, *Administration Now Shifts Its Emphasis on Foreign Aid*, N.Y. TIMES, May 9, 1947, at 3. See also e.g., REC. OF THE WK., May 18, 1947, at 991 (statement of Undersecretary Dean Acheson before Delta Council at Cleveland, Miss., on 8 May 1947). "[We] are going to have to concentrate our emergency assistance in areas where it will be most effective in building world political and economic stability, in promoting human freedom and democratic institutions, in fostering liberal trading policies, and in strengthening the authority of the United Nations." *Id.* at 993.

⁷ The reference to DOD in this context embraces its predecessor agencies as well (e.g., the War Department and the Navy Department).

⁸ President Harry S. Truman, State of the Union Address (7 Jan. 1953).

Thus, everywhere in the free world, the communists seek to fish in troubled waters, to seize more countries, to enslave more millions of human souls. They were, and are, ready to ally themselves with any group, from the extreme left to the extreme right, that offers them an opportunity to advance their ends.

....

... This is the measure of the challenge we have faced since World War II – a challenge partly military and partly economic, partly moral and partly intellectual, confronting us at every level of human endeavor and all around the world.

....

... We realized that if we and our allies did not have military strength to meet the growing Soviet military threat, we would never have the opportunity to carry forward our efforts to build a peaceful world of law and order – the only environment in which our free institutions could survive and flourish.

Did this mean we had to drop everything else and concentrate on armies and weapons? Of course it did not: side-by-side with this urgent military requirement, we had to continue to help create conditions of economic and social progress in the world. . . .

These two requirements – military security and human progress – are more closely related in action than we sometimes recognize. Military security depends upon a strong economic underpinning and a stable and hopeful political order; conversely, the confidence that makes for economic and political progress does not thrive in areas that are vulnerable to military conquest.

Id.

⁹ See NATIONAL SECURITY STRATEGY, *supra* note 2.

Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals can bring great chaos and suffering to our shores for less than it costs to purchase a single tank. . . . The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror.

conducted in Bosnia-Herzegovina, Bangladesh, Thailand, Afghanistan, Iraq, Yemen, Ethiopia, Somalia, Djibouti, Kenya, Nicaragua, Colombia, Honduras, and the Caribbean. Indeed, the U.S.-led war against religious fundamentalists in the Middle East has even developed an “HA front”; the U.S. military’s HA efforts are opposed by HA efforts undertaken by extremist organizations¹⁰ hoping to foster fertile recruiting grounds for terrorists.¹¹

Despite these developments, there is still a clear limitation on the type of HA assistance that the military can, and should, provide.¹² Because DOD’s mission is to provide for the defense of the United States, the military should only conduct HA operations having a clear, strategic military value. Political leadership and military commanders will generally agree that the military is not in the business of nation-building, and, as such, military activities, including HA activities, are typically limited to operations that yield tangible tactical or military objectives.¹³ As such, the HA projects in which the military engages generally: (i) focus on areas traditionally used as recruiting grounds by terrorist organizations to counteract terrorist presence in such areas; (ii) create containment borders around areas of political or economic instability to ensure that such instability does not spread to more stable areas; or (iii) increase U.S. military presence in host nations where the military would like to develop or strengthen military-to-military relationships.

II. The Genesis of HA Statutory Authorities

In 1986, Congress blessed the growing role of the military in humanitarian affairs by establishing a legal framework upon which the military may finance and execute HA projects worldwide.¹⁴ This effort was largely a congressional reaction to a 1984 decision (the Honduras Opinion)¹⁵ by the General Accounting Office (GAO)¹⁶ effectively prohibiting the military from using appropriated operation and maintenance (O&M) funds to pay for costs related to HA projects.

In the early 1980s, a National Guard unit, using O&M funds, financed a humanitarian exercise that was part of a military exercise conducted in Honduras.¹⁷ While National Guard personnel constructed base camps for use by the National Guard, they also upgraded access roads around the base camps, constructed a thirteen-mile section of road in north central Honduras, built a local schoolhouse, provided medical assistance to 50,000 Honduran civilians, and provided veterinary assistance to 40,000 animals.¹⁸ The Honorable William “Bill” Alexander (Rep., D-AR) requested that the GAO provide him with a formal legal decision regarding the propriety of the National Guard’s use of O&M funds for these purposes.¹⁹

Id. at i.

¹⁰ Al-Ittihad al-Islami is an example of such an organization.

¹¹ Ejara Amante, *Defending the Nation Against Terror*, available at <http://www.ethioembassy.org.uk/articles/articles/march-00/Ejara%20Amante%20-%201.htm> (last visited Dec. 4, 2007).

The funds [Al-Ittihad] raises locally or outside Somalia partially go into social services, schools and Sharia courts while the larger part of it goes to weaponry. . . . Amazingly, Al-Ittihad's approach appears to be more of a long term in nature, preferring to build a broader support and economic backing which now is openly seen in the booming of investments in telecommunications and money transfers (the existing banking system in Somalia) in all parts of Somalia that of an immediate lucrative. One should also be aware of the fact that some of the transactions of this extremist group have been handled by well known international NGO's that are actively engaged in humanitarian activities inside Somalia.

Id.

¹² In fact, the HA activities discussed in this article are a small, albeit integral component, of the on-going mission to win the War on Terror and are not the dispositive cure for all geo-political issues arising in the world today. See generally NATIONAL SECURITY STRATEGY, *supra* note 2, at 6, 9, 10, 29–31. Other extensive HA programs (e.g., those conducted by DOS) will also have an impact on the outcome of the War on Terror.

¹³ See generally U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSSTR) OPERATIONS (28 Nov. 2005).

¹⁴ See 10 U.S.C. § 2547 (1988). In 1986, Congress authorized Humanitarian and Refugee Affairs to transport non-lethal excess property, relief supplies and privately donated cargo to meet humanitarian needs worldwide.

¹⁵ The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984).

¹⁶ Now known as the General Accountability Office.

¹⁷ The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at *8.

¹⁸ *Id.*

¹⁹ *Id.* at *1.

Prior to the Honduras Opinion, the military financed HA-type projects using O&M funds. Military departments relied upon the authority provided by 10 U.S.C. § 2805(c) to finance minor military construction projects using O&M funds.²⁰ In addition, they characterized the labor of medical and veterinary personnel in connection with such projects as volunteer “off-duty” work of American servicemembers.²¹

For example, prior to the issuance of the Honduras Opinion, a military service might engage in a road construction project around an airport utilized by the military in connection with an ongoing military operation. The service would charge construction and other related costs to that department’s O&M funding. To bolster support with local populations regarding such a project and to engender trust in the military, certain personnel would provide free medical and veterinary services to local populations. To finance these activities, a local commander would take advantage of the relative flexibility provided by the O&M appropriation authority.

The Comptroller General of the United States concluded that the use of O&M funds to finance certain portions of this project was improper.²² Specifically, the Comptroller General noted “[DOD] has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as [the U.S. Agency for International Development]) through the Economy Act, 31 U.S.C. § 1535, or (for minor projects) as incidental to the provision of security assistance.”²³ The GAO also rejected arguments that the civic and humanitarian activities undertaken by National Guard personnel were off-duty services that only happened to benefit personnel operational training readiness.²⁴

The GAO established a three-part test to determine if the funding of a particular HA project is proper: (i) the expense must be reasonably related to the purposes for which the appropriation was made; (ii) the expenditure must not be prohibited by law; and (iii) the expenditure must not fall specifically within another category of appropriations provided to the entity.²⁵ Determining that a number of the activities conducted by the National Guard in this exercise failed this test, the GAO concluded that financing humanitarian projects through O&M funds was unauthorized.²⁶ The GAO advised DOD to “seek specific funding authorization from Congress.”²⁷

In response to the GAO’s advice, DOD took the battle to Congress. Congress quickly enacted HA-specific legislation for DOD’s benefit.²⁸ Under this framework, DOD was authorized to allocate funds to execute HA projects throughout the world.²⁹

III. The Current Statutory Regime

The four core statutes forming the basis for funding DOD-directed HA activities are 10 U.S.C. § 401, 10 U.S.C. § 402, 10 U.S.C. § 2557, and 10 U.S.C. § 2561.

A. Section 401

Section 401 was enacted on 14 November 1986 in direct response to the Honduras Opinion.³⁰ It is one of the central DOD HA funding statutes, establishing funding for DOD directed humanitarian and civic assistance (HCA) operations.³¹

²⁰ See 10 U.S.C. § 2805(c). As noted in the Honduras Opinion and as described herein, this statute did not provide sufficient statutory support for these HA operations. *Id.*

²¹ The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at *42 (1984).

²² *Id.*

²³ *Id.* at *2.

²⁴ *Id.* at *42.

²⁵ *Id.* at *12.

²⁶ *Id.* at *56.

²⁷ *Id.* at *7.

²⁸ 10 U.S.C. § 2547 (1986).

²⁹ *Id.*

³⁰ *Id.* § 401.

³¹ See *id.* The current statutory framework is derived from § 401.

Generally speaking, HCA operations are HA activities that can be directly traced to mission-oriented objectives of a military command. The statute requires that HCA activities be conducted “in conjunction with authorized military operations”³² and that they promote “the security interests of both the [U.S.] and the country in which the activities are to be carried out”³³ while supporting the “specific operational readiness skills of the members of the armed forces who participate in the activities.”³⁴ Such activities must: (i) complement, and may not duplicate, any other form of social or economic assistance which may be provided to a country by any other department or agency of the United States;³⁵ (ii) serve the basic economic and social needs of the people of such country;³⁶ and (iii) not be provided, directly or indirectly, to any individual, group or organization engaged in military or paramilitary activity.³⁷ In order to ensure cooperation with the DOS regarding any HCA activity, Congress specifically requires the Secretary of State to authorize any HCA activity undertaken by the DOD in a particular country.³⁸ Section 401 explicitly states that HCA activities include: (i) medical, dental and veterinary care provided in areas of a country that are rural or underserved by medical, dental and veterinary professionals, respectively;³⁹ (ii) construction of rudimentary surface transportation systems; (iii) well drilling and construction of basic sanitation facilities; and (iv) rudimentary construction and repair of public facilities.⁴⁰

B. Section 2561

Enacted on 23 October 1992, § 2561 is the second pivotal HA funding statute, establishing DOD funding for broader and more extensive humanitarian assistance projects (HAO).⁴¹ Given the expansive language contained therein, the act serves as an indication of congressional intent that the DOD can and should engage in HA activities as world events may require.

Section 2561 acts as a catch-all funding statute for DOD HA fiscal purposes, providing a legitimate basis for funding HA activities even if specific funding under § 401 or § 402 (described below) is not available or authorized.⁴² First, § 2561 authorizes DOD to provide for transportation of humanitarian relief to foreign nations, including for events or conditions that threaten serious harm to the environment (such as oil spills).⁴³ This provision has been used to finance the transportation of U.S. government donated relief supplies in situations where § 402 funds are not available for such purposes.⁴⁴

Section 2561 also authorizes the DOD to use § 2561 funds “for other humanitarian purposes worldwide.”⁴⁵ Because this statutory language is open-ended, DOD guidance rightly suggests that HAO can be far more varied than HCA activities.⁴⁶ Some approved HAO activities include: (i) projects using host nation contractors for basic building and repairs; (ii) the purchase of end items other than those used in connection with § 401-funded HCA activities; (iii) training or technical assistance for humanitarian purposes; and (iv) certain improvements to infrastructure, which are limited to rudimentary construction and basic repairs.⁴⁷

³² 10 U.S.C. § 401(a)(1) (2006).

³³ *Id.* § 401(a)(1)(A).

³⁴ *Id.* § 401(a)(1)(B).

³⁵ *Id.* § 401(a)(2).

³⁶ *Id.* § 401(a)(2).

³⁷ *Id.* § 401(a)(3).

³⁸ *Id.* § 401(b)(1).

³⁹ *Id.* § 401(e)(1). Congress amended this definition on 30 October 2000 to expand DOD capability to serve areas that “are underserved by medical, dental and veterinary professionals.” *Id.* § 401, at 167. Prior to such amendment, DOD activities were limited to rural areas only.

⁴⁰ *Id.* § 401(e)(5).

⁴¹ *See id.* § 2561(a).

⁴² *See id.* § 2561. *See also* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 12(B)(2)(c), at 268 (2005) [hereinafter OPLAW HANDBOOK].

⁴³ 10 U.S.C. § 2561(a)(1).

⁴⁴ OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(c), at 268.

⁴⁵ 10 U.S.C. § 2561(a)(1).

⁴⁶ OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(c), at 268.

⁴⁷ Examples of some such infrastructure projects include rudimentary road work, drilling and repairing water wells and repairing buildings used for public purposes (such as schools, clinics or community centers).

In addition, based on the language of § 2561, unlike HCA projects, HAO missions do not have to promote the operational readiness skills of associated Soldiers and do not need to be conducted in conjunction with an on-going military operation or exercise.

C. Section 402

Enacted on 4 December 1987, § 402 enables the DOD to fund HA transportation operations relating to delivery of privately donated goods (i.e., not owned by or donated by the United States government or its agencies).⁴⁸ Pursuant to § 402, the DOD may transport to any country supplies which have been furnished by a non-governmental source which are intended to be delivered for humanitarian assistance purposes.⁴⁹ Such transportation activities must be consistent with the foreign policy of the United States⁵⁰ and the supplies related to such activities must be in suitable condition for humanitarian purposes.⁵¹

D. Section 2557

On 8 November 1985, Congress enacted § 2557, which establishes the DOD's ability to donate excess non-lethal supplies for use in humanitarian relief efforts.⁵² Section 2557 requires that the DOD make available for humanitarian relief any non-lethal excess supplies, which supplies are to be transferred to the Secretary of State, who is responsible for distribution of such supplies.⁵³ "Non-lethal excess supplies" are defined as excess property not including real property or weapons, ammunition, or other equipment or material designed to inflict serious bodily harm or death.⁵⁴ In practice, U.S. Agency for International Development, acting as an agent for DOS, distributes such supplies on DOS's behalf.⁵⁵

IV. Improving the Framework

This brings me to my present purpose, which is to request elucidation of my instructions from His Majesty's Government, so that I may better understand why I am dragging an army over these barren plains. I shall pursue one with the best of my ability but I cannot do both. 1. To train an army of uniformed British clerks in Spain for the benefit of the accountants and copy-boys in London, or, perchance, 2. To see to it that the forces of Napoleon are driven out of Spain.

— Purported Letter of the Earl of Wellington to the British Foreign Office, August 1812

The existing statutory regime can be improved to address practical considerations military leaders face while engaging in HA activities to wage the War on Terror. In particular, three major improvements can be made to substantially increase the efficacy of the military's HA efforts: (i) enhance execution of HA projects; (ii) clarify funding authorization provisions to avoid unnecessary confusion regarding types of HA projects that have been authorized; and (iii) ensure continuity of an American presence regarding completed HA projects.

The following sections set forth some of the conceptual underpinnings behind the specific legislative changes proposed in this article. Actual amendments to the statutory language (marked to show changes from the current statutory language) are appended at the end of this article.

⁴⁸ 10 U.S.C. § 402.

⁴⁹ *Id.* § 402(b)(1)(D).

⁵⁰ *Id.* § 402(b)(1)(A).

⁵¹ *Id.* § 402(b)(1)(B).

⁵² *Id.* § 2557.

⁵³ *Id.* § 2557(b).

⁵⁴ *Id.* § 2557(d)(1). The supplies that can be distributed under this statute (e.g., tents, shovels, vehicles and sleeping bags) can be life-saving equipment regarding HA operations relating to natural or man-made disasters (e.g., the earthquake in Pakistan). See *U.S. Assistance for Earthquake in Pakistan*, INTERNET BUS. NEWS, Oct. 11, 2005.

⁵⁵ OPLAW HANDBOOK, *supra* note 42, ch. 12(B)(2)(e), at 268, 269.

A. Enhanced Execution

Take time to deliberate, but when time for action has arrived, stop thinking and go on in.

— Napoleon Bonaparte

Under the current statutory framework, military commanders are empowered with the ability to execute or finance “rudimentary” or “basic” construction and repairs to public facilities, surface transportation systems or sanitary systems.⁵⁶ Without outside assistance, military personnel are unable to deliver more advanced work product to local communities (e.g., a fully furnished school house or medical clinic) and must therefore obtain resources from DOS, the host nation or non-governmental organizations (NGOs). If such coordination fails to occur or such resources are not provided in a timely and efficient manner, military personnel are limited to providing rudimentary or basic work product to local communities.

The restrictive words of rudimentary or basic contained in the applicable statutes are intended to address two significant and valid concerns. First, the military is, by its very nature, an organization that prepares for and fights wars, and its HA activities must necessarily be restricted to activities that the military is equipped to handle (e.g., building a clinic is possible but building a strip mall is not). Second, DOD activities should not subsume initiatives undertaken by DOS, which is primarily responsible for foreign affairs issues, including representing the United States abroad and helping develop stable economic and political environments in foreign nations.

However, as drafted, the restrictive language inadvertently: (i) limits the intrinsic quality of the work product the military can provide (rather than limiting the *scope* of what the military should provide) and (ii) forces HA project planners to overcome unnecessary, and sometimes insurmountable, governmental inefficiencies in order to avoid DOD/DOS entanglement.

The statutory language clearly fails to address the first objective of ensuring that the military engage in activities it is equipped to handle. By using subjective quality standards like rudimentary or basic, the statutory language inadvertently places an emphasis on the quality of work rather than the scope of work that should be allowed. In practice, many commands approving projects believe the language establishes a bar on the quality of work product that the military can deliver, even if the military could provide far better work product without having to undertake expensive, extravagant or exceptional measures in connection therewith. Because the language does not require military planners to only execute HA projects that they reasonably believe the military can execute within their technical expertise and ability, or that are self-sustaining after completion, under the current regime, the military can engage in projects outside their expertise or requiring constant follow-up support with the understanding that, in each case, they have delivered a rudimentary or basic product.⁵⁷ Finally, because the statutory language does not require the military to use its best efforts in executing an HA project, the military may from time to time deliver sub-standard work product or work product of little utility.

While the statutory framework rightly supports the tradition of separating DOD and DOS responsibilities by requiring that military personnel ensure that their HA projects in a region do not encroach upon or duplicate DOS efforts in such region, the statutory language also takes the unfortunate additional step of hampering DOD’s ability to execute HA missions by “forcing” DOS involvement in HA projects. Even though DOD and DOS may desire to see HA projects successfully and meaningfully executed, substantive and efficient cooperation between DOD and DOS in foreign, and sometimes hostile, lands is often unrealistic.

In practice, the political or social climate in a host nation may put the military in a better position than DOS to offer HA. Clearly, military forces may have extensive involvement in hostile territories where DOS personnel cannot or will not participate due to appreciable security concerns (including, for example, high-likelihood of terrorist and/or other armed attacks). In addition, foreign nations may be ready to accept military-to-military training with the United States and obtain HA benefits “on the side” rather than receiving outright, direct, U.S. government sponsored aid, which may be considered by local populations as a “hand-out.” If such circumstances exist, the statutory language effectively prohibits the military from delivering advanced HA work product, as DOS, NGO or host nation involvement, as the case may be, is impractical.

⁵⁶ *Id.* § 401(e)(2)-(4).

⁵⁷ *Id.*

The military may also be in a better position than DOS to assess issues relating to HA projects, including transportation, supply, and logistics concerns. Given that military personnel are on the ground from inception, they have strong local contacts and a fuller understanding of how to tailor the HA projects to local needs. Under the current framework, however, military personnel are required to maneuver through numerous U.S. administrative channels and to obtain DOS, NGO or host nation resources and support to advance an HA project beyond the rudimentary or basic stage. In addition, DOS may have to divert personnel and resources to meet the military's needs with no legal or other obligation on the part of DOS to do so. In essence, the forward momentum of an HA project unfortunately may end upon completion of a rudimentary or basic level of work, and the U.S. government will only provide additional improvements that might benefit a local community if the U.S. bureaucracy is able to address it.

The unnecessary restriction on the quality of work that the military can provide runs counter to the message that HA projects are intended to convey—that the U.S. government is interested in seeing local, impoverished communities in foreign countries develop. A casual observer in a rural community might consider U.S. HA efforts as half-hearted, at best, if the final result of extensive U.S. activity is a school house without books and furniture or a medical clinic without instruments, medicine and supplies. As most HA operations are high visibility projects in remote and impoverished communities, the framework should put the military in the position of being able to deliver quality HA work product to capitalize on the goodwill that is earned with local populations.

The DOS does not appreciably benefit from restricting the quality of work that the military can provide. Because the military is obligated to notify DOS of HA projects taking place in foreign countries,⁵⁸ DOS is already able to use such information to foster better and stronger relations with the related host nation. A poorly executed HA project, however, reflects badly upon DOD, DOS, and the United States as a whole.

Against this backdrop, the following amendments to the statutory framework are warranted:

1. Remove references to “rudimentary” and “basic” in Section 401; add a requirement that all HA projects (including Section 401 and Section 2561 funded projects) be “immediately usable” and “self-sustaining” and be within the “technical expertise and ability” of the military; expand DOD authority to spend HA funds to the extent necessary to make HA projects “immediately usable” and “self-sustaining”; and add a requirement to Section 401 and Section 2561 that the military use its “best efforts” when executing an HA construction project.

This proposed amendment to the statutory framework will effect four fundamental changes.

First, it will remove the rudimentary and basic limitations relating to § 401 HCA activities.⁵⁹ Without this restriction, military forces can provide better quality work product to local populations.

Second, it will require that military commanders consider whether an HA project is something the military can accomplish given the expertise and ability of military personnel. Project funding will therefore not be wasted on extravagant projects or projects the military cannot handle.

Third, it will allow military forces to spend authorized funds to ensure that good work product is delivered. This amendment would give military planners the flexibility they need to find other sources for labor and materials (e.g., local contractors or coalition forces) in connection with an HA project even if DOS, host nation or NGO support is unavailable. To ensure that expenses in this regard are regulated, it may be warranted to require military commanders to make a good faith effort to try to obtain such labor and/or materials from DOS, the host nation or an NGO and limit the total amount of funds that may be expended in respect of a structure to make it immediately usable.

Finally, it will make clear to military commanders that if they do engage in an HA construction project, the military will use its best efforts to deliver at least good work product to local populations. This will also ensure appropriate use of funds.

⁵⁸ See *id.* § 401(b).

⁵⁹ *Id.* § 401.

2. *Amend Section 2557(b) to Allow Military Personnel to Directly Distribute Non-lethal Excess Supplies in Connection with HA Projects, If Warranted*

As currently drafted, § 2557(b) does not permit local military commanders to directly distribute non-lethal excess supplies to local populations in connection with ongoing HA activities.⁶⁰ Rather, military commanders are required to release non-lethal excess supplies to higher commands, which, in turn, release such supplies to subordinate commanders or send such supplies to DOS for eventual distribution worldwide.⁶¹ This method of distribution is highly inefficient in that it does not allow local military commanders to tie the distribution of their own excess non-lethal supplies to projects they are conducting and thereby reinforce the good-will they are already earning. In addition, given that distribution of supplies are sometimes required in time-sensitive emergency situations, this provision could effectively prevent the distribution of such supplies in a timely manner.

The statute should be amended to allow local military commanders to either distribute non-lethal excess supplies to local populations in connection with any ongoing HA operation, if such distribution can be considered reasonably related to such HA operation, or transfer such items to DOD for redistribution.⁶² The DOD, in turn, should have the ability to distribute such supplies as currently contemplated to DOS for distribution by DOS or to subordinate DOD commands worldwide to enable them to coordinate and integrate DOD HA project initiatives and to distribute such supplies in connection with such projects.

3. *Amend Section 402(a) to Remove the “Space Available” Limitation*

Section 402(a) requires that goods not donated by the government be transported for humanitarian purposes only on a “space available” basis.⁶³ If the intent of the statute is to provide for the transportation of donated goods to less accessible areas or areas where the United States is trying to establish positive goodwill, it may be more beneficial to enable the military to transport such goods on separate, independent military missions, if practicable. Given today’s geo-political environment, the military should make the most of every opportunity it has to foster positive relations with local populations in distressed or impoverished areas.

Expanding the scope of § 402(a) in this manner will not result in unnecessary and increased governmental expense. Although DOD will have greater flexibility in executing missions, DOD will remain incentivized to limit unwarranted transportation activities as its budget will not necessarily increase. Further, given that most humanitarian missions of this type would fall within the purview of DOS responsibility, it is reasonable to conclude that DOD would only undertake a mission if it directly benefits DOD or is otherwise warranted under the circumstances.

B. Clarification of Funding Authorization

I would rather fight with my hands than my tongue.

— *Dolley Madison*

Congress should clarify certain terms used in the statutory language to ensure that military commanders have clear guidance on the appropriateness of certain projects. In addition to improving the operational efficiency of military commands, additional clarity will help military commanders determine how to most efficiently use HA projects in waging the War on Terror.

1. *Clarify the Meaning of “Military Operations” in § 401(a)(1)*

Section 401(a)(1) requires that HCA activities be executed in conjunction with “authorized military operation[s].”⁶⁴

⁶⁰ *Id.* § 2557(b).

⁶¹ *Id.*

⁶² To ensure that excess supplies that other military units might need are not distributed by local commanders to local populations, local commanders should be required to first obtain DOD approval for such distributions.

⁶³ 10 U.S.C. § 402(a).

⁶⁴ *Id.* § 401(a)(1).

However, the statute does not define or provide any guidance about what the term “authorized military operation” means. As a result, there is some debate in the military community as to whether the term references a specific military operation taking place in a country or a more general military operation (e.g., Operation Enduring Freedom or Operation Joint Endeavor) applicable to a number of countries within an area of responsibility (AOR). The generally accepted position is that the term means a specific military operation taking place in a country.⁶⁵

However, if congressional intent regarding HCA projects is to increase the scope and impact of the military in hostile environments to effectively combat terrorism in and around specified AORs, it is vital that a military commander has the discretion to determine where to allocate HCA resources in an assigned AOR. Because the authorized military operation element requires military commanders to attach an HCA project in one country to a non-HA military mission in that country, even if a country invites the military to conduct an HCA operation in its jurisdiction, the military generally cannot do so unless that country also invites the military to conduct other operations in its jurisdiction.

This disconnect can be addressed by specifying that authorized military operations means “direct, incidental or ancillary operations (including, without limitation, humanitarian and civic assistance projects or other humanitarian projects) conducted by U.S. military personnel in and around an area of responsibility designated to a related military command.” This type of amendment will allow commanders to justify executing HCA projects using an AOR-based test as opposed to a specific military operation focus, enabling military planners to open more doors to more countries for HA purposes.

2. Clarify That Section 2561 Funds Can Be Used to Finance Medical, Dental and Veterinary Projects If Section 401 Funds Are Not Available for Such Purposes

The current statutory authority provides that § 2561 funds may be used to finance “other humanitarian purposes worldwide.”⁶⁶ With the exception of medical, dental and veterinary projects (MDV Projects), the generally accepted interpretation of this phrase is that if a project cannot be funded through other sources, including § 401, the military might be able to fund that project using § 2561 funds. However, regarding MDV Projects, the commonly accepted practice (which, in the author’s opinion, is without legal support) is not to utilize § 2561 funds to finance any type of MDV Project (including MDV Projects in which U.S. personnel do not provide actual medical, dental or veterinary treatment and act in a consultative capacity only).⁶⁷

Given the scope and intent of § 2561, § 401 should be amended so that it is clearly not the exclusive funding statute for MDV Projects. Section 2561 should also be amended to explicitly allow the military to fund MDV Projects if funding under the authority of § 401 is somehow unavailable (e.g., because of a lack of an authorized military operation in an area).

C. Continuing the American Presence

It is fatal to enter any war without the will to win it.

— Douglas MacArthur

To ensure that the United States continues to capitalize on the goodwill earned from executed HA missions, the current framework needs to ensure at least some continued American presence in areas where HA projects have been conducted, even if at a minimal level. Under the current structure, the military can execute an HA project, and, upon completion, American representatives may never again return to such a location.

⁶⁵ This analysis has been confirmed by the author through various discussions with personnel at USCENTCOM and CJTF-HOA during the period from July to November 2005.

⁶⁶ 10 U.S.C. § 2561(a)(1).

⁶⁷ Some practitioners with whom I have worked in deployed environments rely on a lone sentence in the *OPLAW Handbook* as authority for this premise. “Generally, if the contemplated activity falls within the parameters of [Section 401], then [Section 401] should be used.” *OPLAW HANDBOOK*, *supra* note 42, ch. 12(B)(2)(c), at 268. Judge Advocates should be careful to note that the use of Section 2561 funding is not specifically prohibited.

Amend Section 401 and Section 2561 to Require and Fund Follow-Up Visits by Military Personnel, DOS Personnel or Other Government Officials

A well-executed HA project reinforces a positive image of the United States in the minds of the local populations benefiting from such a project. This positive reinforcement may very well be the greatest weapon in our arsenal for waging the War on Terror.

Given the breadth of operations in which the military is involved and demands on the military for personnel and resources, however, the military, out of necessity, will move from one HA project site to another and may not maintain contact with local communities to continue to foster the goodwill of the locals.

Section 401 and § 2561 should require the military to continue to have a local presence for a short period of time immediately after completion of an HA project and DOS or another agency to allocate resources after completion of a military HA project to ensure continued U.S. presence in the region. Having a mandatory follow-up requirement will enable the U.S. government to capitalize on the forward momentum gained with completion of the HA project and to hopefully establish an ongoing positive U.S. image in remote and strategic locations. As this will require personnel and resources from the military, DOS or another agency, the statutory language should also authorize the funding necessary to carry out these missions.

IV. Conclusion

Thus it is that in war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory.

— Sun Tzu, *The Art of War*

The military's ability to provide infrastructure support to indigenous populations in resource poor and economically and politically unstable environments is perhaps one of the greatest tools for winning the hearts and minds of local populations. Congressional action supporting the military's efforts in this regard have been commendable, but as a generous and prosperous nation, the United States can go one step further in promoting HA operations.

With each completed HA project, the United States comes one step closer to reinforcing a strong, positive image of the Soldiers, Sailors, Marines, and Airmen of the armed forces who make efforts at great personal risk to serve people in troubled foreign lands. With each such effort, local communities have a slightly better understanding of the vision of the U.S. people. Finally, with each such step, the terrorists, the demagogues, the tyrants, and the fanatics of the world have greater difficulty convincing innocents to join their cause against the United States. While this may not, in and of itself, win the War on Terror, the United States will be one step closer to being able to do so.

Appendix

ANNEX I PROPOSED STATUTORY AMENDMENTS

§ 401. *Humanitarian and civic assistance provided in conjunction with military operations*

(a)

(1) Under regulations prescribed by the Secretary of Defense, the Secretary of a military department may carry out humanitarian and civic assistance activities in conjunction with authorized military operations of the armed forces in a country if the Secretary concerned determines that the activities will promote –

(A) the security interests of both the United States and the country in which the activities are to be carried out; and

(B) the specific operational readiness skills of the members of the armed forces who participate in the activities.

(2) Humanitarian and civic assistance activities carried out under this section shall complement, and may not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States. Such activities shall serve the basic economic and social needs of the people of the country concerned.

(3) Humanitarian and civic assistance may not be provided under this section (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity.

(4) *In respect of any humanitarian and civic assistance activity provided under subsection (a)(1) relating to any construction or repair of any building, dwelling or other infrastructure, the Secretary of Defense shall ensure that: (i) members of the armed forces participating in such activities perform such construction or repair activities to the best of such members' ability; and (ii) upon completion of such construction or repair activities, such building, dwelling or other infrastructure shall be immediately usable and self-sustaining. The Secretary of Defense shall make a good faith effort to obtain funds and resources from the Secretary of State for any expenses over \$5,000 required to make such building, dwelling or other infrastructure immediately usable and self-sustaining in accordance with this subsection (a)(4), and, to the extent such funds are not reasonably available in connection with the execution of such project, expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.*

(5) *The Secretary of Defense and the Secretary of State shall ensure that members of the armed forces or members of the Department of State shall, to the extent reasonably practicable and in the best interests of the United States, visit any location where any humanitarian and civic assistance activity has been provided under subsection (a)(4) at least once every six months after completion of such activity for a period of two years. Expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.*

(6) *The Secretary of Defense shall ensure that any humanitarian and civic assistance activity provided under subsection (a)(1) shall be within the reasonable technical expertise and ability of the members of the armed forces who participate in the activities.*

(b) Humanitarian and civic assistance may not be provided under this section to any foreign country unless the Secretary of State specifically approves the provision of such assistance.

(c)

(1) Expenses incurred as a direct result of providing humanitarian and civic assistance under this section to a foreign country shall be paid for out of funds specifically appropriated for such purpose.

(1) 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 pursuant to paragraph (1), except that funds appropriated to the Department of Defense for operation and maintenance (other than

funds appropriated pursuant to such paragraph) may be obligated for humanitarian and civic assistance under this section only for incidental costs of carrying out such assistance.

(d) The Secretary of Defense shall submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on International Relations of the House of Representatives a report, not later than March 1 of each year, on activities carried out under this section during the preceding fiscal year. The Secretary shall include in each such report-

- (1) a list of the countries in which humanitarian and civic assistance activities were carried out during the preceding fiscal year;
- (2) the type and description of such activities carried out in each country during the preceding fiscal year; and
- (3) the amount expended in carrying out each such activity in each such country during the preceding year.

(e) In this section, the term "humanitarian and civic assistance" means any of the following:

- (1) Medical, dental, and veterinary care provide in areas of a country that are rural or are underserved by medical, dental, and veterinary professionals, respectively, including education, training and technical assistance related to the care provided.
- (2) Construction of ~~rudimentary~~ surface transportation systems.
- (3) Well drilling and construction of ~~basic~~ sanitation facilities.
- (4) ~~Rudimentary~~ Construction and repair of public facilities.

(f) *As used in this section, the term "authorized military operation" means any direct, incidental or ancillary operation (including, without limitation, humanitarian and civic assistance projects or other humanitarian projects) conducted by U.S. military personnel in and around any area of responsibility designated to a related military command.*

§ 402. Transportation of humanitarian relief supplies to foreign countries

(a) Notwithstanding any other provision of law, and subject to subsection (b), the Secretary of Defense may transport to any country, without charge, supplies which have been furnished by a nongovernmental source and which are intended for humanitarian assistance. Such supplies may be transported ~~only~~ on a space available basis *or as otherwise directed by the Secretary of Defense if such transportation is reasonably practicable and in the best interests of the United States.*

(b)

- (1) The Secretary may not transport supplies under subsection (a) unless the Secretary determines that –
 - (A) the transportation of such supplies is consistent with the foreign policy of the United States;
 - (B) the supplies to be transported are suitable for humanitarian purposes and are in usable condition;
 - (C) there is a legitimate humanitarian need for such supplies by the people or entity for whom they are intended;
 - (D) the supplies will in fact be used for humanitarian purposes; and
 - (E) adequate arrangements have been made for the distribution or use of supplies in the destination country.
- (2) The President shall establish procedures for making the determinations required under paragraph (1). Such procedures shall include inspection of supplies before acceptance for transport.
- (3) It shall be the responsibility of the entity requesting the transport of supplies under this section to ensure that the supplies are suitable for transport.

(c)

- (1) Supplies transported under this section may be distributed by an agency of the United States Government, a foreign government, an international organization, or a private nonprofit relief organization.
- (2) Supplies transported under this section may not be distributed, directly or indirectly, to any individual, group, or organization engaged in a military or paramilitary activity.

(d)

- (1) The Secretary of Defense may use the authority provided by subsection (a) to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition, such as an oil spill, that threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available.
- (2) Notwithstanding subsection (a), the Secretary of Defense may require reimbursement for costs incurred by the Department of Defense to transport supplies under this subsection.

(e) Not later than July 31 each year, the Secretary of State shall submit to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed Services and the Committee on International Relations of the House of Representatives a report identifying the origin, contents, destination, and disposition of all supplies transported under this section during the 12-month period ending on the preceding June 30.

§ 2557. Excess nonlethal supplies: availability for homeless veteran initiatives and humanitarian relief

(a)

- (1) The Secretary of Defense may make available for humanitarian relief purposes any nonlethal excess supplies of the Department of Defense.
- (2) The Secretary of Defense may make excess clothing, shoes, sleeping bags, and related nonlethal excess supplies available to the Secretary of Veterans Affairs for distribution to homeless veterans and programs assisting homeless veterans. The transfer of nonlethal excess supplies to the Secretary of Veterans Affairs under this paragraph shall be without reimbursement.

(b) Excess supplies made available for humanitarian relief purposes under this section shall *be distributed by the Secretary of Defense as the Secretary of Defense may prescribe by regulation* or be transferred to the Secretary of State, who shall be responsible for the distribution of such supplies.

(c) This section does not constitute authority to conduct any activity which, if carried out as an intelligence activity by the Department of Defense, would require a notice to the intelligence committees under title V of the National Security Act of 1947 (50 U.S.C. 413 et seq.).

(d) In this section:

- (1) The term “nonlethal excess supplies” means property, other than real property, of the Department of Defense-
 - (A) that is excess property, as defined in regulations of the Department of Defense; and
 - (B) that is not a weapon, ammunition, and other equipment or material that is designed to inflict serious bodily harm or death.
- (2) The term “intelligence committees” means the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives.

§ 2561. Humanitarian assistance

(a) **Authorized Assistance.-**

(1) To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide.

(2) The Secretary of Defense may use the authority provided by paragraph (1) to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition, such as an oil spill, that threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available. The Secretary may require reimbursement for costs incurred by the Department of Defense to transport supplies under this paragraph.

(3) *Humanitarian assistance provided under paragraph (1) may include any humanitarian and civic assistance activity covered by 10 U.S.C. § 401(e)(1) to the extent such humanitarian and civic assistance activity is not funded through funds appropriated therefor under 10 U.S.C. § 401(e)(1).*

(4) *In respect of any humanitarian assistance provided under subsection (a)(1) relating to any construction or repair of any building, dwelling or other infrastructure, the Secretary of Defense shall ensure that: (i) members of the armed forces participating in such activities perform such construction or repair activities to the best of such members' ability; and (ii) upon completion of such construction or repair activities, such building, dwelling or other infrastructure shall be immediately usable and self-sustaining. The Secretary of Defense shall make a good faith effort to obtain funds and resources from the Secretary of State for any expenses over \$5,000 required to make such building, dwelling or other infrastructure immediately usable and self-sustaining in accordance with this subsection (a)(4), and, to the extent such funds are not reasonably available in connection with the execution of such project, expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.*

(5) *The Secretary of Defense and the Secretary of State shall ensure that members of the armed forces or members of the Department of State shall, to the extent reasonably practicable and in the best interests of the United States, visit any location where any humanitarian assistance has been provided under subsection (a)(4) at least once every six months after completion of such activity for a period of two years. Expenses incurred in connection therewith shall be paid for out of funds specifically appropriated for such purpose.*

(6) *The Secretary of Defense shall ensure that any humanitarian and civic assistance activity provided under subsection (a)(4) shall be within the reasonable technical expertise and ability of the members of the armed forces who participate in the activities.*

(b) Availability of Funds.- To the extent provided in appropriation Acts, funds appropriated for humanitarian assistance for the purposes of this section shall remain available until expended.

(c) Status Reports.-

(1) The Secretary of Defense shall submit to the congressional committees specified in subsection (f) an annual report on the provision of humanitarian assistance pursuant to this section for the prior fiscal year. The report shall be submitted each year at the time of the budget submission by the President for the next fiscal year.

(2) Each report required by paragraph (1) shall cover all provisions of law that authorize appropriations for humanitarian assistance to be available from the Department of Defense for the purposes of this section.

(3) Each report under this subsection shall set forth the following information regarding activities during the previous fiscal year:

(A) The total amount of funds obligated for humanitarian relief under this section.

(B) The number of scheduled and completed transportation missions for purposes of providing humanitarian assistance under this section.

(C) A description of any transfer of excess nonlethal supplies of the Department of Defense made available for humanitarian relief purposes under section 2557 of this title. The description shall include the date of the transfer, the entity to whom the transfer is made, and the quantity of items transferred.

(d) Report Regarding Relief for Unauthorized Countries.- In any case in which the Secretary of Defense provides for the transportation of humanitarian relief to a country to which the transportation of humanitarian relief has not been

specifically authorized by law, the Secretary shall notify the congressional committees specified in subsection (f) and the Committees on Appropriations of the Senate and House of Representatives of the Secretary's intention to provide such transportation. The notification shall be submitted not less than 15 days before the commencement of such transportation.

(e) Definition.- In this section, the term "defense authorization Act" means an Act that authorizes appropriations for one or more fiscal years for military activities of the Department of Defense, including authorizations of appropriations for the activities described in paragraph (7) of section 114 (a) of this title.

(f) Congressional Committees.- The congressional committees referred to in subsections (c)(1) and (d) are the following:

- (1) The Committee on Armed Services and the Committee on Foreign Relations of the Senate.
- (2) The Committee on Armed Services and the Committee on International Relations of the House of Representatives.