

Appendix*

Department of Defense Legislation for Fiscal Year 2006

Typically, the legislation update is contained in the January issue of *The Army Lawyer*; however, this year, neither the Appropriations nor the Authorization Act was passed by the submission deadline.

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

President Bush signed into law the Department of Defense (DOD) Appropriations Act, 2006, on 30 December 2005.¹ The Act appropriated over \$440 billion to DOD for fiscal year (FY) 2006.² This amount is down from the approximately \$453 billion that Congress appropriated to DOD in FY 2005, but is about \$43 billion more than President George W. Bush requested for the current fiscal year.³

Basic Yearly Appropriations

Congress appropriated over \$96 billion⁴ for Military Personnel (MILPER), down from almost \$104 billion⁵ last fiscal year; \$121.7 billion⁶ for Operation and Maintenance (O&M), up slightly from \$121.06⁷ billion last fiscal year; \$76.5 billion⁸ for Procurement, down from \$77.6⁹ billion last year; and \$71.9 billion¹⁰ for Research, Development, Test, and Evaluation (RDT&E), up from almost \$70 billion last year.¹¹

Emergency and Extraordinary Expenses (EEE) and Combatant Commander Initiative Fund (CCIF)

Congress again authorized the Secretary of Defense (SECDEF) and the service secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for “emergencies and extraordinary expenses,” in an amount totaling \$50,849,800 for both the DOD and the service secretaries.¹² In addition, Congress authorized the use of \$25 million of the DOD O&M appropriation for the Combatant Commander Initiative Fund, authorized under 10 U.S.C. § 166a.¹³

* This appendix is to be used in conjunction with the January 2006, *The Army Lawyer*, Contract and Fiscal Law Developments of 2005—The Year in Review, Department of Defense Legislation for Fiscal Year 2006.

¹ Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005). The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate Reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 109-359, at 173 (2005); *see also* H.R. REP. NO. 109-119 (2005); S. REP. NO. 109-141 (2005); H.R. REP. NO. 109-95 (2005).

² S. REP. NO. 109-141, at 1 (2005).

³ *Id.*

⁴ Department of Defense Appropriations Act, 2006, tit. I.

⁵ Department of Defense Appropriations Act, 2005, tit. I, Pub. L. No. 108-287, 118 Stat. 951 (2004).

⁶ Department of Defense Appropriations Act, 2006, tit. II.

⁷ Department of Defense Appropriations Act, 2005, tit. II.

⁸ Department of Defense Appropriations Act, 2006, tit. III.

⁹ Department of Defense Appropriations Act, 2005, tit. III.

¹⁰ Department of Defense Appropriations Act, 2006, tit. IV.

¹¹ Department of Defense Appropriations Act, 2005, tit. IV.

¹² Department of Defense Appropriations Act, 2006, tit. II. The DOD may use its O&M for emergencies and extraordinary expenses (EEE) in an amount not to exceed \$36 million; the Army, \$11,478,000; the Navy, \$6,003,000; and the Air Force, \$7,699,000. The Marine Corps does not receive special authority to expend EEE funds. *Id.*; *see also* 10 U.S.C.S § 127 (LEXIS 2004).

¹³ Department of Defense Appropriations Act, 2006, tit. II; *see also* 10 U.S.C.S. § 166a (providing the underlying authority for the Combatant Commander Initiative Fund).

The United States Court of Appeals for the Armed Forces

The United States Court of Appeals for the Armed Forces again received an appropriation for salaries and expenses in the amount of \$11,236,000,¹⁴ up from \$10,825,000¹⁵ last fiscal year.

Environmental Restoration

Congress appropriated more than \$1.4 billion to DOD, the Army, the Navy, and the Air Force for environmental restoration, which includes, “environmental restoration, reduction, and recycling of hazardous waste, removal of unsafe buildings and debris... [and] for similar purposes.”¹⁶

Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA)

Congress provided \$61,546,000 in funds, which are available until 30 September 2007, for the programs authorized under a number of sections of Title 10 relating to humanitarian assistance, to include demining, excess property programs, and “Humanitarian Assistance (Other)” (HAO).¹⁷ The appropriation is up slightly from \$59 million last fiscal year.¹⁸

Former Soviet Union Threat Reduction

Congress appropriated \$415,549,000 for assistance to the republics of the former Soviet Union.¹⁹ This assistance is limited to activities related to the elimination, safety and security transportation, and storage of nuclear, chemical, and other weapons in those countries, which also includes efforts aimed at non-proliferation of these weapons.²⁰ Of the amount appropriated, \$15 million specifically supports the dismantling and disposal of nuclear submarines, submarine reactor components, and warheads in the Russian Far East.²¹ Congress again included authority to use these funds for “defense and military contacts.”²² These funds are available until 30 September 2008.²³

¹⁴ Department of Defense Appropriations Act, 2006, tit. II. The appropriation also authorizes the use of up to \$5,000 of this appropriation for official representation purposes. *Id.*

¹⁵ *Id.*

¹⁶ *Id.* The Department of Defense received \$28,167,000, the Army received \$407,865,000, the Navy received \$305,275,000, and the Air Force received \$406,461,000. *Id.* In addition, a separate appropriation, titled “Environmental Restoration, Formerly Used Sites,” Congress appropriated a total of \$256,921,000. The funds available under these sections are transferable to other appropriations available to DOD, the Army, the Air Force, and the Navy. The funds then merge with the appropriation to which the funds were transferred and may then only be used for the purpose of and the time amount for which the appropriation is available. *Id.*

¹⁷ *Id.*; see also 10 U.S.C.S. §§ 401, 402, 404, 2557, 2561 (LEXIS 2004).

¹⁸ Department of Defense Appropriations Act, 2005, tit. II, Pub. L. No. 108-287, 118 Stat. 951 (2004).

¹⁹ Department of Defense Appropriations Act, 2006, tit. II (Former Soviet Union Threat Reduction Account). The amount is up slightly from \$409.2 million last FY. Department of Defense Appropriations Act, 2005, tit. II.

²⁰ Department of Defense Appropriations Act, 2006, tit. II.

²¹ *Id.*

²² *Id.*

²³ *Id.*

Defense Health Program

Congress provided more than \$2 billion more in funding for the Defense Health Program, for a total of over \$20.2 billion.²⁴

Drug Interdiction and Counter-Drug Activities

Congress again appropriated funds for the DOD to use for drug interdiction and counter-drug activities.²⁵ The funds are transferable to other appropriations, to include: military personnel of the reserve components, O&M, procurement, and RDT&E.²⁶

General Transfer Authority

Congress increased the level of DOD's general transfer authority from \$3.5 billion to \$3.75 billion for FY06,²⁷ and also provided an additional \$2.5 billion of additional funding.²⁸

Congressional Prohibitions

Congress again placed prohibitions in Title VII of the Appropriations Act, to include prohibiting the use funds for "publicity or propaganda not authorized by Congress"²⁹ and for the purpose of influencing congressional action on any legislation or appropriation matters, either directly or indirectly.³⁰ Congress also limited the ability of the SECDEF and the Service Secretaries to obligate funds during the last two months of the fiscal year to twenty percent of one-year appropriations contained in the Act.³¹ Congress again limited the availability of funds for conversion of functions of the DOD to contractors³² and prohibited the use of any appropriated funds to initiate a new installation overseas without advance notification to the appropriations committees.³³ Further, Congress directed that no "funds appropriated by [the Act] shall be available to perform any [A-76 study] if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 40 months [for a multi-function activity]."³⁴ Congress also prohibited the sale of the F/A-22 advanced tactical fighter to any foreign country.³⁵

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* The appropriation includes transfer to military personnel appropriations for the reserve component serving in either Title 10 or Title 32 status. *Id.* The transferred funds take on the attributes of the appropriation to which they are transferred with regard to purpose and time. *Id.*

²⁷ *Id.* § 8005. In the fiscal years preceding FY 2005, the level of the DOD's general transfer authority had been between \$2 and \$2.5 billion. *See* Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, § 8005, 117 Stat. 1054, 1071 (2003); Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8005, 116 Stat. 1519, 1537 (2002); Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247 (2002); Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8005, 114 Stat. 656, 674 (2000).

²⁸ Department of Defense Appropriations Act, 2006, tit. IX (Additional Appropriations).

²⁹ *Id.* tit VIII, § 8001.

³⁰ *Id.* § 8012.

³¹ *Id.* § 8004, not to include "obligations for support of active duty training of reserve components or summer camp training of the Reserve Officers' Training Corps." *Id.*

³² The Appropriations Act uses the language in the first paragraph of section 8014, "not more than 10 Department of Defense civilian employees . . ." *Id.* § 8014. Note, however, that the Authorization Act language for the same paragraph indicates "10 or more." 2006 Authorization Act, § 341. The Authorization Act amends subsection (a) of the controlling statute, 10 U.S.C.S. § 2461 (LEXIS 2004), while the Appropriations Act does not.

³³ Department of Defense Appropriations Act, 2006, § 8012.

³⁴ *Id.* § 8021.

³⁵ *Id.* § 8067.

Energy Cost Savings

Appropriations that are still available at the end of the fiscal year as a result of energy cost savings realized by DOD remain available for obligation the next fiscal year “to the extent, and for the purposes, provided in section 2865 of title 10, United States Code.”³⁶

Investment Threshold

Congress again directed that O&M funds may be used “to purchase items having an investment unit cost of not more than \$250,000.”³⁷

Limitations of Transfer of Defense Articles and Services

During an international peacekeeping, peace enforcement, or humanitarian assistance operation, Congress has prohibited DOD’s authority to obligate any funds to transfer defense articles and services to other countries or international organizations, “unless the congressional defense committees, the Committee on International Relations of the House of Representative, and the Committee on Foreign Relations of the Senate are notified 15 days in advance of such transfer.”³⁸

Human Rights Vetting Requirement

Congress again placed the requirement for human rights vetting prior to using any appropriated funds for the training of security forces of a foreign country in the Appropriations Act.³⁹ The section prohibits DOD support of such training, “if the [SECDEF] has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.”⁴⁰

Government Credit Card Refunds

Congress directed that refunds from Government travel cards, Government Purchase Cards, official travel arranged by Government Contracted Travel Management Centers, “may be credited to operation and maintenance, and research, development, test, and evaluation accounts of the Department of Defense which are current when the funds are received.”⁴¹

Financing and Fielding of Key Army Capabilities

Congress directed DOD and the Department of the Army to “make future budgetary and programming plans to fully finance the Non-Line of Sight Future Force cannon and resupply vehicle program (NLOS-C) in order to field this system in fiscal year 2010, consistent with the broader plan to field the Future Combat System (FCS) in fiscal year 2010.”⁴² Additionally, Congress provided that if the Army is unable to field the FCS by 2010, that the NLOS-C will still be developed independent of the FCS timeline.⁴³ Further, Congress requires the Army to have eight NLOS-C systems by the end of

³⁶ *Id.* § 8031.

³⁷ *Id.* § 8036.

³⁸ *Id.* § 8059.

³⁹ *Id.* § 8069.

⁴⁰ *Id.*

⁴¹ *Id.* § 8074.

⁴² *Id.* § 8096.

⁴³ *Id.*

calendar year 2008.⁴⁴ Finally, Congress dictated that the Army “shall ensure that budgetary and programmatic plans will provide for no fewer than seven (7) Stryker Brigade Combat Teams.”⁴⁵

Promotional Materials for Operations in Iraq and Afghanistan

The SECDEF is authorized to present “promotional materials, to include a United States flag . . . to any member . . . who . . . participates in Operation Enduring Freedom or Operation Iraqi Freedom, along with other recognition items in conjunction with any week-long national observance and day of national celebration, if established by Presidential proclamation. . . .”⁴⁶

Additional and Special Appropriations

Basic Appropriations

Department of Defense-wide, Congress appropriated additional MILPER in an amount exceeding \$5.7 billion⁴⁷ and O&M in an amount exceeding \$800 million,⁴⁸ of which up to \$195 million of no-year funds,⁴⁹ that “may be used to reimburse Pakistan, Jordan, and other key cooperating nations, for logistical, military, and other support provided, or to be provided to United States military operations.”⁵⁰ Congress appropriated additional funding for procurement in an amount exceeding \$7.9 billion and for RDT&E in an amount exceeding \$50 million.⁵¹ Congress also appropriated additional funds for Revolving and Management Funds in the amount of \$2,516,400,000.⁵²

Iraqi Freedom Fund

While their intent to continue funding the Iraqi Freedom Fund remains indefinite, Congress this year appropriated an additional \$4.658 billion for transfer into military personnel, operation and maintenance, OHDACA, procurement, RDT&E, and working capital funds.⁵³ Of this appropriation, Congress further directed that “not less than \$1,360,000,000 shall be available for the Joint [Improvised Explosive Device] Task Force.”⁵⁴

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* § 8122.

⁴⁷ *Id.* tit. IX (Army, \$4,713,245,000; Navy, \$144,000,000; Marine Corps, \$455,000,000; Air Force, \$508,000,000; Army, \$138,755,000; Reserve Personnel, Navy, \$10,000,000; National Guard Personnel, Army, \$234,400,000; National Guard Personnel, Air Force, \$3,200,000).

⁴⁸ *Id.* (Army, \$21,348,886,000; Navy, \$1,810,500,000; Marine Corps, \$1,833,126,000; Air Force, \$2,483,900,000; Defense-Wide, \$805,000,000; Army Reserve, \$48,200,000; Navy Reserve, \$6,400,000; Marine Corps Reserve, \$27,950,000; Air Force Reserve, \$5,000,000; Army National Guard, \$183,000,000; Air National Guard, \$7,200,000).

⁴⁹ These funds are not subject to the regular time requirements of most appropriations and are available until expended.

⁵⁰ *Id.* tit. IX. “Key cooperating nation support” expenditures require the approval of the Secretary of Defense, with the concurrence of the Secretary of State, in coordination with the Director of the Office of Management and Budget, and the fifteen-day prior notification to the appropriate committees. *Id.*

⁵¹ *Id.* (Procurement: Army Aircraft, \$232,100,000; Army Missile, \$55,000,000; Army Weapons and Tracked Vehicles, \$860,190,000; Army Ammunition, \$273,000,000; Other Procurement, Army, \$3,174,900,000; Navy Aircraft, \$138,837,000; Navy Weapons, \$116,900,000; Navy and Marine Corps Ammunition, \$38,885,000; Other Procurement, Navy, \$49,100,000; Marine Corps, \$1,710,145,000; Air Force Aircraft, \$115,300,000; Air Force Missile, \$17,000,000; Other Procurement, Air Force, \$17,500,000; Defense-wide, \$182,075,000; and National Guard and Reserve Equipment, \$1,000,000,000. RDT&E: Army, \$13,100,000; Air Force, \$12,500,000; and Defense-wide, \$25,000,000).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

Drug Interdiction and Counter-Drug Activities

For general drug interdiction and counter-drug activities, Congress appropriated an additional \$27.62 million.⁵⁵
Train and Equip

Congress again made available \$500 million of DOD O&M for use in Iraq and Afghanistan to “train, equip, and provide related assistance only to military or security forces. . . to enhance their capability to combat terrorism and to support United States military operations in Iraq and Afghanistan.”⁵⁶ Train and equip authority may be used to provide “equipment, supplies, services, training, and funding.”⁵⁷

The Commander’s Emergency Response Program

Congress continues to provide funding authority, this year up to \$500 million in DOD O&M, to the Commander’s Emergency Response Program (CERP) for “the purpose of enabling military commanders in Iraq [and Afghanistan] to respond to urgent relief and reconstruction efforts within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people.”⁵⁸ Congress continues to require DOD to submit quarterly reports and provide guidance to the field.⁵⁹ The most recent guidance was issued in July of 2005.⁶⁰

Force Protection Vehicles

Congress provided for the purchase of up to twenty heavy and light armored vehicles for force protection, “notwithstanding price or other limitations. . . or any other provision of law,”⁶¹ to be paid for with any funding provided to DOD “for operations in Iraq and Afghanistan.”

Lift and Sustain

Congress again provided for the use of DOD O&M for “supplies, support, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq and Afghanistan.”⁶² This authority continues without a specific dollar limitation; however, quarterly reporting on expenditures for lifting and sustaining coalition forces is required.⁶³

⁵⁵ *Id.*

⁵⁶ *Id.* § 9006. This section required committee notification (defense committees, the Committee on International Relations of the House of Representatives, and the Committee on Foreign Relations of the Senate) fifteen days prior to providing the train and equip assistance. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* § 9007.

⁵⁹ *Id.* The Senate Armed Services Committee explained its expectations in the report accompanying the Bill, as follows:

The provision would require the Secretary to provide quarterly reports to the congressional defense committees on the source, allocation, and use of funds pursuant to this authority. The committee expects the quarterly reports to include detailed information regarding the amount of funds spent, the recipients of the funds, and the specific purposes for which the funds were used. The committee directs that funds made available pursuant to this authority be used in a manner consistent with the CERP guidance that the Under Secretary of Defense (Comptroller) issued in a memorandum dated February 18, 2005. This guidance directs that CERP funds be used to assist the Iraqi and Afghan people in the following representative areas: water and sanitation; food production and distribution; agriculture; electricity; healthcare; education; telecommunications; economic, financial and management improvements; transportation; irrigation; rule of law and governance; civic cleanup activities; civic support vehicles; repair of civic and cultural facilities; and other urgent humanitarian or reconstruction projects.

S. REP. NO. 109-69, at 383 (2005).

⁶⁰ Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments, et al., subject: Commanders’ Emergency Response Program Guidance (27 July 2005).

⁶¹ Department of Defense Appropriations Act, 2006, § 9008.

⁶² *Id.*

⁶³ *Id.* § 9009.

Reporting Requirements

For FY 2006, Congress requires extensive reporting of a “comprehensive set of performance indicators and measures for progress toward military and political stability in Iraq.”⁶⁴ The requirements are extensive and include reporting specific numbers of trained security forces and the numbers of insurgents in Iraq.⁶⁵

Detainee Treatment Act of 2005

This year Congress took the opportunity to enact legislation regarding the treatment of detainees.⁶⁶ The Detainee Treatment Act of 2005 includes guidance on uniform standards regarding interrogation,⁶⁷ the prohibition of “cruel, inhuman, or degrading treatment or punishment of persons under custody or control of the United States Government,”⁶⁸ and the procedures for status reviews of detainees outside of the United States.⁶⁹ The Act also requires the SECDEF to “ensure that all personnel of the Iraqi military forces who are trained by [DoD] personnel and contractor personnel of the [DOD] received training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.”⁷⁰

MILITARY QUALITY OF LIFE AND VETERANS AFFAIRS APPROPRIATIONS ACT, 2006

President Bush signed the Military Quality of Life and Veterans Affairs Appropriations Act on 30 September 2005.⁷¹ The Act provides over \$6.5 billion in Military Construction funding,⁷² over \$4 billion in family housing,⁷³ and almost \$1.76 billion for base closure activities.⁷⁴

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006

On 6 January 2006, the President signed into law the National Defense Authorization Act for FY 2006 (Authorization Act).⁷⁵

⁶⁴ *Id.* § 9010.

⁶⁵ *Id.*

⁶⁶ *Id.* tit. X.

⁶⁷ *Id.* § 1002 (prohibiting DOD personnel from using methods of interrogation on persons in DOD custody not listed in the Army field manual on intelligence interrogation).

⁶⁸ *Id.* § 1003.

⁶⁹ *Id.* § 1005 (directing that the Secretary of Defense submit procedural standards and other reports regarding Guantanamo Bay, Afghanistan, and Iraq).

⁷⁰ *Id.* § 1006.

⁷¹ Pub. L. No. 109-114, 119 Stat. 2372 (2005).

⁷² *Id.* § 2372-2375. Army, \$1,775,260,000 (provides that \$50,000,000 are available for overhead to cover force protection systems in Iraq); Navy and Marine Corps, \$1,157,141,000; Air Force, \$1,288,530,000; Defense-wide, \$1,008,855,000; Army National Guard, \$523,151,000; Air National Guard, \$316,117,000; Army Reserve, \$152,569,000; Naval Reserve, \$46,864,000; and Air Force Reserve, \$105,883,000. Additionally, Congress appropriated funds for the NATO Security Investment Program in the amount of \$206,858,000. *Id.*

⁷³ *Id.* § 2375-2376. Army Family Housing Construction, \$549,636,000; Army Family Housing Operation and Maintenance, \$803,993,000; Navy and Marine Corps Housing Construction, \$218,942,000; Navy and Marine Corps Family Housing Operation and Maintenance, \$588,660,000; Air Force Family Housing Construction, \$1,101,887,000; Air Force Family Housing Operation and Maintenance, \$766,939,000; Family Housing Operation and Maintenance, Defense-wide, \$46,391,000; and Department of Defense Family Housing Improvement Plan, \$2,500,000.

⁷⁴ *Id.* at 2376-2377. Department of Defense Base Closure Account 1990, \$254,827,000; and Department of Defense Base Closure Account 2005, \$1,504,466,000.

⁷⁵ Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006) [hereinafter 2006 Authorization Act]

Procurement

Army

Congress authorized the Secretary of the Army to enter into multiyear contracts for the procurement of UH-60 Blackhawk helicopters,⁷⁶ MH-60S Seahawk helicopters,⁷⁷ modernized target acquisition designation sight/pilot night vision sensors for AH-64 Apache helicopters,⁷⁸ and for conversion of the AH-64s to the new AH-64D configuration.⁷⁹

Additionally, Congress directed the Secretary of the Army to provide continuing reports on the Army Modular Force initiative, to include the acquisition plan and requirements for funding for the program.⁸⁰ The Secretary of the Army was also directed that any Army contract for modernization and recapitalization of the fleet of Army tactical wheeled vehicles should be a joint service program with the Marine Corps.⁸¹ Correspondingly, the Navy and Marine Corps are directed to collaborate with the Army should they choose to modernize or recapitalize their wheeled vehicle fleet.⁸²

Air Force

Like the Army, Congress also granted the Air Force the authority to enter into multiyear contract for aircraft, specifically C-17s.⁸³ Additionally, Congress prohibited the retirement of the KC-135W, F-117, and C-130E/H aircraft in fiscal year 2006.⁸⁴ Procurement of any new unmanned aerial vehicle systems (UAV) and component parts for new systems is prohibited; however, new parts can be purchased under existing contracts for existing UAV systems.⁸⁵

Research, Development, Test, and Evaluation

In this section, Congress directed the Comptroller General to continue annual reporting on the Future Combat Systems Program.⁸⁶ Congress further directed that any purchase of the Future Combat Systems Program must be completed under the negotiated procurement procedures, rather than the other transaction authority provisions of Title 10, United States Code, Section 2371.⁸⁷

Reflecting the current joint environment in which DOD operates, Congress directed that some DOD RDT&E projects be undertaken jointly—the Marine Corps-Army Joint Heavy Lift Rotorcraft Program,⁸⁸ the DOD Joint Tactical Radio System,⁸⁹ and a DOD joint combat trauma registry.⁹⁰

⁷⁶ *Id.* § 111.

⁷⁷ *Id.*

⁷⁸ *Id.* § 112.

⁷⁹ *Id.* § 113.

⁸⁰ *Id.* § 115.

⁸¹ *Id.* § 114.

⁸² *Id.*

⁸³ *Id.* § 131.

⁸⁴ *Id.* §§ 132-34. Congress further detailed that any purchase of new C-130J/KC-130J aircraft should be effected using the Federal Acquisition Regulation, Part 15, by using negotiated procurement procedures, rather than under Part 12, as a commercial item acquisition. *Id.* § 135.

⁸⁵ *Id.* § 142.

⁸⁶ *Id.* § 211.

⁸⁷ *Id.* § 212; 10 U.S.C.S § 2371 (LEXIS 2004) (research projects: transactions other than contracts and grants).

⁸⁸ Department of Defense Authorization Act, 2006, § 217.

⁸⁹ *Id.* § 218.

⁹⁰ *Id.* § 256.

Operation and Maintenance

Extensions of Authority

In the Authorization Act, Congress extended various authorities from past years. These include the extension of the authority to provide logistics support and services for weapons systems contractors,⁹¹ the extension of the period for reimbursement for protective gear or health equipment purchased by or for deployed servicemembers,⁹² and the extension of temporary authority for contractor performance of security guard functions.⁹³ The section on security guard functions, originally enacted in FY 2003, is still listed as “temporary,” but has been renewed for at least one more fiscal year.⁹⁴

Commemoration of Armed Forces’ Success in Operation Iraqi Freedom and Operation Enduring Freedom

Congress authorized celebrations in honor of military efforts in Iraq and Afghanistan.⁹⁵ The provision grants the authority to the President to declare a day of celebration to honor servicemembers returning from deployments to Iraq and Afghanistan and to issue a proclamation to the citizens of the United States requesting that they observe the declared day of celebration with ceremonies and activities.⁹⁶ Participation by members of the Armed Forces in these celebrations is also authorized.⁹⁷ Funds provided to DOD may be expended to cover costs of the servicemembers’ participation in these events, but must not exceed \$20 million. In addition, any private contributions made specifically for covering the costs of the participating servicemembers must first be deducted from this \$20 million.⁹⁸

Military Personnel Policy

Grades of the Judge Advocates General

Before the amendment in this year’s authorization act, the language of Title 10, U.S.C., Section 3037(a), stated that

[t]he President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Assistant Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps, who are recommended by the Secretary of the

⁹¹ *Id.* §331; *see also* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. 107-314, Stat. 2521; 10 U.S.C.S. § 2302 (LEXIS 2004).

⁹² Department of Defense Authorization Act, 2006, § 332. The January 2005 issue of *The Army Lawyer* (Contract and Fiscal Law Year in Review Legislative Appendix), explains the background for the authorization, as follows:

The [2005] Authorization Act directs the SECDEF to reimburse military members “for the cost (including any shipping cost) of any protective, safety, or health equipment” purchased by the military member or by another person in the member’s behalf “in anticipation of, or during, the deployment of the member in connection with Operation Enduring Freedom, or Operation Iraqi Freedom” The reimbursement requirement applies only if the SECDEF certifies the equipment was critical to the military member’s protection, safety, or health; the member was not issued the equipment prior to deployment; and the military member purchased the equipment between 11 September 2001 and 31 July 2004. Not later than 120 days following the Act’s enactment, the SECDEF must issue rules to “expedite the provision of reimbursement” Following issuance of the implementation guidance, military members will have one year to submit qualifying claims for reimbursement.

Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—The Year in Review*, ARMY LAW., Jan. 2005, at 198 [hereinafter *2004 Year in Review*] (citations omitted).

⁹³ Department of Defense Authorization Act, 2006, § 344; *see also* 2004 Year in Review, *supra* note 93, at 203.

In general, section 2465 of title 10 prohibits the DOD from entering into contracts for security guard (and firefighting) services on installations within the United States.⁹³ The Bob Stump National Defense Authorization Act, 2003, granted the DOD authority to enter into contracts for any “increased performance” of security guard functions due to the terrorist attacks on 11 September 2002, notwithstanding the prohibition under section 2465 of title 10. Congress provided the authority temporarily, with an expiration date of 1 December 2005.

Id. (citing 10 U.S.C.S. § 2465 (LEXIS 2004); the Uniting and Strengthening America by Providing Appropriated Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001; Pub. L. No. 107-314, § 332, 116 Stat. 2458, 2513 (2002))

⁹⁴ Department of Defense Authorization Act, 2006, § 344.

⁹⁵ *Id.* § 378.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Army. An officer appointed as the Judge Advocate General or Assistant Judge Advocate General normally holds office for four years. However, the President may terminate or extend the appointment at any time. If an officer who is so appointed holds a lower regular grade, he shall be appointed in the regular grade of major general.⁹⁹

The Authorization Act amends that paragraph by replacing the last sentence, in part, with a separate paragraph for each of the Judge Advocates General. For the Army, the paragraph reads, “[t]he Judge Advocate General, while so serving, shall hold a grade *no lower than* major general. An officer appointed as Assistant Judge Advocate General who holds a lower regular grade shall be appointed in the regular grade of major general.”¹⁰⁰ For the Navy, the Judge Advocate General “shall hold a grade not lower than rear admiral, or major general, as appropriate.”¹⁰¹ Finally, for the Air Force, the new paragraph directs that the Judge Advocate General “shall hold a grade not lower than major general.”¹⁰²

Compensation and Other Personnel Benefits

Effective 1 January 2006, the monthly base pay of uniformed service members increased by 3.1 percent,¹⁰³ down from a 3.5 percent increase last fiscal year.¹⁰⁴

Permanent Increase in Length of Time Dependents of Certain Deceased Members May Continue to Occupy Military Family Housing or Receive Basic Allowance for Housing

By amending 37 U.S.C. § 403(1), Congress provided permanent authority for certain dependents to remain in family housing or to receive basic allowance for housing for 365 days instead of 180 days.¹⁰⁵ Prior to this amendment, such authority was only temporary.¹⁰⁶

Bonus and Special Pay and Travel and Transportation Allowances

In addition to extending numerous special pay and bonus programs,¹⁰⁷ Congress focused on amending several provisions of Title 37, United States Code, to provide more benefits for deployed servicemembers and injured servicemembers and their families. Congress authorized the SECDEF to authorize retroactive hostile fire and imminent danger pay,¹⁰⁸ to make available special pay for members rehabilitating from wounds, injuries, and illnesses incurred in a combat operation or

⁹⁹ 10 U.S.C.S. § 3037(a) (LEXIS 2004). The committee report on the amendment to the section explains:

The committee recommends a provision that would raise the statutory grades of the Judge Advocate General's of the Army, Navy, and Air Force to lieutenant general or vice admiral, as appropriate. These three officers would be in addition to the numbers that would otherwise be permitted for their Armed Forces for officers serving on active duty in grades above major general or rear admiral, as the case may be.

The greatly increased operations tempo of the Armed Forces has resulted in an increase in the need for legal advice from uniformed judge advocates in such areas as operational law, international law, the law governing occupied territory, the Geneva Conventions, and related matters. In addition, the system of military justice, administered by the Judge Advocates General, has taken on increased importance. This provision recognizes these developments and the vital importance of the duties of these officers in today's Armed Forces.

S. REP. NO. 109-069, at 312 (2005).

¹⁰⁰ Department of Defense Authorization Act, 2006, § 508 (emphasis added).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* § 601.

¹⁰⁴ Ronald W. Reagan National Defense Authorization Act, 2005, § 601, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

¹⁰⁵ See Pub. L. 109-13, 119 Stat. 251, § 1022 (2005).

¹⁰⁶ *Id.*; see also, Pub. L. 109-77, 119 Stat. 2041, § 124 (extending the authority found in Pub. L. 109-13 in a continuing resolution).

¹⁰⁷ Department of Defense Authorization Act, 2006, §§ 621-624. Certain bonus and special pay authorities for among others, reserve forces, health care professionals and nuclear officers are contained in these sections.

¹⁰⁸ *Id.* § 636.

combat zone,¹⁰⁹ to authorize the transportation of family members in connection with the repatriation of members held captive,¹¹⁰ to make permanent the authority to provide travel and transportation allowances for family members to visit hospitalized servicemembers injured in a combat operation or combat zone,¹¹¹ and to provide for additional death gratuity for survivors of certain servicemembers who die on active duty.¹¹²

Acquisition Policy, Acquisition Management, and Related Matters

Congress passed a provision that will undoubtedly be helpful for small businesses. Section 816 prohibits contracting officers from using “tiered evaluations of offers for contracts and for task and delivery orders under contracts”¹¹³ unless the contracting officer:

- (1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;
- (2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and
- (3) includes in the contract file a written explanation of why such contracting officer was unable to make such a determination.¹¹⁴

Congress imposed additional controls on procurement in Section 811, “Internal Controls for Procurements on Behalf of the Department of Defense.” Congress mandated that the DOD Inspector General is required to review, among other things, current procurement policies and procedures and internal controls of agencies procuring property and supplies on behalf of DOD.¹¹⁵ In addition, if another agency is found not complying with DOD procurement policy, DOD is prohibited from ordering, purchasing, or otherwise procuring “property or services in an amount in excess of \$100,000” from that agency.¹¹⁶

Congress mandated that the SECDEF, in consultation with the Chairman of the Joint Chiefs of Staff, within a year after the Authorization Act’s enactment, develop a joint policy for contingency contracting during combat operations and post-conflict operations.¹¹⁷ The policy, among other things, must include the designation of a senior commissioned officer in each military department to administer the policy and the assignment of a senior commissioned officer with “appropriate acquisition experience and qualifications to act as the head of contingency contracting during combat operations, post-conflict operations, and contingency operations.”¹¹⁸ A training program must be created by the Defense Acquisition University to train contingency contracting personnel in the following areas:

¹⁰⁹ *Id.* § 642.

¹¹⁰ *Id.* § 653.

¹¹¹ *Id.* § 655.

¹¹² *Id.* § 664. Congress increased the death gratuity in Title 10, Section 1478(a) from \$12,000 to \$100,000 and made provisions in the Section for retroactive payments of the death gratuity under certain circumstances.

¹¹³ *Id.* § 816.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 817.

¹¹⁸ *Id.* Section 817, Joint Policy on Contingency Contracting, details Congress’ intentions for establishing the combat and post-conflict operational policy not later than a year after the date of the enactment of the Authorization Act, and requires various reports, as follows:

(1) Interim report.---- (A) Requirement.--Not later than 270 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives an interim report on contingency contracting. (B) Matters covered.--The report shall include discussions of the following: (i) Progress in the development of the joint policy under subsection (a). (ii) The ability of the Armed Forces to support contingency contracting. (iii) The ability of commanders of combatant commands to request contingency contracting support and the ability of the military departments and the acquisition support agencies to respond to such requests and provide such support, including the availability of rapid acquisition personnel for such support. (iv) The ability of the current civilian and military acquisition workforce to deploy to combat theaters of operations and to conduct contracting activities during combat and during post-conflict, reconstruction, or other contingency operations. (v) The effect of different periods of deployment on continuity in the acquisition process.

(2) Final report.-- Not later than 18 months after the date of the enactment of this Act, the Secretary of Defense shall submit to the committees listed in paragraph (1)(A) a final report on contingency contracting, containing a discussion of the implementation of the joint policy developed under subsection (a), including updated discussions of the matters covered in the interim report.

- i. the use of law, regulations, policies, and directives related to contingency contracting operations;
- ii. the appropriate use of rapid acquisition methods, including the use of exceptions to competition requirements under *section 2304 of title 10, United States Code*, sealed bidding, letter contracts, indefinite delivery indefinite quantity task orders, set asides under section 8(a) of the Small Business Act (*15 U.S.C. 637(a)*), undefinitized contract actions, and other tools available to expedite the delivery of goods and services during combat operations or post-conflict operations;
- iii. the appropriate use of rapid acquisition authority, commanders' emergency response program funds, and other tools unique to contingency contracting; and
- iv. instruction on the necessity for the prompt transition from the use of rapid acquisition authority to the use of full and open competition and other methods of contracting that maximize transparency in the acquisition process. . . .¹¹⁹

Of interest are some of the acquisition provisions that were not included in the final FY 2006 Authorization Act. One Senate committee recommendation would have clarified rapid acquisition authority for the SECDEF to respond to combat emergencies, which would give DOD “greater flexibility,”¹²⁰ and:

[i]n particular would: (1) give the Secretary of Defense authority to address deficiencies that have resulted in combat casualties, even if they are not “combat capability deficiencies” and even if they have not resulted in fatalities; (2) permit the Secretary to delegate his authority under the section to the Deputy Secretary of Defense; and (3) clarify that the category of statutes and regulations that may be waived if necessary to prevent combat casualties include domestic source or content restrictions that would inhibit or impede the rapid acquisition of needed equipment.¹²¹

The Senate committee also recommended a provision that would have required the SECDEF to “maintain a publicly-available website that provides information on instances in which major contractors have been fined, paid penalties or restitution, settled, plead guilty to, or had judgments entered against them in connection with allegations of improper conduct.”¹²² A major contractor was defined in the proposed section as a contractor that received “at least \$100,000,000 in Federal contracts in the most recent fiscal year.”¹²³ In addition, the section would have required reporting on sole source contracts for Iraq reconstruction, “Not later than 120 days after the date of the enactment of this Act.” The report, which would have been the responsibility of the Administrator for Federal Procurement Policy, would have had to include information for “all sole source contracts in excess of \$2,000,000 entered into by executive agencies in connection with Iraq reconstruction from January 1, 2003, through the date of the enactment of this Act.”¹²⁴ Again, however, this provision was not included in the final Authorization Act.

Yet another Senate committee recommendation that was not included in the final Authorization Act would have required DOD to report to Congress a list and description of

each task or delivery order contract or other contract related to security and reconstruction activities in Iraq and Afghanistan in which an audit conducted by an investigative or audit component of the Department of Defense during the 90-day period ending on the date of such report resulted in a finding . . . by an investigative or audit component of the Department of Defense that the contract includes costs that are unsupported, questioned, or both.¹²⁵

Id.

¹¹⁹ *Id.*

¹²⁰ S. REP. NO. 109-069, § 843 (2005).

¹²¹ *Id.*

¹²² *Id.* § 854.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* § 824.

General Provisions

Transfer Authority

Congress again granted the SECDEF authority to transfer no more than \$3.5 billion of FY 2006 authorizations, provided the SECDEF determines that it is in the national interest and the authorizations are only used for items that have a higher priority than the items from which the authorization is transferred.¹²⁶ This authorization may not be used for an item that has been denied authorization by Congress.¹²⁷ Additionally, Congress increased the general transfer authority level retroactively for FY 2005 from \$3.5 billion¹²⁸ to \$6.18 billion.¹²⁹

Reestablishment of the Electromagnetic Pulse (EMP) Commission

Congress reestablished the EMP commission, originally established in the Fiscal Year 2001 Authorization Act, to “investigate, make recommendations, and report to Congress on the evolving threat to the United States from electromagnetic pulse . . . attack resulting from the detonation of a nuclear weapon or weapons at high altitude.”¹³⁰

Matters Relating to Foreign Nations

Extension of Humanitarian and Civic Assistance Provided to Host Nations in Conjunction with Military Operations

Congress increased the limit on the amount of authority available under Subsection (c)(3) of Section 401 of the United States Code for landmine clearing operations from \$5 million to \$10 million.¹³¹ In this section, Congress also amended Section 401 to include surgical as well as medical, dental, and veterinary care in areas of a country that are rural or underserved by medical, surgical, dental, and veterinary professionals.¹³² Congress also added language to include education, training, and technical assistance in the definition of medical humanitarian assistance.¹³³

Commander’s Emergency Response Program (CERP) Authorization

While only authorizing CERP expenditures on a yearly basis, this year Congress authorized the program for a two-year period. This authorization is for the same amount Congress appropriated in the FY 2006 Appropriations Act (\$500 million) for the urgent relief and reconstruction program.¹³⁴ Congress also continued the requirement for quarterly reports, a requirement also included in the Appropriations Act.¹³⁵

Security and Stabilization Assistance

Under Section 1207, the Secretary of Defense “may provide services to, and transfer defense articles and funds to, the Secretary of State for the purposes of facilitating the provision by the Secretary of State of reconstruction, security, or stabilization assistance to a foreign country.”¹³⁶ The monetary limit for these transfers may not exceed \$100 million in any fiscal year and once transferred, the funds may remain available until expended.¹³⁷ At any time that the SECDEF exercises

¹²⁶ Department of Defense Authorization Act, 2006, § 1001.

¹²⁷ *Id.*

¹²⁸ See Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

¹²⁹ Department of Defense Authorization Act, 2006, § 1003.

¹³⁰ *Id.* § 1052.

¹³¹ *Id.* § 1201.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* § 1202; see also *supra* note 59 and accompanying text (highlighting the CERP provisions contained in the 2006 Appropriations Act).

¹³⁵ Department of Defense Authorization Act, 2006, § 1202.

¹³⁶ *Id.* § 1207.

¹³⁷ *Id.*

authority under this section, Congress must be notified of what was transferred, the purpose for the transfer, and the type of funds used in the transfer.¹³⁸

Reimbursement of Certain Coalition Nations for Support Provided to United States Military Operations

Congress authorized the SECDEF to reimburse key cooperating nations for logistical and military support provided in conjunction with military operations in Iraq and Afghanistan using Defense-wide O&M.¹³⁹ Total payments may not exceed \$1.5 billion, which is reflected in the 2006 Appropriations Act.¹⁴⁰ Contractual agreements for payment are prohibited under this section and the SECDEF is required to notify Congress fifteen days prior to making any payment.¹⁴¹

Authority to Transfer Defense Articles and Provide Defense Services to the Military and Security Forces of Iraq and Afghanistan

Congress also gave the authority to the SECDEF to

transfer defense articles from the stocks of [DOD] and to provide defense services in connection with the transfer of such defense articles to the military and security forces of Iraq and Afghanistan in order to support the efforts of those forces to restore and maintain peace and security in those countries.¹⁴²

The aggregate value of all transferred articles and services cannot exceed \$500 million.¹⁴³ The transfer of the articles is subject to the limitations and authorities, with some exceptions, as set forth in the Foreign Assistance Act of 1961, Section 516.¹⁴⁴

Prohibition on Procurements from Communist Chinese Military Companies

In the Act, Congress prohibited the SECDEF from procuring certain goods or services from any Communist Chinese military company under a contract or any subcontract at any tier.¹⁴⁵

War-Related Reporting Requirements

This section requires the SECDEF to submit reports detailing procurement and equipment maintenance costs and facility infrastructure costs in Operations Iraqi Freedom, Enduring Freedom, and Noble Eagle to the congressional defense committees.¹⁴⁶

¹³⁸ *Id.*

¹³⁹ *Id.* § 1208.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* § 1209.

¹⁴³ *Id.*

¹⁴⁴ *Id.* The authorities contained in subsections (b)(1)(B), (e), (f), and (g) of Section 516 do not apply to transfers under this section. *See* 22 U.S.C.S. § 2321j (LEXIS 2004).

¹⁴⁵ Department of Defense Authorization Act, 2006, § 1211.

¹⁴⁶ *Id.* § 1221.

Quarterly Reports on War Strategy in Iraq

This section requires SECDEF, in coordination with the Central Intelligence Agency, to brief appropriate congressional committees on the “strategy for the war in Iraq, including the intelligence and other measures of evaluation used in determining the progress made in the execution of that strategy.”¹⁴⁷

Report on Civilian Casualties in Afghanistan and Iraq

Congress has mandated that the SECDEF submit to the congressional defense committees a report on records of civilian casualties in Afghanistan and Iraq, to include whether records are kept, and if so, how they are kept, where they are maintained, and what officials are responsible for maintaining the records.¹⁴⁸ Additionally, the report requires the inclusion of any information relating to the circumstances surrounding the casualties, whether the casualties were fatalities or injuries, whether any condolence payment was made to the person or the person’s family, as well as “any other information relating to those casualties.”¹⁴⁹

Purchase of Weapons Overseas for Force Protection Purposes in Countries in Which Combat Operations are Ongoing

Congress amended Title 10 of the U.S. Code by adding Section 127c, which gives authority to the SECDEF, during ongoing military operations in a country, to purchase weapons from “any foreign person, foreign government, international organization, or other entity located in that country” for force protection purposes.¹⁵⁰ The monetary authority in the section is limited to \$15 million per fiscal year. Further, Congress imposed semi-annual reporting requirements upon use of the authority.

Riot Control Agents

In Section 1232 of the Authorization Act, Congress restated the U.S. policy on the use of riot control agents (RCA):

Riot control agents are not chemical weapons and that the President may authorize their use as legitimate, lethal, and non-lethal alternatives to the use of force that, as provided in Executive Order No. 11850 (40 Fed. Reg. 16187) and consistent with the resolution of ratification of the Chemical Weapons Convention, may be employed by members of the Armed Forces in war in defensive military modes to save lives, including the illustrative purposes cited in Executive Order No. 11850.¹⁵¹

Congress also imposed a reporting requirement on the use of RCA to include a description of all DOD materials on the use of and training for the use of RCA, how the use of RCA is consistent with United States policy, a description of all RCA currently used, and a “general description of steps taken or planned to be taken by the Department of Defense to clarify the circumstances under which [RCA] may be used by members of the Armed Forces, among other things.”¹⁵² The report is due no later than 180 days after enactment of the Act.¹⁵³

¹⁴⁷ *Id.* § 1222.

¹⁴⁸ *Id.* § 1224.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* § 1232.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*