

Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations

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It's hard to conceive that it would take more forces to provide stability in post-Saddam Iraq than it would take to conduct the war itself and secure the surrender of Saddam's security forces and his army. Hard to imagine.¹

I. Introduction

Since the end of the Cold War, the United States has been increasingly involved in stabilization and reconstruction operations throughout the world.² In many cases, the government has failed to rapidly and effectively respond when necessary.³ These failures occurred, in large part, because the U.S. Government was not fully prepared to execute these operations.⁴ This has resulted in the unnecessary loss of human life, increased damage to civilian infrastructure, and increased overall stabilization and reconstruction costs.⁵ The U.S. Government's lack of preparedness in this area was most readily apparent after the fall of Baghdad.⁶ The early stabilization and reconstruction efforts in Iraq were met with sharp public criticism and are largely viewed as the catalyst for change in the U.S. Government's policy concerning how stabilization and reconstruction operations are conducted.⁷

Within the Department of Defense (DOD), there have been three significant changes in the conduct of stabilization and reconstruction operations.⁸ First, DOD formalized a new stability operations policy that elevated stability operations to a core military mission on par with combat operations.⁹ Second, DOD broadened its military planning guidance to more fully address pre-conflict and post-conflict operations.¹⁰ Third, DOD developed a new joint operating concept to serve as the basis for how the military will support future Stabilization, Security, Transition and Reconstruction (SSTR) operations.¹¹

The DOD's new approach to SSTR operations raises two critical issues: (1) what is DOD's role when executing these operations and, (2) to what extent can these operations be lawfully conducted under existing fiscal law principles? This article will address those questions. In doing so, it will examine DOD's new approach to SSTR operations and determine the extent to which the armed forces can legally conduct these operations under the current statutory appropriations and authorizations that Congress has enacted for DOD. It will also examine current SSTR operations conducted in support of the

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¹ *Hearing Before the H. Budget Comm.* (Feb. 27, 2003) (statement of Paul Wolfowitz, U.S. Deputy Sec'y of Def.)

² U.S. GOV'T ACCOUNTABILITY OFFICE, *MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE DOD'S STABILITY OPERATIONS APPROACH AND ENHANCE INTERAGENCY PLANNING*, GAO-07-549, at 1 (May 2007) [hereinafter GAO-07-549] (explaining why the Government Accountability Office conducted this study).

³ Colonel John C. Buss, *The State Department Office of Reconstruction and Stabilization and Its Interaction with the Department of Defense*, 09–05 CTR. FOR STRATEGIC LEADERSHIP 1 (2005) (issue paper written in partial fulfillment of Master of Strategic Studies Degree while the author attended the U.S. Army War College) (on file with author).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See GAO-07-549, *supra* note 2, at 3–4.

⁹ U.S. DEP'T OF DEFENSE DIR. 3000.05, *MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS* para. 1.2 (28 Nov. 2005) [hereinafter DODD 3000.05].

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, *JOINT OPERATIONS* (17 Sept. 2006) (C1, 13 Feb. 2008) [hereinafter JOINT PUB. 3-0].

¹¹ U.S. DEP'T OF DEFENSE, *MILITARY SUPPORT TO STABILIZATION, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS JOINT OPERATING CONCEPT VERSION 2.0* (Dec. 2006) [hereinafter JOINT OPERATING CONCEPT].

Global War on Terrorism, before identifying additional appropriations and authorizations that would enable the U.S. military to fully execute these operations.

This article begins with an overview of the existing fiscal law framework and discusses how that framework is applied to DOD when funding military operations. By examining the U.S. Government's stabilization and reconstruction policy and focusing on the changes that have been made as a result of the perceived failures in Iraq, this article evaluates DOD's new approach to SSTR operations and determines the scope of military support envisioned under that approach. It then discusses several select Congressional appropriations and authorizations that permit DOD to conduct foreign assistance. Finally, this article evaluates the SSTR operations currently being executed in support of the Global War on Terrorism, identifies the fiscal and policy issues raised, and recommends potential solutions to those issues.

II. Fiscal Framework

The general rule is that the Department of State (DOS) is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.¹² There are two exceptions to this rule that allow DOD to fund and conduct foreign assistance in certain cases.¹³ First, the Government Accountability Office (GAO) has determined that DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.¹⁴ Second, DOD can fund and conduct foreign assistance if Congress enacts a DOD appropriation and/or authorization for that purpose.¹⁵ In order to fully understand how these exceptions are applied, it is necessary to examine the fiscal framework in which they are rooted.

A. *United States v. MacCollom*

In the case of *United States v. MacCollom*,¹⁶ the Supreme Court examined a statute that granted limited authority to federal courts authorizing them to expend public funds to furnish transcripts for plaintiffs in certain actions.¹⁷ At issue in *MacCollom* was whether the federal courts could authorize the expenditure of public funds to furnish transcripts for plaintiffs in actions that were not explicitly covered by the statute.¹⁸ The Court determined that public funds could not be expended without express congressional authorization.¹⁹ In the plurality opinion, Justice Rehnquist noted, "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."²⁰ *MacCollom* is the foundation upon which the remainder of the fiscal framework is built. The next section of this article demonstrates how this rule is applied to DOD when funding military activities.

B. The Honorable Bill Alexander Opinion

On 25 January 1984, Congressman Bill Alexander requested that the GAO investigate and provide a formal legal opinion concerning the propriety of using DOD Operations and Maintenance (O&M) appropriations to fund various activities which took place during a military exercise in the Republic of Honduras.²¹ Congressman Alexander also requested that the GAO

¹² NAT'L SEC. PRESIDENTIAL, DIR. 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 2 (7 Dec. 2005) [hereinafter NSPD 44]; see also The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A (1984); Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

¹³ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A; see also U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

¹⁴ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

¹⁵ *Id.*; see also U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

¹⁶ 426 U.S. 317 (1976).

¹⁷ *Id.* at 320.

¹⁸ *Id.* at 321.

¹⁹ *Id.*

²⁰ *Id.* (citing *Reeside v. Walker*, 11 How. 272, 291 (1851)).

²¹ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A, at 1 (1984).

determine whether any Anti-Deficiency Act (ADA) violations had occurred if they found that the participating units had improperly used O&M appropriations to fund those activities.²²

1. Facts

On 3 August 1983, DOD commenced a joint combined military exercise (Ahuas Tara) in the Republic of Honduras.²³ During this exercise, over 12,000 U.S. military personnel participated in joint maneuvers with the Honduran military.²⁴ Part of these maneuvers involved U.S. military forces providing substantial infantry, artillery, and medical training to Honduran military personnel.²⁵

United States military forces also completed various construction activities throughout the exercise.²⁶ These activities included: (1) building a 3500-foot dirt airstrip; (2) expanding a 4300-foot dirt airstrip to 8000 feet; (3) expanding a 3000-foot asphalt airstrip to 3500 feet; (4) building approximately 300 wooden huts to use as barracks, dining facilities, and administrative offices; and (5) conducting site preparation and installing two radar facilities.²⁷

Finally, U.S. military forces executed numerous humanitarian assistance missions in support of the exercise.²⁸ These missions included: (1) providing medical assistance to approximately 50,000 Honduran civilians; (2) providing veterinary services to approximately 40,000 animals; and (3) building a school to be used by Honduran children.²⁹

All of the aforementioned activities were charged to DOD O&M appropriations as operational exercise expenses.³⁰ Generally, O&M appropriations can only be used for “expenses, not otherwise provided for, necessary for the operation and maintenance of the applicable service or agency.”³¹ The main issue in this case was whether these activities were necessary for the operation or maintenance of the U.S. military units that participated in the exercise.

2. The GAO Findings

On 22 June 1984, the GAO issued a formal opinion finding that DOD had improperly used O&M appropriations during the exercise.³² First, they determined that DOD improperly used O&M appropriations to train Honduran military personnel and concluded that this training should have been funded by DOS as security assistance to the Republic of Honduras.³³ Next, the GAO found that DOD improperly used O&M appropriations to fund construction activities that cost in excess of \$200,000.³⁴ The GAO indicated that O&M appropriations could have been used to fund construction activities costing less than \$200,000 if the activities were primarily for the benefit of U.S. military forces and not for the benefit of the Honduran military.³⁵ Finally, the GAO determined that DOD improperly used O&M funds to conduct humanitarian assistance

²² *Id.*

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 4.

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.* The statutory threshold for Unspecified Minor Military Construction (UMMC) in 1983 was \$200,000. *Id.* at 7. The current statutory threshold for UMMC is \$750,000. Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, div. A, tit. 2, 121 Stat. 1295 (2007).

³⁵ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A, at 1.

activities.³⁶ The GAO noted that DOD has no separate authority to conduct humanitarian assistance activities except on behalf of other U.S. Government agencies or as incidental to the provision of security assistance.³⁷

The GAO then turned to the issue of whether the misuse of DOD O&M appropriations, by the units involved in the exercise, constituted ADA violations.³⁸ The GAO found that these units committed ADA violations when they used O&M appropriations to fund the training of Honduran military personnel and when they used O&M appropriations to provide humanitarian and civic assistance.³⁹ The GAO was unable to determine if any ADA violations occurred as a result of the various construction activities because they could not establish if any of those activities individually exceeded the \$200,000 threshold for unspecified minor military construction.⁴⁰ They recommended that DOD conduct its own investigation on this point.⁴¹

The next sub-section of this article discusses the analysis the GAO used to reach their findings. This analysis is important because it will be used to evaluate whether current SSTR operations are being properly funded.

3. *The GAO Analysis*

The GAO analysis started by reiterating long standing fiscal law principles.⁴² First, the GAO noted that O&M appropriations are to be used for “expenses, not otherwise provided for, necessary for the operation and maintenance of the applicable service or agency.”⁴³ The GAO then stated that DOD did not have unlimited discretion on how to use O&M appropriations.⁴⁴ Rather, the use of O&M appropriations must be “necessary or incidental to the proper execution of the object of the appropriation.”⁴⁵ This is often referred to as the Necessary Expense Doctrine.⁴⁶

The GAO then discussed three factors to be considered under the Necessary Expense Doctrine.⁴⁷ First, “the expenditure must be reasonably related to the purpose for which the appropriation was made.”⁴⁸ Next, “the expenditure must not be prohibited by law.”⁴⁹ Finally, “the expenditure must not fall specifically within the scope of some other category of appropriations.”⁵⁰ The GAO then applied these three factors to the activities conducted during the joint combined military exercise in Honduras.⁵¹

a. *Training Activities*

The GAO found that DOD improperly used O&M appropriations to train Honduran military personnel during the exercise because the training amounted to security assistance and as such, fell specifically within the scope of more specific appropriations.⁵² The GAO noted that during combined military exercises there will necessarily “be a transfer of information

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1–2.

³⁹ *Id.* at 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, 10 U.S.C. § 2241(b) (2000).

⁴⁷ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A, at 4.

⁴⁸ *Id.* (citing *To Sec’y of State*, 42 Comp. Gen. 226, 228 (1962)).

⁴⁹ *Id.* (citing *To the Sec’y of Agriculture*, 38 Comp. Gen. 782, 785 (1959)).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 12.

and skills between the armed forces of the participating countries.”⁵³ The GAO determined that “some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure ‘interoperability’ of the two forces.”⁵⁴ The issue here was whether the transfer of information rose “to a level of formal training comparable to that normally provided by security assistance projects.”⁵⁵

The GAO examined the training that was conducted by U.S. military forces and found that it constituted formal training instead of training geared towards ensuring the interoperability of United States and Honduran military forces.⁵⁶ The GAO determined that DOD could not use O&M appropriations to fund and conduct this training because Congress had specifically established comprehensive legislative programs to formally train foreign military forces.⁵⁷

b. Construction Activities

The GAO found that DOD improperly used O&M appropriations to fund construction activities costing in excess of \$200,000, the statutory threshold for unspecified minor military construction projects.⁵⁸ They determined that DOD’s use of O&M appropriations was proper to the extent construction activities cost less than \$200,000.⁵⁹ The GAO, however, was unable to determine which construction activities were proper because they could not verify the costs or the accounting methods used.⁶⁰

The GAO noted that Congress had specifically appropriated funds to be used for military construction projects.⁶¹ Next, they established, that apart from this appropriation, Congress had also provided authorization for DOD to use O&M funds for unspecified minor military construction projects costing less than \$200,000.⁶² The GAO then noted that neither of these authorities were “the basis for DOD’s use of O&M funds for its construction activities in Honduras.”⁶³ As such, the GAO examined whether DOD had separate authority, apart from those mentioned above, to use O&M funds for the construction activities conducted during the exercise.⁶⁴ The GAO determined that DOD did not have separate authority to use O&M funds for military construction activities because Congress had legislated specific appropriations available for these activities.⁶⁵ The GAO then found that regardless of DOD’s intentions, O&M appropriations could be used to fund construction activities costing less than the statutory threshold.⁶⁶

c. Humanitarian and Civic Assistance Activities

The GAO found that DOD improperly used O&M appropriations to perform humanitarian assistance and civic activities during the exercise because such activities fell specifically within the scope of other appropriations.⁶⁷ First, the GAO recognized that DOD “has long carried out a wide variety of Humanitarian Assistance and civic action programs in Central America.”⁶⁸ It then noted that, “[i]n some cases, assistance has been provided through written agreements with the Agency

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 12–13.

⁵⁶ *Id.* at 13.

⁵⁷ *Id.*

⁵⁸ *Id.* at 10.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1–2.

⁶¹ *Id.* at 7.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 14.

⁶⁸ *Id.*

for International Development (AID) under authority of the Economy Act, 31 U.S.C. § 1535. In other cases, however, U.S. forces have carried out humanitarian and civic action activities without reimbursement from AID or the host-country.⁶⁹ The issue in this case was whether DOD has independent authority to conduct humanitarian assistance activities.⁷⁰

The GAO determined that DOD could conduct humanitarian assistance activities on a limited basis as part of its core military mission.⁷¹ The issue then became whether the humanitarian assistance activities conducted in this case exceeded the scope of what was permissible.⁷² The GAO examined the activities conducted during the exercise and found that they were extremely extensive in nature and as such, exceeded the scope of what was permissible.⁷³ The GAO determined that these activities should have been funded and conducted under DOS authority and not with DOD O&M appropriations.⁷⁴

4. The Conclusion

The Honorable Bill Alexander opinion adds two key pieces to the fiscal framework. First, it establishes that DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.⁷⁵ Second, it establishes when DOD can use O&M appropriations to conduct foreign assistance.⁷⁶ In particular, it clarifies what activities are “necessary or incidental to the proper execution of the object of an appropriation.”⁷⁷

C. Conclusion

The DOS is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.⁷⁸ There are two exceptions to this general rule.⁷⁹ First, DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.⁸⁰ Second, DOD can fund or conduct foreign assistance if Congress enacts a DOD appropriation and/or authorization for that purpose.⁸¹ Absent one of these two exceptions, DOD cannot fund or conduct foreign assistance on behalf of the U.S. Government. This fiscal framework significantly affects DOD’s ability to conduct SSTR operations pursuant to DOD Directive 3000.05.⁸²

III. The U.S. Government’s Stabilization and Reconstruction Policy

There are numerous U.S. Government agencies that are involved with creating and implementing U.S. foreign policy.⁸³ The DOS and DOD are largely viewed as the two most significant agencies within this area.⁸⁴ This section of the article will

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 15.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 13.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.*

⁷⁸ NSPD 44, *supra* note 12, at 2; *see also* The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A; Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

⁷⁹ *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

⁸⁰ *Id.* at 13.

⁸¹ *Id.* at 4; *see also* U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

⁸² *See* DODD 3000.05, *supra* note 9.

⁸³ Colonel Rickey L. Rife, *Defense Is from Mars, State Is from Venus: Improving Communications and Promoting National Security I* (1998) (unpublished M.S. thesis, U.S. Army War College) (on file with author).

⁸⁴ *Id.*

discuss how these agencies have modified their approach to stabilization and reconstruction operations as a result of the Global War on Terrorism.

A. Past Practice

In the past, U.S. foreign policy was conducted by DOS “until it was apparent that diplomacy had run its course and war was inevitable—at which point it was turned over to the military.”⁸⁵ This separatist approach changed considerably in the years following the Cold War.⁸⁶ After the fall of the Soviet Union, DOS and DOD increasingly found themselves being forced to work together to achieve foreign policy goals.⁸⁷ Both agencies struggled to define their roles in this new and changing global environment.⁸⁸ This identity crisis significantly impacted the various peacekeeping missions and humanitarian efforts that were conducted in Somalia, Haiti, Bosnia, and Kosovo.⁸⁹ The lack of clearly defined foreign policy roles came to the forefront during the Global War on Terrorism, and was especially evident during the early stabilization and reconstruction efforts in both Afghanistan and Iraq.⁹⁰

The early stabilization and reconstruction efforts in Afghanistan and Iraq are largely viewed as unsuccessful.⁹¹ For the most part, this can be attributed to the fact that DOS and DOD lacked clearly defined roles and failed to unify their efforts.⁹² These initial stabilization and reconstruction failures were met with sharp public criticism and are seen as the reason why these agencies changed their policies concerning how the operations are conducted.⁹³

Both DOS and DOD have significantly altered how they approach stabilization and reconstruction operations. The policy changes, and the events that gave rise to them, are discussed below. It is important to note that in most cases the agencies acted independently, so the timing of the events and policy changes do not necessarily coincide.

B. The DOD and the Defense Science Board Study

In January 2004, the Secretary of Defense tasked the Defense Science Board⁹⁴ to conduct a study that focused on increasing the effectiveness of U.S. Government agencies “across the spectrum of activities from peacetime through stabilization and reconstruction.”⁹⁵ The study, *Transition to and from Hostilities*, was performed throughout the summer of 2004 and the results were released in December 2004.⁹⁶ The Defense Science Board made two key recommendations that shaped DOD policy.⁹⁷

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 1; *see also* GAO-07-549, *supra* note 2, at 1–2.

⁸⁷ Rife, *supra* note 83, at 1.

⁸⁸ *Id.*

⁸⁹ Buss, *supra* note 3, at 1; *see also* GAO-07-549, *supra* note 2, at 1–2.

⁹⁰ *Id.*

⁹¹ Buss, *supra* note 3, at 1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ The Defense Science Board is an advisory group that provides independent advice and recommendations to DOD officials on scientific issues, technical issues, manufacturing, the acquisition process, and other matters of special interest. Defense Science Board, Charter Defense Science Board, *available at* <http://www.acq.osd.mil/dsb/charter.htm> (last visited July 22, 2008).

⁹⁵ Memorandum from Chairman, Defense Science Board, to the Office of the Sec’y of Defense, subject: Report of the Defense Science Board 2004 Summer Study on Transition to and from Hostilities (Dec. 2004) [hereinafter Study on Transition to and from Hostilities].

⁹⁶ *Id.*

⁹⁷ *Id.* at iv–v; *see also* GAO-07-549, *supra* note 2, at 13–17.

First, the Defense Science Board recommended that the government create “Contingency Planning and Integration Task Forces” to focus on countries where the risk of U.S. intervention was high.⁹⁸ It suggested that the government staff these task forces with experienced individuals from all agencies that might be involved in future stabilization and reconstruction operations.⁹⁹ It also recommended that these task forces expand the model planning process to include not only stabilization efforts that might be conducted during combat operations, but also those that might prevent conflict and assist in post-conflict operations.¹⁰⁰ This recommendation can be viewed as the conception of the Provincial Reconstruction Teams (PRTs) operating in Afghanistan and Iraq.

Next, the Defense Science Board recommended building and maintaining certain fundamental capabilities deemed critical to the success of stabilization and reconstruction operations.¹⁰¹ This included: (1) making stabilization and reconstruction missions a core competency for DOS and DOD; (2) improving strategic communication capabilities; and (3) focusing intelligence collection efforts to achieve both military and political objectives.¹⁰²

The recommendations of the Defense Science Board dramatically impacted DOD’s approach to stabilization and reconstruction operations.¹⁰³ First, DOD issued a new stability operations policy, DOD Directive 3000.05, which elevated stability operations to a core military competency.¹⁰⁴ Next, DOD broadened its military planning guidance to more fully address pre-conflict and post-conflict operations.¹⁰⁵ This new planning guidance expands the military planning construct from four phases to six phases and places special emphasis on conflict avoidance.¹⁰⁶ Finally, DOD developed a new joint operating concept to serve as the basis for how the future military commander will support SSTR operations.¹⁰⁷ This joint operating concept focuses the military effort on six key areas, called Major Mission Elements.¹⁰⁸ Each of these policy changes is discussed in greater detail below.

C. The DOS and the Office of the Coordinator for Reconstruction and Stabilization

At the same time that the Defense Science Board was performing the study, *Transition to and from Hostilities*, President Bush established the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) within DOS.¹⁰⁹ The purpose of the S/CRS is to “develop proposals and mechanisms to enhance civilian capabilities, and improve interagency coordination in planning and conducting stabilization and reconstruction operations.”¹¹⁰

The Office of the S/CRS is led by DOS, but includes representatives from the U.S. Agency for International Development (USAID), DOD, the Central Intelligence Agency (CIA), the Army Corps of Engineers, and the Department of Treasury.¹¹¹ Its mission is “to lead, coordinate, and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they can reach a sustainable path toward peace, democracy, and a market economy.”¹¹²

⁹⁸ Study on Transition to and from Hostilities, *supra* note 95; *see also* GAO-07-549, *supra* note 2, at 13–17.

⁹⁹ Study on Transition to and from Hostilities, *supra* note 95.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ GAO-07-549, *supra* note 2, at 3.

¹⁰⁴ *See* DODD 3000.05, *supra* note 9, para. 4.2.

¹⁰⁵ *See* JOINT PUB. 3-0, *supra* note 10.

¹⁰⁶ *Id.*

¹⁰⁷ *See* JOINT OPERATING CONCEPT, *supra* note 11.

¹⁰⁸ *Id.*

¹⁰⁹ Buss, *supra* note 3, at 2; *see also* U.S. Dep’t of State, Office of the Coordinator for Reconstruction and Stabilization, <http://www.state.gov/s/crs/> (last visited Oct. 3, 2008) [hereinafter S/CRS].

¹¹⁰ Buss, *supra* note 3, at 2.

¹¹¹ *Id.*

¹¹² *Id.*

In December 2005, President Bush confirmed that DOS was the lead government agency for foreign assistance operations when he issued National Security Presidential Directive 44 (NSPD 44).¹¹³ This directive made DOS the lead U.S. Government agency for all conflict management efforts.¹¹⁴ Under NSPD 44, the S/CRS is responsible for the integration of all relevant U.S. resources and assets in conducting reconstruction and stabilization operations and reports directly to the Secretary of State.¹¹⁵ Additionally, NSPD 44 made the S/CRS a member of the new Policy Coordination Committee for Reconstruction and Stabilization Operations (PCCRSO).¹¹⁶

D. National Security Presidential Directive 44

On 7 December 2005, President Bush issued NSPD 44.¹¹⁷ The purpose of NSPD 44 is to “promote the security of the United States through improved coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.”¹¹⁸ National Security Presidential Directive 44 is significant for three reasons. First, it established new U.S. foreign policy concerning stabilization and reconstruction efforts.¹¹⁹ Next, it made the DOS the lead agency for all stabilization and reconstruction efforts.¹²⁰ Finally, it created a PCCRSO.¹²¹

National Security Presidential Directive 44 established new U.S. foreign policy. It states,

The United States has a significant stake in enhancing the capacity to assist in stabilizing and reconstructing countries or regions, especially those at risk of, in, or in transition from conflict or civil strife, and to help them establish a sustainable path toward peaceful societies, democracies, and market economies. The United States should work with other countries and organizations to anticipate state failure, avoid it whenever possible, and respond quickly and effectively when necessary and where appropriate to promote peace, security, development, democratic practices, market economies, and the rule of law. Such work should aim to enable governments abroad to exercise sovereignty over their own territories and to prevent those territories from being used as a base of operations or safe haven for extremists, terrorists, organized crime groups, or others who pose a threat to U.S. foreign policy, security, or economic interests.¹²²

It also designated the DOS as the lead agency for all stabilization and reconstruction efforts by directing the Secretary of State to

coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities. The Secretary of State shall coordinate such efforts with the Secretary of Defense to ensure harmonization with any planned or ongoing U.S. operations across the spectrum of conflict.¹²³

Additionally, the Secretary of State and the Secretary of Defense are directed to “integrate stabilization and reconstruction contingency plans with military contingency plans” and “develop a general framework for fully coordinating stabilization and reconstruction activities and military operations at all levels where appropriate.”¹²⁴

¹¹³ NSPD 44, *supra* note 12, at 2.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2.

¹²¹ *Id.* at 4–5.

¹²² *Id.* at 1–2.

¹²³ *Id.*

¹²⁴ *Id.* at 4.

The last significant aspect of NSPD 44 is that it established a PCCRSO.¹²⁵ This committee is chaired by the S/CRS and includes various representatives from the National Security Council staff.¹²⁶ The purpose of this committee is to coordinate U.S. Government policy concerning future stabilization and reconstruction operations.¹²⁷

This section of the article examines key changes the U.S. Government made concerning its stabilization and reconstruction operations policy. The next section of this article will explore how these changes affect U.S. military operations.

IV. What Is Military Support to SSTR Operations?

Before we can analyze whether DOD can legally fund SSTR operations under the existing fiscal framework, it is necessary to determine exactly what these operations entail. In other words, what is military support to SSTR operations?

Department of Defense Directive (DODD) 3000.05 defines stability operations as “[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions.”¹²⁸ Military support to these operations includes those “activities that support U.S. Government plans for stabilization, security, reconstruction, and transition operations, which lead to a sustainable peace while advancing U.S. interests.”¹²⁹ To determine the nature of military support envisioned under the new DOD policy, it is necessary to examine the policy and the additional DOD guidance that stemmed from it.

A. Department of Defense Directive 3000.05

On 28 November 2005, DOD issued DOD Directive 3000.05, *Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations*.¹³⁰ This DODD dramatically changed the DOD approach to stabilization and reconstruction operations.¹³¹ First, it officially established DOD’s new stability operations policy.¹³² Next, it provided initial guidance to DOD on SSTR operations.¹³³ Finally, it assigned responsibilities within DOD for planning, training, and preparing to conduct and support SSTR operations.¹³⁴

The most significant aspect of the new DOD policy is that it elevated stability operations to a core military mission and directed that they be given the same level of priority as combat operations.¹³⁵ This means that stability operations must be “explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, material, leadership, personnel, facilities, and planning.”¹³⁶ This aspect of the new policy considerably altered past DOD practice, where stability operations were considered only during the last phase, commonly referred to as Phase IV, of major combat operations.¹³⁷

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ DODD 3000.05, *supra* note 9, para. 3.1.

¹²⁹ *Id.* para. 3.2.

¹³⁰ DODD 3000.05, *supra* note 9.

¹³¹ *Id.*

¹³² *Id.* para. 1.2.

¹³³ *Id.* para. 1.1.

¹³⁴ *Id.* para. 1.2.

¹³⁵ *Id.* para. 4.1.

¹³⁶ *Id.*

¹³⁷ *See* GAO-07-549, *supra* note 2, at 14.

A second significant aspect of DODD 3000.05 is that it provided strategic level guidance for planning, training, and preparing to conduct and support SSTR operations.¹³⁸ First, this policy directs U.S. military forces to be prepared to “perform all tasks necessary to establish or maintain order when civilians cannot do so.”¹³⁹ These tasks include rebuilding indigenous institutions, reviving or building the private sector, and/or developing representative governmental institutions.¹⁴⁰ Next, this policy requires DOD to increase cooperation with relevant government agencies, foreign governments and security forces, international and non-governmental organizations, and civilians within the private sector.¹⁴¹ Third, this policy directs the military to “lead and support the development of military-civilian teams” that could be tasked with “ensuring security, developing local governance structures, promoting bottom-up economic activity, rebuilding infrastructure, and building indigenous capacity for such tasks.”¹⁴² Finally, DODD 3000.05 requires increased support to indigenous persons and groups who promote freedom, the rule of law, and an entrepreneurial economy.¹⁴³

The last significant aspect of DODD 3000.05 is that it assigned responsibilities within the DOD for planning, training, and preparing to conduct and support SSTR operations.¹⁴⁴ It tasked the Chairman of the Joint Chiefs of Staff with developing joint doctrine concerning SSTR operations. It also tasked the Commander, U.S. Joint Forces Command with developing a new joint operational concept.¹⁴⁵ This operational guidance is discussed below and helps to further define the type of support U.S. military forces could be required to provide at the tactical level.

B. Joint Publication 3.0

On 17 September 2006, the Chairman of the Joint Chiefs of Staff published Joint Publication 3-0, *Joint Operations*.¹⁴⁶ Joint Publication 3-0 provides “the doctrinal foundation and fundamental principles that guide the Armed Forces of the United States in the conduct of joint operations across the range of military operations.”¹⁴⁷ Its purpose is to provide “military guidance for the exercise of authority by combatant commanders . . . and prescribes joint doctrine for operations and training.”¹⁴⁸ Joint Publication 3-0 is significant for two reasons. First, it discusses a range of military operations that a combatant commander could employ to support national security goals.¹⁴⁹ Second, it expands the traditional “phasing model” for major operations and campaigns from four to six phases, and incorporates stability operations as an operational consideration during each of those phases.¹⁵⁰

Joint Publication 3-0 is significant because it discusses a range of military options the combatant commander could employ to support national security goals.¹⁵¹ Generally, this range of military options consists of three broad categories: (1) military engagement, security cooperation, and deterrence activities; (2) crisis response and limited contingency operations; and (3) major operations and campaigns.¹⁵² Each of these three categories can be used to identify specific military missions, some of which are characterized as SSTR operations.

¹³⁸ DODD 3000.05, *supra* note 9, para. 1.2.

¹³⁹ *Id.* para. 4.3.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* para. 4.4.

¹⁴² *Id.* para. 4.5, 4.5.1.

¹⁴³ *Id.* para. 4.8.

¹⁴⁴ *Id.* para. 5.

¹⁴⁵ *Id.* para. 5.1.

¹⁴⁶ JOINT PUB. 3-0, *supra* note 10.

¹⁴⁷ *Id.* at i.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at I-6 to I-10.

¹⁵⁰ *Id.* at IV-27 to IV-29.

¹⁵¹ *Id.* at I-6 to I-10.

¹⁵² *Id.*

Military engagement, security cooperation, and deterrence activities are generally designed to “shape the operational environment and keep day-to-day tensions between nations or groups below the threshold of armed conflict while maintaining U.S. global influence.”¹⁵³ Specific military missions within this category include: (1) foreign security assistance, (2) humanitarian and civic assistance, (3) anti-terrorism support, (4) counter-insurgency support, (5) counter-drug operations, and (6) show of force operations.¹⁵⁴

Crisis response and limited contingency operations are designed to “protect U.S. interests, and prevent surprise attack or further conflict.”¹⁵⁵ These operations “can be a single small-scale, limited-duration operation or a significant part of a major operation of extended duration involving combat.”¹⁵⁶ Specific military missions within this category include: (1) peacekeeping/peace enforcement operations, (2) foreign humanitarian assistance missions, (3) non-combat evacuation operations, (4) consequence management operations, and (5) limited strikes or raids.¹⁵⁷

Major operations and campaigns are designed to “prevail against the enemy as quickly as possible, conclude hostilities, and establish conditions favorable to the host nation and the U.S. and its multi-national partners.”¹⁵⁸ These operations “often require conducting stability operations to restore security, provide services and humanitarian relief, and conduct emergency reconstruction.”¹⁵⁹

The scope of U.S. military support provided to SSTR operations might vary from passive to active depending upon numerous factors associated with each particular operation.¹⁶⁰ For example, U.S. military forces might be the sole agency conducting stabilization operations “when indigenous civil, USG, multi-national or international capacity does not exist or is incapable of assuming responsibility.”¹⁶¹ A more passive example might involve U.S. military forces participating on integrated civilian-military reconstruction teams.¹⁶² These teams could be made up of representatives from the military, other government agencies, foreign governments and security forces, or members of the private sector.¹⁶³ A final example might include U.S. military forces simply providing passive support for stabilization and reconstruction operations, such as base security, when and if necessary.¹⁶⁴

A second important aspect of Joint Publication 3-0 is that broadens the military planning guidance, for major operations and campaigns, to more fully address pre-conflict and post-conflict operations.¹⁶⁵ Previous planning guidance, which considered only four operational phases, was revised to require consideration of six operational phases.¹⁶⁶ Additionally, this expanded planning construct requires planners to consider stability operations during each of the six operational phases.¹⁶⁷

The first additional phase requires planners to consider different types of activities that might be conducted to stabilize nations and prevent the outbreak of hostilities.¹⁶⁸ These activities will typically involve collaborative interagency planning and include security operations and Humanitarian Assistance missions.¹⁶⁹

¹⁵³ *Id.* at I-8 to I-9.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at I-9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See* JOINT PUB. 3-0, *supra* note 10.

¹⁶¹ *Id.* at I-9.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at I-8 to I-9.

¹⁶⁵ *Id.* at V-1 to V-2.

¹⁶⁶ *Id.* at IV-27 to IV-29.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at IV-27.

¹⁶⁹ *Id.*

The second additional phase requires planners to consider different types of activities that will assist in post conflict stabilization, reconstruction, and the transition to self-rule.¹⁷⁰ These activities include security operations, developing local governance capacities, rebuilding infrastructure, and establishing the rule of law.¹⁷¹

C. Joint Operating Concept Version 2.0

In December of 2006, the Joint Forces Command published Joint Operating Concept Version 2.0, *Military Support to Stabilization, Security, Transition, and Reconstruction Operations*.¹⁷² The purpose of Joint Operating Concept Version 2.0 is to “describe how the future Joint Force Commander will provide military support to stabilization, security, transition, and reconstruction operations within a military campaign in pursuit of national strategic objectives in the 2014-2026 timeframe.”¹⁷³

Joint Operating Concept Version 2.0 focuses on “the full range of military support that the future Joint Force might provide in foreign countries across the continuum from peace to crisis and conflict in order to assist a state or region that is under severe stress or has collapsed due to either a natural or man-made disaster.”¹⁷⁴ The scope of military support required for each operation varies depending upon where it fits on that continuum.¹⁷⁵ For example, in “high end” SSTR operations (SSTR operations associated with U.S.-imposed regime change, assisting a faltering government, or responding to a collapse of a foreign government caused by internal failure) it might be necessary to provide extensive military support.¹⁷⁶ Compare this to “low end” SSTR operations (disaster relief, foreign security assistance, etc.) where the support provided by the military will be much narrower.¹⁷⁷

Joint Operating Concept Version 2.0 uses six Major Mission Elements (MMEs) or desired end states to focus the future joint force commander and the required military efforts.¹⁷⁸ These six MMEs include: (1) establishing and maintaining a safe, secure environment; (2) delivering humanitarian assistance; (3) reconstructing critical infrastructure and restoring essential services; (4) supporting economic development; (5) establishing representative, effective governance and the rule of law; and (6) conducting strategic communication.¹⁷⁹ The military support provided to an operation will be based on the desired end state that the joint force commander is trying to achieve.

D. Conclusion

After reviewing the policy established by DODD 3000.05 and the planning guidance set forth in Joint Publication 3-0 and Joint Operating Concept Version 2.0, we can conclude that the military support provided to SSTR operations will vary for each particular operation. Generally, the military support provided to a particular SSTR operation will be contingent upon three factors: (1) where does the operation fit on the continuum that ranges from peace to crisis to conflict;¹⁸⁰ (2) how is the operation categorized;¹⁸¹ and (3) what is the desired end-state of that operation?¹⁸² At a minimum, commanders must consider stability operations when planning each phase of any military operation.¹⁸³ On the other end of the spectrum, DOD

¹⁷⁰ *Id.* at IV-29.

¹⁷¹ *Id.*

¹⁷² JOINT OPERATING CONCEPT, *supra* note 11.

¹⁷³ *Id.* at 1.

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 22.

¹⁷⁷ *Id.* at 23.

¹⁷⁸ *Id.* at 20.

¹⁷⁹ *Id.*

¹⁸⁰ See JOINT OPERATING CONCEPT, *supra* note 11.

¹⁸¹ See JOINT PUB. 3-0, *supra* note 10.

¹⁸² See JOINT OPERATING CONCEPT, *supra* note 11.

¹⁸³ JOINT PUB. 3-0, *supra* note 9, at IV-27 to IV-29.

might find that it is the sole agency conducting SSTR operations after a major operation or campaign.¹⁸⁴ The next section of this article discusses several select congressional appropriations and authorizations that permit DOD to conduct foreign assistance.

V. Select Appropriations and Authorizations that Allow the DOD to Conduct Foreign Assistance

Foreign assistance encompasses any and all assistance provided to a foreign nation on behalf of the U.S. Government.¹⁸⁵ Generally, it can be broken down into three categories: (1) security assistance, (2) humanitarian assistance, and (3) development assistance.¹⁸⁶ Recall that DOS is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.¹⁸⁷ However, Congress has appropriated funds for DOD to conduct foreign assistance in certain situations.¹⁸⁸ This section of the article will discuss select DOD foreign assistance appropriations and authorizations that impact DOD's ability to conduct SSTR operations.

A. Security Assistance

Security assistance is foreign assistance provided to another nation's military or police forces on behalf of the U.S. Government.¹⁸⁹ It generally involves funding, training, and equipping those forces.¹⁹⁰ The two most significant DOD security assistance appropriations, for purposes of this article, are the Iraqi Security Forces Fund (ISFF) and the Afghanistan Security Forces Fund (ASFF).¹⁹¹

On 11 May 2005, President Bush enacted the 2005 Defense Emergency Supplemental Appropriations Act, which established the ISFF and ASFF.¹⁹² These appropriations authorized DOD to provide assistance to the security forces of Iraq and Afghanistan.¹⁹³ This assistance included providing equipment, supplies, services, training, and facility and infrastructure repairs to the military and police forces of Iraq and Afghanistan.¹⁹⁴

On 26 December 2007, President Bush enacted the 2008 Consolidated Appropriations Act (CAA).¹⁹⁵ Division L of the CAA is the 2008 Defense Emergency Wartime Supplemental Appropriation, and it appropriated \$1.5 billion to the ISFF and \$1.35 billion to the ASFF.¹⁹⁶ These funds are available for obligation through 30 September 2009.¹⁹⁷ They are currently being used to train and equip the military and police forces of Iraq and Afghanistan.¹⁹⁸

B. Humanitarian Assistance

¹⁸⁴ *Id.* at 1-9.

¹⁸⁵ See *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A (1984).

¹⁸⁶ *Id.*

¹⁸⁷ NSPD 44 *supra* note 12, at 4; see also *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A; Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

¹⁸⁸ See generally Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, div. A, 121 Stat. 1295 (2007); Consolidated Appropriations Act, 2008, Pub. L. No. 110-116, div. L, 121 Stat. 1844, 1896 (2007); see also Major Jose A. Cora, *DOD Authorizations and Appropriations Flowchart*, *infra* App. (2008) (unpublished flowchart depicting DOD authorizations and appropriations).

¹⁸⁹ See *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

¹⁹⁰ *Id.*

¹⁹¹ See div. L, 121 Stat. 1844, 1896.

¹⁹² Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. No. 109-13, 119 Stat. 231 (creating the AfSFF (\$1.285 billion) and the ISFF (\$5.7 billion)).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Div. L, 121 Stat. 1844, 1896.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See *infra* note 237.

Humanitarian assistance is foreign assistance provided directly to the population of another nation by the U.S. Government.¹⁹⁹ There are three significant humanitarian assistance appropriations and authorizations that impact SSTR operations. They are the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation,²⁰⁰ the Humanitarian and Civic Assistance (HCA) authorization,²⁰¹ and the Commander's Emergency Response Program (CERP) authorization.²⁰²

1. OHDACA

The primary purpose of the OHDACA appropriation is to provide funding for humanitarian de-mining operations.²⁰³ However, the OHDACA appropriation contains a set of authorizations that allows DOD to use OHDACA funds for other types of humanitarian assistance operations.²⁰⁴ These operations include transporting humanitarian relief supplies, providing foreign disaster, making excess non-lethal supplies available for humanitarian relief, and providing humanitarian assistance.²⁰⁵ The 2008 DOD Appropriation Act appropriated \$102.78 million to be used for OHDACA programs world-wide.²⁰⁶ It is available for new obligations through 30 September 2010.²⁰⁷

2. HCA

The HCA is an authorization that allows DOD to conduct humanitarian assistance operations using DOD O&M funds.²⁰⁸ Two types of humanitarian assistance operations can be conducted under the HCA authorization.²⁰⁹ They are pre-planned HCA and de minimis HCA.²¹⁰

Under 10 U.S.C. § 401, pre-planned HCA includes: (1) medical, dental and veterinary care in rudimentary areas; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of rudimentary sanitation systems; and (4) rudimentary construction and repair of public facilities.²¹¹ Pre-planned HCA is available for world-wide use, but the authorization contains several restrictions that make it difficult to access.²¹² These restrictions include: (1) HCA may not duplicate other forms of U.S. foreign assistance; (2) the use of HCA requires service level approval; (3) the use of HCA requires DOS concurrence; and (4) operations conducted using HCA must be part of the mission essential task list (METL) of the units conducting those operations.²¹³ Funding for pre-planned HCA comes from service level O&M funds.²¹⁴

De minimis HCA provides authority for operational unit commanders to react to "targets of opportunity" while conducting authorized military operations world-wide.²¹⁵ These activities must be small in scope and must involve only

¹⁹⁹ See The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A.

²⁰⁰ See generally Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, div. L, 121 Stat. 1295 (2007); 10 U.S.C.S. § 401 (LexisNexis 2008); 10 U.S.C.S. § 402 (LexisNexis 2008); 10 U.S.C.S. § 404 (LexisNexis 2008); 10 U.S.C.S. § 2557 (LexisNexis 2008); 10 U.S.C.S. § 2561 (LexisNexis 2008).

²⁰¹ 10 U.S.C.S. § 401.

²⁰² National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 323, div. L, 122 Stat. 3, 60.

²⁰³ 10 U.S.C.S. § 401.

²⁰⁴ See generally *id.* §§ 401, 402, 404, 2557, 2561.

²⁰⁵ *Id.*

²⁰⁶ Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, div. L, 121 Stat. 1295 (2007).

²⁰⁷ *Id.*

²⁰⁸ 10 U.S.C.S. § 401; see also div. A, 121 Stat. 1295.

²⁰⁹ 10 U.S.C.S. § 401; see also div. A, 121 Stat. 1295; U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994) [hereinafter DODD 2205.2]; U.S. DEP'T OF DEFENSE, INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM (27 Jan. 1995) [hereinafter DODI 2205.3].

²¹⁰ See 10 U.S.C.S. § 401; DODD 2205.2, *supra* note 209; DODI 2205.3, *supra* note 209.

²¹¹ 10 U.S.C.S. § 401.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

negligible costs.²¹⁶ De minimis HCA is undefined, but the general rule is “a few soldiers, a few dollars, for a few hours.”²¹⁷ Department of Defense Directive 2205.2 limits the amount of funds spent on de minimis HCA to \$2500 per operation, unless an exception to the policy is granted which may allow up to \$10,000 per operation²¹⁸ Funding for de minimis HCA comes from unit level O&M funds.²¹⁹

3. The CERP

The CERP provides appropriated funds directly to commanders of operational units in Afghanistan and Iraq, allowing them to meet the emergency humanitarian and reconstruction needs of the civilian population in their respective areas of operation.²²⁰ The program was initiated on 16 June 2003, when the Coalition Provisional Authority (CPA) authorized the Commander of Coalition Forces “to take all actions necessary to operate a Commanders’ Emergency Response Program.”²²¹ On 19 June 2003, the Commander of Combined Joint Task Force 7 (CJTF-7) implemented CERP by issuing Fragmentary Order (FRAGO) 89.²²² This detailed the requirements of the program, including authorized reconstruction projects, implementing tasks, and expenditure limits.²²³

The initial CERP program was funded with millions of dollars of seized Iraqi funds that were recovered by U.S. forces during the early stages of the war.²²⁴ By September 2003, the CPA realized that these recovered funds would not last beyond the end of the year.²²⁵ As a result, President Bush requested an authorization to use DOD O&M appropriations to fund the CERP program.²²⁶ On 6 November 2003, President Bush enacted the 2004 National Defense Authorization Act, which authorized the use of \$500 million of DOD O&M funds for CERP projects in Afghanistan and Iraq.²²⁷

Since November 2003, Congress has continuously reauthorized CERP.²²⁸ On 28 January 2008, President Bush enacted the 2008 National Defense Authorization Act, which authorized the use of up to \$977 million of DOD O&M funds for CERP projects in Afghanistan and Iraq.²²⁹ These funds are used for projects that will immediately assist the people of Afghanistan and Iraq, and support the reconstruction of those countries.²³⁰ Examples of CERP projects conducted in Afghanistan and Iraq include water distribution projects, sanitation services, electricity projects, health care efforts, education programs, rule of law and governance initiatives, and civic clean-up activities.²³¹

The remainder of this article will analyze the post-conflict SSTR operations that are being conducted in Afghanistan and Iraq, and the limited pre-conflict SSTR operations that are being conducted world-wide in support of the Global War on Terrorism. It will identify the fiscal and policy issues raised by those operations and recommend potential solutions to those issues.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ DODD 2205.2, *supra* note 209.

²¹⁹ See 10 U.S.C.S. § 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

²²⁰ Colonel Mark S. Martins, *The Commander’s Emergency Response Program*, 37 JOINT FORCE Q. 46, 49 (2005).

²²¹ *Id.* at 47 (quoting Memorandum from Ambassador L. Paul Bremer, CPA Administrator, to the Commander of Coalition Forces (June 16, 2003)).

²²² *Id.*

²²³ *Id.* at 47–48.

²²⁴ *Id.* at 47.

²²⁵ *Id.* at 49.

²²⁶ *Id.*

²²⁷ *Id.*; see also National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 1426, div. L, 117 Stat. 1392 (2003).

²²⁸ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 323, div. L, 122 Stat. 3, 60.

²²⁹ *Id.*

²³⁰ See Martins, *supra* note 220, at 47–48.

²³¹ Afghanistan Provincial Reconstruction Teams, <http://www.state.gov/p/sca/rls/fs/80706.htm> (last visited Oct. 3, 2008) [hereinafter Afghanistan PRTs]; Fact Sheet on Provincial Reconstruction Teams, Dec. 17, 2007) http://iraq.usembassy.gov/iraq/20060223_prt_fact_sheet.html [hereinafter Iraq PRTs].

VI. Post-Conflict SSTR Operations in Afghanistan and Iraq

Generally, U.S. military forces are conducting post-conflict SSTR operations in Afghanistan and Iraq in three ways. First, PRTs are using a variety of appropriated funds and authorizations to perform numerous stabilization and reconstruction projects within their assigned provinces.²³² Second, operational units are using the CERP program to conduct various stabilization and reconstruction activities within their battle space.²³³ Third, U.S. military forces are training and equipping the Afghan National Security Forces and the Iraqi Security Forces.²³⁴ This section of the article will examine the post-conflict SSTR operations in Afghanistan and Iraq and discuss how they are funded. Then it will analyze those funding mechanisms within the fiscal framework discussed earlier. Finally, it will identify the problems that arise within each of these operational constructs.

A. PRTs

Provincial reconstruction teams are integrated civil-military teams that serve as the primary interface between Coalition Forces and the provincial and local governments throughout Afghanistan and Iraq.²³⁵ The primary mission of the PRTs is to develop the provincial and local government's ability to govern, while advancing security, the rule of law, and economic development within the province.²³⁶

The U.S. military developed the PRT concept in Afghanistan during the summer of 2002, with the first PRT being deployed in early 2003.²³⁷ The success of the PRT initiative in Afghanistan led to the concept being implemented in Iraq.²³⁸ The U.S. military deployed the first Iraqi PRT in November 2005.²³⁹ Currently, there are twenty-five PRTs operating in Afghanistan and twenty-five PRTs operating in Iraq.²⁴⁰

The early PRTs in Afghanistan consisted of U.S. military forces, Afghan advisors, and civilian representatives from the DOS, USAID, and the U.S. Department of Agriculture.²⁴¹ This composition was slightly modified as the lessons learned developed. The make-up of the existing PRTs, in both Afghanistan and Iraq, varies depending on the needs of each individual province.²⁴² Generally there are three different PRT models being employed, one in Afghanistan and two in Iraq.²⁴³

1. The PRT Models

a. The Afghan Model

In Afghanistan, each PRT is made up of 50 to 100 members, with the average size being 80 members.²⁴⁴ In most cases, the U.S. military retains lead authority over the PRT.²⁴⁵ The majority of the Afghan PRTs are composed of military

²³² See Michael J. McNerney, *Stabilization and Reconstruction in Afghanistan: Are PRTs a Model or a Muddle?*, 35 *PARAMETERS* 32 (Winter 2005–2006) (discussing the PRTs in Afghanistan); see also Nima Abbaszadeh et al., *Provincial Reconstruction Teams: Lessons and Recommendations* (Jan. 2008) (unpublished M.A. thesis, Princeton University) (on file with author).

²³³ See Martins, *supra* note 220, at 48–49 (discussing the importance of CERP).

²³⁴ See Combined Security Transition Command—Afghanistan, <http://www.cstc-a.com/index.html> (last visited Oct. 3, 2008) [hereinafter CSTC-A]; see also Multi-National Security Transition Command—Iraq, <http://www.mnstci.iraq.centcom.mil/> (last visited Oct. 3, 2008) [hereinafter MNSTC-I].

²³⁵ Abbaszadeh et al., *supra* note 232, at 5.

²³⁶ Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

²³⁷ McNerney, *supra* note 232, at 32.

²³⁸ Abbaszadeh et al., *supra* note 232, at 5.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ McNerney, *supra* note 232, at 32.

²⁴² Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

²⁴³ Abbaszadeh et al., *supra* note 232, at 49–50.

²⁴⁴ *Id.* at 49.

personnel because of the emphasis placed on force protection.²⁴⁶ Military members on the PRT include a headquarters element, a platoon of Soldiers for force protection, civil affairs teams, translators, and psychological operations personnel.²⁴⁷ Civilian members on the PRT usually number between three and five, and generally include representatives from the DOS, USAID, the Department of Agriculture, and the Department of Justice (DOJ).²⁴⁸ Most PRTs also include an Afghan advisor from the Afghan Interior Ministry.²⁴⁹

b. The Iraqi Model

In Iraq, each PRT is made up of thirty to eighty members, with the average size being fifty members.²⁵⁰ The DOS retains lead authority over the Iraqi PRTs, with deputy authority delegated to the U.S. military.²⁵¹ The majority of the Iraqi PRTs are composed of civilian personnel.²⁵² There are two reasons for this larger civilian composition. First, there are no dedicated force protection elements because the majority of the Iraqi PRTs are located on U.S. forward operating bases (FOBs).²⁵³ Second, the relative security of the FOB allows for greater civilian participation on the PRTs.²⁵⁴ Civilian members on the PRT include representatives from the DOS, USAID, the Department of Agriculture, and DOJ.²⁵⁵ In some cases there are civilian representatives from the U.S. Army Corps of Engineers.²⁵⁶ Military members on the PRT include headquarters personnel, civil affairs teams, and psychological operations personnel.²⁵⁷

c. The Embedded Model

In January 2007, the U.S. military developed the embedded PRT (ePRT) to coincide with the “surge” operations being conducted in Iraq.²⁵⁸ The ePRTs are made up of twelve to sixteen members and are designed to operate within an Army brigade combat team (BCT) or Marine Corps Regiment (MCR).²⁵⁹ Civilian members on the ePRT include a team leader from DOS and representatives from other appropriate government agencies.²⁶⁰ Military members on the ePRT include a civil affairs officer and the necessary representatives from specific military specialties.²⁶¹ Most ePRTs also include Iraqi Cultural Advisors.²⁶² Of the twenty-five PRTs conducting operations in Iraq, ten of them are ePRTs.²⁶³

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 50.

²⁴⁷ *Id.*

²⁴⁸ *Id.*; see also McNerney, *supra* note 232, at 36.

²⁴⁹ Abbaszadeh et al., *supra* note 232, at 50.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* Initially the lack of a dedicated force protection element posed a significant problem because the PRTs could not travel freely about their province. *Id.* This issue was addressed in February 2007, when the Department of State and the DOD signed a Memorandum of Agreement under which they agreed to provide a military escort when the PRTs were required to travel off the FOB. *Id.*

²⁵⁴ Abbaszadeh et al., *supra* note 232, at 50.

²⁵⁵ *Id.*

²⁵⁶ Iraq PRTs, *supra* note 231.

²⁵⁷ Abbaszadeh et al., *supra* note 232, at 50.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Iraq PRTs, *supra* note 231.

2. Legally Funding the PRTs

Initial funding for the Afghan PRT operations came from DOD's OHDACA appropriation.²⁶⁴ The PRTs used OHDACA funds to dig wells, build schools, and repair medical clinics.²⁶⁵ The OHDACA funds, however, are difficult to use and limited in their application to basic humanitarian needs projects.²⁶⁶ The PRTs found this funding mechanism did not provide them with the means necessary to complete more significant projects such as repairing infrastructure, training and equipping security forces, and developing the rule of law.²⁶⁷ Additionally, the Afghan PRTs found that the projects they were able to complete with OHDACA funds were identical to those that were being completed by various non-government organizations.²⁶⁸

In early 2004, DOS and USAID began to fund Afghan PRT operations by channeling reconstruction aid through the DOS Economic Security Fund (ESF).²⁶⁹ At about the same time, Congress authorized the use of O&M funds for CERP projects in Afghanistan.²⁷⁰ Currently, the Afghan PRTs conduct the majority of their reconstruction projects with the DOS ESF funds and use CERP funds as a supplement.²⁷¹ Both sources of funding have greatly enhanced the Afghan PRT's ability to achieve their primary mission of assisting the provincial governments.²⁷²

Initial funding for Iraqi PRT operations came from the appropriated Iraq Relief and Reconstruction Fund (IRRF).²⁷³ This fund is being drawn to a close, so the majority of reconstruction funds are now being channeled through the DOS's ESF.²⁷⁴ The PRTs are also using DOD O&M funds via the CERP authorization.²⁷⁵ The Iraqi PRT operations are similar to those being conducted in Afghanistan.²⁷⁶ Currently, the Iraqi PRTs fund the majority of their reconstruction projects with ESF funds, while CERP funds are used to supplement these projects.²⁷⁷

The funding model is slightly different on the ePRT because of the subordination of the ePRT to the BCT or MCR.²⁷⁸ The relationship between the ePRT and the brigade or regimental commander provides the ePRT with greater access to CERP funds.²⁷⁹ The ePRT Team Leader, in coordination with select staff members, evaluates potential projects and makes recommendations to the commander for prioritization and funding.²⁸⁰ As a result, the majority of ePRT operations are funded with CERP.²⁸¹

3. Interagency Coordination Challenges with the PRT Model

Legally funding the PRTs in Afghanistan and Iraq is not a major challenge since Congress has appropriated various funds to conduct these SSTR operations. The multi-agency model of PRTs, however, poses significant civil-military

²⁶⁴ McNerney, *supra* note 232, at 36.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; *see supra* pp. 15–16.

²⁶⁷ McNerney, *supra* note 231, at 36.

²⁶⁸ *Id.*

²⁶⁹ Abbaszadeh et al., *supra* note 232, at 49.

²⁷⁰ Martins, *supra* note 220, at 49.

²⁷¹ Abbaszadeh et al., *supra* note 232, at 49.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*; *see also* Iraq PRTs, *supra* note 231.

²⁷⁶ Abbaszadeh et al., *supra* note 232, at 49.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 50.

²⁷⁹ *Id.*

²⁸⁰ Interview with Major Richard DeMeglio, Brigade Judge Advocate, in Charlottesville, Va. (Mar. 13, 2008) [hereinafter Demeglio Interview].

²⁸¹ *Id.*

coordination challenges for DOD, DOS, and other U.S. Government agencies. First, DOS and DOD are culturally distinct and use very different decision making models.²⁸² Second, DOS and DOD are each attempting to achieve a slightly different end-state.²⁸³ The DOS tends to focus on mid to long term political and economic successes, while DOD tends to focus on short term security concerns.²⁸⁴ A great example of this issue is the Concerned Local Citizens Program where DOD pays members of local tribes to guard “critical infrastructure.”²⁸⁵ This has resulted in significant short-term security gains, but directly contradicts what DOS is trying to accomplish, namely achieving security with the Iraqi Security Forces.²⁸⁶ Finally, there has been some disagreement as to the roles that DOD and DOS play within both the PRT and the overall strategic plan.²⁸⁷

The U.S. Government widely recognizes the lack of civil-military coordination in the Global War on Terrorism and is making major efforts to improve it. Recall that NSPD 44 requires increased integration and coordination between the Secretary of State and the Secretary of Defense concerning stabilization and reconstruction operations.²⁸⁸ Additionally, the DOD has created Contingency Planning and Integration Task Forces, or joint civil-military efforts that focus on countries where the risk of U.S. intervention is high.²⁸⁹ Finally, the Army Chief of Staff recently approved a pilot program that will allow ten DOS foreign officers to attend the intermediate level education class at the Command and General Staff College starting in August 2008.²⁹⁰ In exchange, the Army will select ten field grade officers to backfill them in their civilian positions.²⁹¹ The goal of this exchange program is to increase the cultural understanding between DOS and DOD, and prepare foreign officers for future assignments on PRTs.²⁹²

B. Operational Units and the CERP

Operational units in Afghanistan and Iraq are using the CERP program to conduct various post-conflict SSTR operations.²⁹³ As noted above, this program is designed to “enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility.”²⁹⁴ The CERP is heavily favored by commanders in Afghanistan and Iraq because it provides them with direct control over the funds for certain SSTR activities.²⁹⁵ This allows them to focus their efforts on needs that are unique to their battle space without having to navigate the cumbersome process of securing the approval to use other funds like OHDACA.²⁹⁶

To date, operational units in Afghanistan and Iraq have spent billions of dollars on initiatives designed to provide immediate assistance to the Afghan and Iraqi people, and support the reconstruction of those nations.²⁹⁷ Examples of these initiatives include: providing sanitation services, conducting civic clean-up projects, repairing and installing generators,

²⁸² See generally Rife, *supra* note 83 (discussing the different planning methods used by DOD and DOS).

²⁸³ *Id.*; see also GAO-07-549, *supra* note 2; *Effectiveness of the Reconstruction Team Program in Iraq: Hearing Before the H. Comm. On Armed Services, 110th Cong. 4-5 (2007)* [hereinafter Bowen Statement] (statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction).

²⁸⁴ *Id.*

²⁸⁵ Demeglio Interview, *supra* note 280.

²⁸⁶ *Id.*

²⁸⁷ McNerney, *supra* note 232, at 37; see also *The Role of the Department of Defense in Provincial Reconstruction Teams: Hearing Before the H. Comm. on Armed Services, 110th Cong. 1 (2007)* [hereinafter Parker Statement] (statement of Michelle Parker, USAID, Field Program Officer).

²⁸⁸ NSPD 44, *supra* note 12, at 4.

²⁸⁹ JOINT PUB 3-0, *supra* note 10; see also NSPD 44, *supra* note 12 at 4; Study on Transition to and from Hostilities, *supra* note 95.

²⁹⁰ Gina Cavallaro, *Feds to Study with Army Majors at Fort Leavenworth*, FED. TIMES, Dec. 10, 2007, at 5.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Martins, *supra* note 220, at 49; see also Abbaszadeh et al., *supra* note 231, at 49; Bowen Statement, *supra* note 283; Parker Statement, *supra* note 287.

²⁹⁴ Martins, *supra* note 220, at 47 (quoting Memorandum from Ambassador L. Paul Bremer, CPA Administrator, to the Commander of Coalition Forces (June 166, 2003)).

²⁹⁵ *Id.* at 50; see also McNerney, *supra* note 231, at 37; Abbaszadeh et al., *supra* note 231, at 49; Bowen Statement, *supra* note 287.

²⁹⁶ Martins, *supra* note 220, at 50.

²⁹⁷ *Id.*; see also Abbaszadeh et al., *supra* note 232, at 48.

drilling wells, and providing training to establish the rule of law.²⁹⁸ These initiatives are being funded with DOD O&M appropriations through the CERP authorization, which was discussed above.²⁹⁹

Challenges in Coordinating SSTR Efforts When Operational Units Use CERP

The major issue that arises when operational units conduct SSTR operations with CERP funds is the lack of unity of effort between those units and the other agencies that are involved in SSTR operations.³⁰⁰ In many cases, the programs that are initiated by operational commanders are decentralized and conflict with those being conducted on a national basis.³⁰¹ This problem arises in part because of the different end-state that each participating organization is attempting to achieve.³⁰² For example, operational units tend to focus their efforts on short-term projects that directly improve the security situation in their battle space.³⁰³ These short-term projects, however, may destabilize the mid or long-term objectives that the PRTs are attempting to achieve.³⁰⁴

To achieve success, operational level CERP projects must complement the efforts of the other participating government agencies.³⁰⁵ One means of achieving this is through the use of ePRTs, which were discussed above. This coordination of effort can be achieved with ePRTs because although they are subordinate to their military commander, they continue to have greater access to the civil-military SSTR technical chain.³⁰⁶

C. Training and Equipping the Afghan National Security Forces and the Iraqi Security Forces

In May 2002, U.S. military forces began training the first group of Afghan soldiers for the New Afghan Army.³⁰⁷ Since that time, continuous efforts have been made to organize, train and equip the Afghan National Security Forces.³⁰⁸ Similar efforts were initiated in Iraq shortly after the fall of Baghdad when U.S. military forces started to train the New Iraqi Army.³⁰⁹ Currently, there are two separate U.S. military commands responsible for training and equipping the Afghan National Security Forces and the Iraqi Security Forces.³¹⁰ They are the Combined Security Transition Command-Afghanistan (CSTC-A) and the Multi-National Security Transition Command-Iraq (MNSTC-I).³¹¹

Generally, the missions of CSTC-A and MNSTC-I include organizing, training, and equipping the security forces of Afghanistan and Iraq in order to develop stable nations, strengthen the rule of law, and deter and defeat terrorism within their borders.³¹² United States military forces, through partnership with the Afghan and Iraqi Governments, are accomplishing these missions by: (1) training and recruiting police officers and soldiers, (2) acquiring weapons, uniforms, and equipment for the security forces, (3) assisting with the organization of the security forces, and (4) assisting with the development of the

²⁹⁸ Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

²⁹⁹ Martins, *supra* note 220, at 49; *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 323, div. L, 122 Stat. 3, 60.

³⁰⁰ Martins, *supra* note 220, at 49.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*; *see supra* notes 286-89 and accompanying text.

³⁰⁴ Martins, *supra* note 220, at 51.

³⁰⁵ *Id.*

³⁰⁶ DeMeglio Interview, *supra* note 280.

³⁰⁷ Ali A. Jalali, *Rebuilding Afghanistan's National Army*, 32 *PARAMETERS* 72 (Autumn 2002) (discussing the rebuilding of the Afghan National Army).

³⁰⁸ *Id.*; *see also* CSTC-A, *supra* note 234.

³⁰⁹ *See* MNSTC-I, *supra* note 234.

³¹⁰ CSTC-A, *supra* note 234; MNSTC-I, *supra* note 234.

³¹¹ CSTC-A, *supra* note 234; MNSTC-I, *supra* note 234.

³¹² *Id.*

systems necessary for an effective security infrastructure.³¹³ Legally funding these training organizations in Afghanistan and Iraq is not a major challenge since Congress has appropriated funds to conduct these SSTR operations.³¹⁴

D. Conclusion

Generally, the post-conflict SSTR operations in Afghanistan and Iraq are developing well since Congress has appropriated funds to accomplish the SSTR mission.³¹⁵ There are, however, some interagency challenges that continue to decrease the effectiveness of those operations.³¹⁶ The majority of these challenges are a result of cultural differences among the different agencies, primarily DOD and DOS, involved in post-conflict SSTR operations.³¹⁷ These challenges are widely recognized and there have been major efforts to increase interagency cooperation. These efforts include: (1) designating the DOS as the lead agency for SSTR operations; (2) increasing interagency participation in SSTR operations through the use of the PRTs; and (3) creating an exchange program that will increase the cultural understanding between DOS and DOD.³¹⁸ There is still much work to be done, especially in area of planning and conducting SSTR operations at the tactical level, where the goal should be to synchronize those local operations with the SSTR operations being conducted on a national scale.³¹⁹

The next section of this article will address the SSTR operations conducted outside of Afghanistan and Iraq. In addition to the interagency problems that arise in the post-conflict SSTR context, these SSTR operations face significant funding challenges.

VII. SSTR Operations Outside of Afghanistan and Iraq

The U.S. military is currently engaged in limited contingency SSTR operations in various nations throughout the world.³²⁰ These operations vary in scope and intensity depending on the desired strategic end-state.³²¹ They often lack the same resources that are provided during post-conflict SSTR operations.³²² In some cases, the operational units conducting these SSTR operations are attempting to achieve objectives similar to those the operational units are striving for in Afghanistan and Iraq.³²³ One such contingency operation is being conducted by the U.S. Central Command in the Horn of Africa.³²⁴ This section of the article will examine the limited contingency SSTR operations being conducted outside of Afghanistan and Iraq by using Combined Joint Task Force-Horn of Africa (CJTF-HOA) as an example. It will focus on the funding issues associated with limited contingency SSTR operations and discuss how those issues affect the operational units conducting SSTR missions. Finally, it will identify the problems that arise within this operational construct.

³¹³ *Id.*

³¹⁴ *Id.*; see also Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. L, 121 Stat. 1844, 1896 (2007).

³¹⁵ *Id.*

³¹⁶ See *supra* notes 286-89 and accompanying text.

³¹⁷ See generally Rife, *supra* note 83.

³¹⁸ See *supra* notes 12, 238-66, 293-95 and accompanying text.

³¹⁹ See generally Martins, *supra* note 220.

³²⁰ See GAO-07-549, *supra* note 2, at 1; see also Combined Joint Task Force—Horn of Africa, <http://www.hoa.afcom.mil/AboutCJTF-HOA.asp> (last visited Oct. 3, 2008) [hereinafter CJTF-HOA].

³²¹ See *supra* notes 149-82 and accompanying text.

³²² See *infra* pp. 23-24.

³²³ Compare CJTF-HOA, *supra* note 320, with Afghanistan PRTs, *supra* note 231, and Iraq PRTs, *supra* note 231, and CSTC-A, *supra* note 234, and MNSTC-I, *supra* note 234.

³²⁴ CJTF-HOA, *supra* note 320.

A. CJTF-HOA

The CJTF-HOA is an operational military unit that is conducting limited pre-conflict SSTR operations in the HOA.³²⁵ The mission of CJTF-HOA is to prevent conflict, promote regional stability and protect Coalition interests in order to prevail against extremism.³²⁶ The CJTF-HOA is accomplishing this mission by conducting SSTR operations that include providing clean water, schools, and improved roadways and medical facilities.³²⁷ Additionally, CJTF-HOA is participating in some military-to-military training, as well as other capacity-building programs such as medical, dental, and veterinarian civil action programs.³²⁸

1. Humanitarian Assistance Funding Challenges for SSTR Operations Outside of Afghanistan and Iraq

The CJTF-HOA is conducting the majority of these pre-conflict SSTR operations using the cumbersome OHDACA appropriation and HCA authorizations.³²⁹ These funding mechanisms have significantly limited their ability to conduct these operations because of the restrictions that are placed on their use.³³⁰

Recall the earlier analysis concerning the initial PRT operations in Afghanistan. Generally, the Afghan PRTs found that OHDACA funds did not provide them with the means necessary to complete significant projects like repairing critical infrastructure, training and equipping security forces, and developing the rule of law.³³¹ Additionally, the Afghan PRTs found that the projects they were able to complete with OHDACA funds were identical to those that were being completed by various non-government organizations.³³² These issues are the same issues that confront the operational units conducting pre-conflict SSTR operations outside of Afghanistan and Iraq because they are operating under those same funding constraints.

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the OHDACA appropriation and HCA authorizations, or authorize the use of DOD O&M funds for CERP projects being conducted outside of Afghanistan and Iraq (i.e., Global CERP). On October 31, 2007, DOD recommended that Congress authorize Global CERP in the 2008 National Defense Authorization Act, but Congress did not approve this recommendation.³³³ As such, operational units conducting pre-conflict SSTR operations outside of Afghanistan and Iraq are limited to using the existing OHDACA appropriations and HCA authorizations to execute their mission.

2. Security Assistance Funding Challenges for SSTR Operations Outside of Afghanistan and Iraq

A second issue that arises within the pre-conflict SSTR context is the military-to-military training conducted during these operations. Recall that one of the goals of pre-conflict SSTR operations is to prevent conflict by promoting stability within nations at risk of plunging into crisis.³³⁴ One way to stabilize a country is by providing security assistance to its security forces.³³⁵ In Iraq and Afghanistan, that security assistance is funded through the ASFF and ISFF appropriations.³³⁶ The ASFF and ISFF appropriations, however, are not available outside of Afghanistan and Iraq.³³⁷

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*; see also 10 U.S.C. 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

³³⁰ See 10 U.S.C. 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

³³¹ McNerney, *supra* note 232, at 36.

³³² *Id.*

³³³ Memorandum from The Honorable Robert M. Gates, Sec'y of Defense, to The Honorable Carl Levin, Chairman, Comm. on Armed Services (Oct. 31, 2007) [hereinafter Sec'y of Defense Memo] (on file with author).

³³⁴ See *supra* Part IV.A.–C.

³³⁵ *Id.*

³³⁶ See *supra* Part VI.C.

³³⁷ *Id.*

Operational units are conducting military-to-military security assistance training during pre-conflict SSTR operations must use appropriated funds from the “Build Capacity and Equip (BCE)” authority found in Section 1206 of the 2007 National Defense Authorization Act.³³⁸ This authority allows DOD to “build the capacity” of foreign military forces in support of the Global War on Terrorism.³³⁹ Its use, however, is severely restricted.³⁴⁰ Use of the BCE requires the approval of the Secretary of Defense, the concurrence of the Secretary of State, and Congressional notification.³⁴¹ Additionally, this fund is only available for new obligations until 30 September 2008, which severely limits DOD’s ability to undertake long-term security assistance and stabilization projects.³⁴² Finally, the BCE authority is only \$300 million for use world-wide.³⁴³ This is relatively small when compared to the ASFF (\$1.35 billion) and ISFF (\$1.5 billion) funds.³⁴⁴

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the BCE authorization, extend the availability date, and increase the funding to a level comparable to that of the ASFF and ISFF. On 31 October 2007, DOD recommended that Congress expand the BCE authority and extend its availability past 30 September 2008.³⁴⁵ Congress did not approve either of these recommendations.³⁴⁶ As such, operational units conducting military-to-military security assistance training operations outside of Afghanistan and Iraq are limited to using the existing BCE appropriation.

B. Conclusion

The pre-conflict SSTR operations conducted outside of Afghanistan and Iraq face significant funding challenges that substantially affect the operational units conducting these operations. Generally, the funds available for these operations are difficult to use because they are heavily restricted. Additionally, they do not allow the units to execute the types of missions that are necessary to achieve strategic success. Congress should either ease the restrictions that are placed on these funding mechanisms, or create new appropriations that are more expansive and easier to use.

VIII. Conclusion

Since the end of the Cold War, the United States has been increasingly involved in stabilization and reconstruction operations throughout the world.³⁴⁷ These operations “typically last 5 to 8 years and surpass combat operations in the cost of human lives and dollars.”³⁴⁸ To achieve victory, the U.S. Government must continue to improve how it approaches these operations.

The DOD has significantly changed its approach to SSTR operations.³⁴⁹ First, DOD formalized a new stability operations policy, which elevated stability operations to a core military mission on the same level with combat operations.³⁵⁰ Second, the military planning guidance was broadened to more fully address pre-conflict and post-conflict operations.³⁵¹ Third, a new joint operating concept was developed to serve as the basis for how the military will support future SSTR

³³⁸ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 § 1206, 120 Stat. 2083, 2418 (2006).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Compare* § 1206, *with* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. L, 121 Stat. 1844, 1896 (2007).

³⁴⁵ Sec’y of Defense Memo, *supra* note 333.

³⁴⁶ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 323, div. L, 122 Stat. 3, 60.

³⁴⁷ GAO-07-549, *supra* note 2, at 1.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 3-4.

³⁵⁰ DODD 3000.05, *supra* note 9.

³⁵¹ JOINT PUB. 3-0, *supra* note 10.

operations.³⁵² This new approach raised two critical issues that were answered by this article: (1) what is DOD's role when executing these operations; and (2) to what extent can these operations be lawfully conducted under existing fiscal law principles?

The DOD's role in SSTR operations will vary dependent upon the nature of the operation. Generally, it will be contingent upon three factors: (1) where does the operation fit on the continuum that ranges from peace to crisis to conflict,³⁵³ (2) how is the operation categorized,³⁵⁴ and (3) what is the desired end-state of that operation?³⁵⁵ Recall that at a minimum, military commanders are required to consider stability operations when planning every phase of any military operation.³⁵⁶ On the other hand, DOD might find it is the sole agency conducting SSTR operations after a major operation or campaign.³⁵⁷ In most cases, the model will certainly involve some level of interagency collaboration and cooperation.

Current operations in Afghanistan and Iraq demonstrate that the PRT concept is the method most likely to achieve operational success. The use of PRTs allows for greater interagency planning and brings together both the short-term and long-term viewpoints. This is especially true in the ePRTs, which provide the brigade or regimental commander with a viewpoint that goes beyond his unit's battle space. The PRT concept is not perfect, especially in the area of civil-military coordination, but both DOD and DOS have recognized the weaknesses and are in the process of implementing plans that are likely to increase operational success.

Legally funding the current SSTR operations in Afghanistan and Iraq is not a major challenge since Congress has appropriated or authorized various funds for these purposes. The greater funding challenge is with the pre-conflict SSTR operations being conducted in support of the broader Global War on Terrorism. Recall, that these pre-conflict SSTR operations are being conducted using cumbersome funding mechanisms that aren't tailored to the particular mission. In many cases, this has limited the scope of what the operational units can achieve.

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the OHDACA appropriation and HCA authorizations, or authorize the use of DOD O&M funds for CERP projects being conducted outside of Afghanistan and Iraq (i.e., Global CERP). Additionally, Congress should ease the restrictions placed on the BCE authorization, extend its availability date, and increase the funding to a level that allows the operational units to properly conduct military-to-military training. These changes will provide the operational units conducting pre-conflict SSTR operations with the same tools that are being successfully used in Afghanistan and Iraq.

³⁵² JOINT OPERATING CONCEPT, *supra* note 11

³⁵³ *Id.*

³⁵⁴ JOINT PUB. 3-0, *supra* note 10.

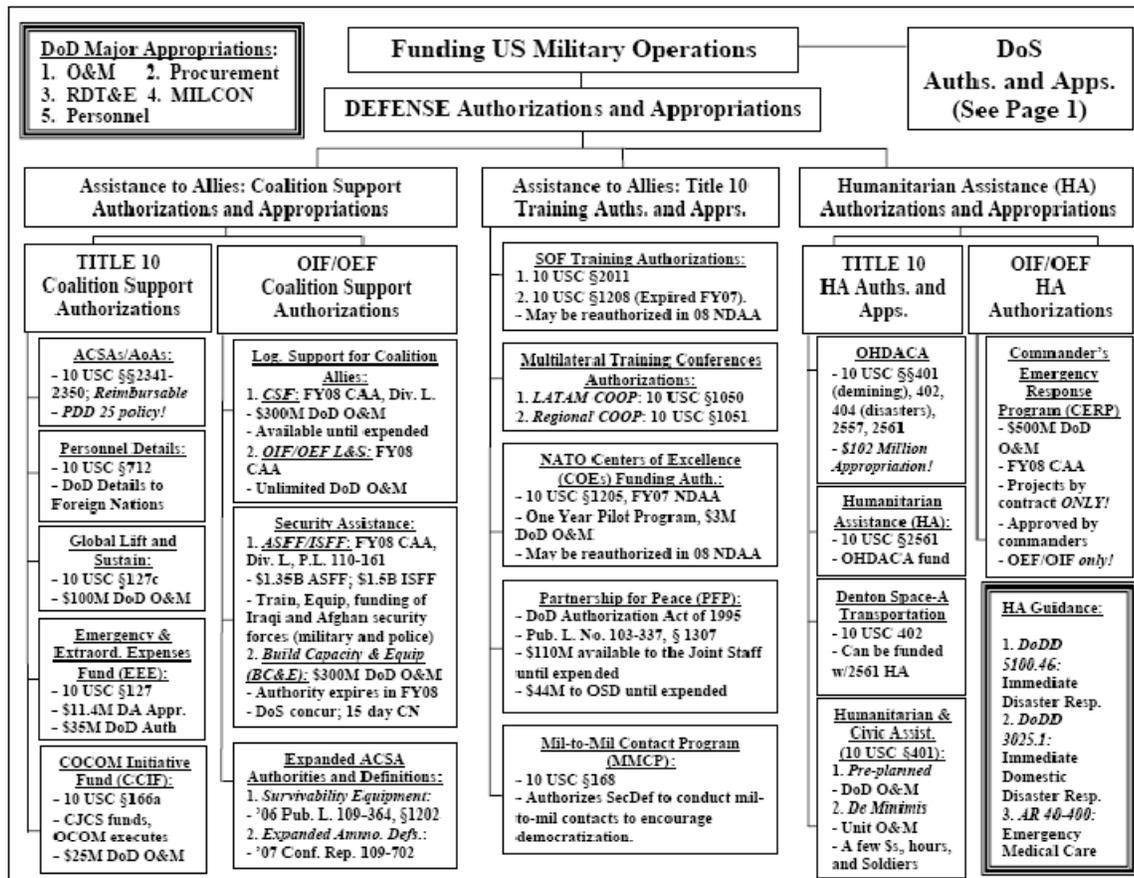
³⁵⁵ JOINT OPERATING CONCEPT, *supra* note 11.

³⁵⁶ JOINT PUB. 3-0, *supra* note 10, at IV-27 to IV-29.

³⁵⁷ *Id.* at I-9.

Appendix

DOD Authorizations and Appropriations³⁵⁸



³⁵⁸ See supra note 191.