

**Special
Feature**

Unfortunately, 24 percent of the force still has not achieved adequate fitness levels to meet Air Force standards or help decrease personal morbidity and mortality risks associated with low-level fitness. The Air Force should pat themselves on the back for taking a giant step forward, but then immediately set a course on continued advancement.

logistics

21st Century Logistics

Air Force Fitness Culture: Are We There Yet? Can We Help? DoD Humanitarian Assistance Programs

This edition of the Journal presents two featured articles: “Air Force Fitness Culture: Are We There Yet?” and “Can We Help? DoD Humanitarian Assistance Programs” In the first article Colonel Thomas F. Roshetko examines the evolution of Air Force fitness and the options for reaching full program effectiveness. Areas of discussion include military fitness requirements, Air Force Fitness Program history, and the Fit-to-Fight Era. He concludes with Air Force Fitness—The Way Ahead. That section recommends developing a better Air Force fitness culture by improving alignment of health and fitness issues. Colonel Roshetko suggests several program adjustments, including renaming the Air Force instruction, limited use of random testing, approving wear of pedometers in uniform, and better analysis of fitness data.

In the second featured article Mr W. Darrell Phillips examines the limited role of, and fiscal constraints upon, the Department of Defense (DoD) in providing foreign humanitarian assistance. He concludes that as the focus of the Global War on Terrorism shifts to other locales, and disasters occur in various foreign countries, DoD’s role will continue to expand and transform. The creation of United States Africa Command will undoubtedly lead to a closer engagement with the nations and peoples of Africa, and accompanying increases in humanitarian assistance. The Commanders’ Emergency Response Program (CERP) has been a major factor in *winning hearts and minds* in Iraq and Afghanistan. He also notes that a major question will be whether Congress will apply CERP, or some variant of it, to future conflicts or peace missions.

Introduction

Throughout the Cold War and during the ongoing *Global War on Terrorism*, United States (US) military forces have engaged in a continuing partnership with the Department of State, foreign militaries, and nongovernmental organizations to provide assistance to people throughout the world. Whether as a result of armed conflict or natural or man-made disasters, people in foreign countries have become accustomed to the presence of US military personnel assisting them in a multitude of ways.

Special Feature

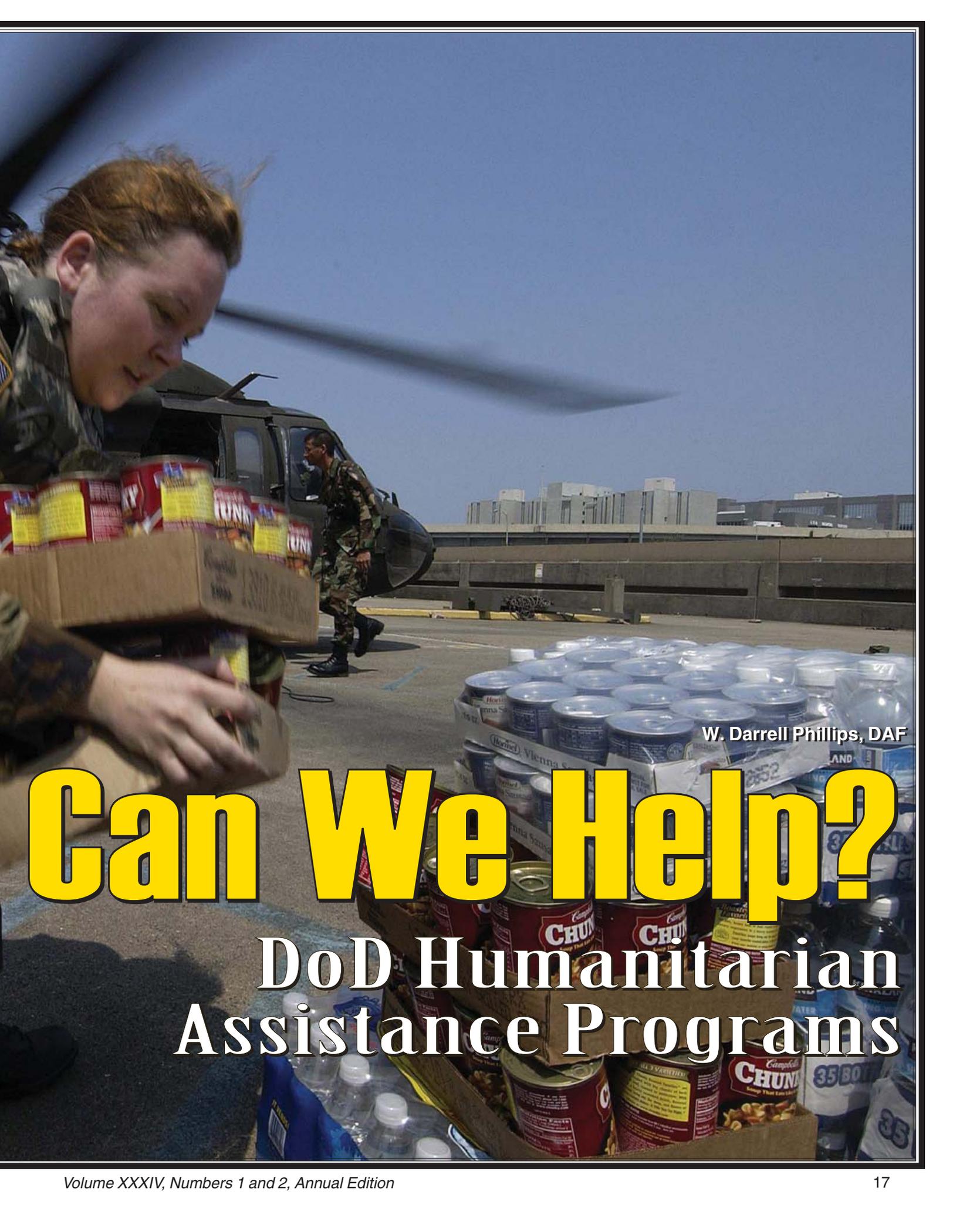
The most recent manifestation of that presence, in response to the Haiti earthquake on 12 January 2010, has again resulted in the provision of massive amounts of US military assistance. However, the reality is that the Department of State (DoS), acting under its authority contained in Title 22 of the United States Code (USC), has the primary responsibility for conducting US foreign affairs and for assisting people in foreign countries. This article will examine the limited role of, and fiscal constraints upon, the Department of Defense (DoD) in providing foreign humanitarian assistance (HA).

Authorization and Appropriation of DoD Funds

For each fiscal year, Congress passes four acts that provide authorization to continue DoD operations and appropriate funds to pay for those operations. Although the formal names of the acts may vary from year to year, they generally include a national defense authorization act (NDAA), a Department of Defense appropriations act, a military construction authorization act, and a military construction appropriations act. The point is often made, but bears repeating, that the DoD cannot incur obligations or expend funds until both the requisite authorization act and appropriations act have been enacted; to do so would violate 31 USC § 1341, a provision of the so-called *Antideficiency Act*. Each year, comptrollers and judge advocates should carefully examine the authorization and appropriations acts to determine what operations Congress may have ceased to authorize, what changes may have been made to existing authorizations, or what new operations may be authorized.

Further complicating the fiscal law arena is the body of law contained in the 50 titles of the USC. For DoD humanitarian assistance purposes, the significant titles are Title 10, *Armed Forces*, and Title 31, *Money and Finance*. However, during deployments US Armed Forces may run the risk of conducting humanitarian assistance activities which are authorized to be conducted by DoS under Title 22, *Foreign Relations and Intercourse*, and thereby using Title 10 funds to unlawfully augment Title 22 funds. Also, other USC titles may affect operations, such as Title 40, *Public Buildings, Property, and Works*, which contains the *Foreign Excess Property Act* (40 USC § 701 to 705). This act allows US Armed Forces to dispose of property that is no longer needed after the closing of an overseas installation or the end of a deployment. This is currently a major





W. Darrell Phillips, DAF

Can We Help?

DoD Humanitarian Assistance Programs

Article Highlights

Congress has shown a willingness and an ability to use fiscal law to effectuate political and military operations, and comptrollers and judge advocates must continue to monitor developments in this critical arena.

Throughout the Cold War and during the ongoing *Global War on Terrorism*, United States (US) military forces have engaged in a continuing partnership with the Department of State, foreign militaries, and nongovernmental organizations to provide assistance to people throughout the world. Whether as a result of armed conflict or natural or man-made disasters, people in foreign countries have become accustomed to the presence of US military personnel assisting them in a multitude of ways. The most recent manifestation of that presence, in response to the Haiti earthquake on 12 January 2010, has again resulted in the provision of massive amounts of US military assistance. However, the reality is that the Department of State, acting under its authority contained in Title 22 of the United States Code, has the primary responsibility for conducting US foreign affairs and for assisting people in foreign countries. This article will examine the limited role of, and fiscal constraints upon, the Department of Defense (DoD) in providing foreign humanitarian assistance (HA).

As the Iraqi and Afghan governments and security forces begin to assume more responsibility for their own national defense, there will undoubtedly be changes in the nature and extent of the humanitarian assistance that the United States, and in particular the DoD, provides. However, as the focus of the *Global War on Terrorism* shifts to other locales, and disasters occur in various foreign countries, DoD's role will continue to expand and transform. The creation of United States Africa Command will undoubtedly lead to a closer engagement with the nations and peoples of Africa, and accompanying increases in humanitarian assistance.

concern in Iraq, as US Armed Forces turn over millions of dollars of foreign excess personal property to the Iraqi government.

When Congress enacts an authorization or appropriations act, it may thereby amend or create a provision in one of the titles of the USC (for example, Section 1201 of the FY06 NDAA amended 10 USC § 401, *Humanitarian and Civic Assistance*, to add surgical care and certain types of education, training, and technical assistance to the humanitarian and civic assistance [HCA] activities which can be provided to inhabitants of a foreign country during a US Armed Forces operation). However, Congress may use an authorization or appropriations act to create or continue a requirement without ever placing it into the USC (for example, in each NDAA since 1999, Congress has imposed a requirement that DoS certify that foreign forces or military to be trained by US forces have not committed a gross violation of human rights, but it has never been enacted into Title 10 or Title 22). Comptrollers and judge advocates must be vigilant to determine the current state of the law regarding the proper obligation of operations and maintenance (O&M) funds.

The DoD Humanitarian Assistance Fiscal Regulatory Structure

Within DoD, the primary responsibility for creating humanitarian assistance doctrine and guidance is shared among the Office of the Undersecretary of Defense for Policy, the Assistant Secretary of Defense for Global Security Affairs (Partnership Strategy), the Assistant Secretary of Defense for Special Operations—Low Intensity Conflict, and the Defense Security Cooperation Agency (DSCA). However, the Joint Chiefs of Staff and the combatant commands also have a significant role. One of the major challenges in the area of humanitarian assistance is locating and understanding the various directives and guidance. DSCA publishes the most extensive guidance (most of which is accessible on the DSCA Web site at <http://www.dsc.osd.mil>), but the combatant commands, and particularly United States Central Command (USCENTCOM), publish various directives relevant to HA activities in their areas of responsibility (AOR). DSCA also manages the appropriated funds for Overseas Humanitarian Disaster and Civic Aid (OHDACA) and publishes guidance for OHDACA and for HCA activities provided under the authority of 10 USC § 401.

During the early 1980s, the General Accounting Office (now the Government Accountability Office) (GAO) investigated a series of exercises in Honduras called *Ahuas Tara*. Their findings were published as *The Honorable Bill Alexander*, Comptroller General Opinion B-213137 (63 Comp Gen 422 [1984], revised in 1986). Among other findings, GAO determined that DoD had no statutory basis to provide humanitarian assistance during exercises, deployments, and similar activities outside the United States. As a result of the opinion, Congress enacted a series of statutes in Title 10 and continues to either amend those statutes or to provide other statutory authorities as part of annual National Defense Authorization Acts and Department of Defense Appropriations Acts. Starting in FY96, Congress combined the DoD statutes into one overall funding appropriation called OHDACA. However, as time went on, the amount of annual OHDACA

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appropriations (usually in the range of \$50M to \$60M) was just not sufficient for the increasing demand for disaster relief and humanitarian assistance projects. Accordingly, Congress and DSCA have determined that combatant command O&M funds will be used for HCA, and that OHDACA funds will be used for the five statutes which currently are funded via the OHDACA appropriation.

Humanitarian and Civic Assistance, 10 USC § 401

10 USC § 401, *Humanitarian and Civic Assistance Provided in Conjunction with Military Operations*, permits DoD to carry out a range of HCA assistance projects. There are a number of statutory conditions which must be met:

- The assistance must promote the national security interests of both the US and the beneficiary country.
- The assistance must promote the specific operational readiness skills of the US forces who participate.
- The Secretary of State must approve all such assistance.
- The assistance shall complement, but may not duplicate, other US social or economic assistance to the beneficiary nation.
- The assistance must serve the basic economic and social needs of the beneficiary nation.
- The assistance must not be provided to any individual, group, or organization engaged in military or paramilitary activity.

Guidance for obtaining approval for and conducting HCA is contained in DoD Instruction (DoDI) 2205.02, *Humanitarian and Civic Assistance (HCA) Activities*, and DoDI 2205.3, *Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program*. DoD Instruction 2205.02 also requires the beneficiary country to approve the proposed HCA assistance.

Additionally, DSCA periodically provides HCA guidance on both their Web site and by specific messages. Their most recent message was a 1 May 2007 "Policy/Programming Guidance for FY 2008 Humanitarian and Civic Assistance (HCA) Projects and Activities." Among other matters, it warns units against undertaking projects which drastically exceed the standards of care provided by the host nation, and constructing projects that the host nation will not be able to maintain once US forces depart.

Section 401 assistance that can be funded with combatant command O&M funds includes the following items.

- Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved, including education, training, and technical assistance related to the care provided
- Construction of rudimentary surface transportation systems
- Well drilling and construction of basic sanitation facilities
- Rudimentary construction and repair of public facilities

Allowable funding costs include incremental expenses, such as costs for consumable materials, supplies, and services, if any, that are reasonably necessary to execute the HCA mission. Funding does not include costs associated with the military operation (such as transportation, personnel expenses, petroleum, oil, lubricants, and repair of equipment) which would likely have been incurred whether or not the HCA was provided.

Additionally, Section 401(c)(4) authorizes what was known as *de minimis* HCA, but is now known as minimal cost HCA. This

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Article Acronyms

A/D – Abandonment or Destruction
APC – Accounting Processing Code
CCIF – Combatant Commander Initiative Fund
CERP – Commanders' Emergency Response Program
DoD – Department of Defense
DoDI – Department of Defense Instruction
DoS – Department of State
DSCA – Defense Security Cooperation Agency
ESP – Emergency and Special Programs
FEPP – Foreign Excess Personal Property
FRAGO – Fragmentation Order
FY – Fiscal Year
GAO – Government Accountability Office
HA – Humanitarian Assistance
HAP – Humanitarian Assistance Program
HCA – Humanitarian and Civic Assistance
NDAA – National Defense Authorization Act
NGO – Nongovernmental Organization
O&M – Operations and Maintenance
OHDACA – Overseas Humanitarian Disaster and Civic Aid
SOP – Standard Operating Procedures
US – United States
USAID – United States Agency for International Development
USC – United States Code
USCENTCOM – United States Central Command
USFOR-I – United States Forces–Iraq

could arise either during a planned HCA program or during an exercise or deployment with no planned HCA. In the legislative history of 10 USC § 401, Congress recognized that it might be appropriate to incur *minimal expenditures* of DoD O&M funds for *incidental costs* of carrying out HCA. Congress provided examples that have been incorporated into DoD Instruction 2205.02—(1) a unit doctor’s examination of local villagers for a few hours with administration of several shots and issuance of some medicine, but not deployment of a medical team to provide mass inoculations to the local populace and (2) the opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of such roadway.

Factors to consider when determining whether minimal cost assistance would incur only *incidental costs* are: in the combatant commander’s reasonable judgment, in light of the overall cost of the military operation in which the proposed expenditure will be incurred, could the combatant commander determine that the expenditure was *incidental* to the military operation?

Minimal cost assistance will be funded out of the combatant command’s O&M account. On 25 October 2006, the Assistant Secretary of Defense for Special Operations—Low Intensity Conflict and DSCA delineated a maximum minimal cost project limit of \$10,000, and required that all minimal cost projects must be approved by the appropriate geographic combatant commander. However, any project exceeding \$2,500 that has contracting issues must utilize a US government warranted contracting officer and comply with contracting laws and regulations. Units proposing to conduct minimal cost HCA must contact the appropriate combatant command for approval and funding.

Overseas Humanitarian, Disaster, and Civic Aid (OHDACA)

Each year, Congress specifically earmarks funds for OHDACA, using a combination of the *National Defense Authorization Act* and the *Department of Defense Appropriations Act*. For FY10, Section 301 of the *National Defense Authorization Act for Fiscal Year 2010* (HR 2647) authorizes the expenditure of \$109,869,000 from DoD-wide O&M appropriations.

Currently, OHDACA funding is used for five different activities, each governed by a specific Title 10 section.

- **Transport of humanitarian relief supplies to foreign countries (the Denton Program). 10 USC § 402.** The Denton Program is jointly administered by DoS, the United States Agency for International Development (USAID) and DSCA. Specific program information and application forms are at <http://dentonfunded.ohasis.org/AboutDenton.htm>. The main facets of the program are listed below.
 - The Secretary of Defense may authorize the transport, without charge but on a space-available basis, of supplies that have been furnished by a nongovernmental source and are intended for humanitarian assistance.
 - The Secretary of Defense has to determine a number of conditions exist before authorizing the transportation.
 - The transportation is consistent with US foreign policy.
 - The supplies are suitable for humanitarian purposes and in usable condition.
 - There is legitimate humanitarian need for such supplies by the people for whom they are intended.

- The supplies will in fact be used for humanitarian purposes.
- The donor has made adequate distribution arrangements for the distribution or use of such supplies in the destination country.
- The supplies may be distributed by an agency of the US government, a foreign government, an international organization, or a private nonprofit relief organization, but supplies cannot be distributed, directly or indirectly, to any individual, group, or organization engaged in a military or paramilitary activity.
- Supplies intended to respond to, or mitigate the effects of, an event that threatens serious harm to the environment (such as an oil spill) may be transported only if other transportation sources are not available, and the Secretary may require reimbursement for DoD’s costs to transport those supplies.

Obviously, space availability will wax and wane with the pace of military operations, but since its inception in 1987 the Denton Program has resulted in massive deliveries of humanitarian supplies around the world.

- **Foreign Disaster Assistance. 10 USC § 404.** The President may direct the Secretary of Defense to provide disaster assistance (including transportation, supplies, services, and equipment) outside the United States to respond to man-made or natural disasters when necessary to prevent loss of life or serious harm to the environment. Within 48 hours after the commencement of assistance, the President has to furnish Congress a report of the nature and extent of assistance provided. Executive Order 12966, *Foreign Disaster Assistance* (15 July 1995) delegated the presidential authority to the Secretary of Defense, with the concurrence of the Secretary of State (except in emergencies). This is a completely different authority than that of the Department of State’s Foreign Disaster Relief authority under 22 USC § 2292.

Pursuant to this authority, DoD organizations have provided foreign disaster relief throughout the world, in situations as varied as the Southeast Asia Tsunami in December 2004, the Pakistan earthquake in October 2005, the Philippines mudslides in February 2006, and the Burma floods of April 2008. In just the Tsunami response, DoD organizations transported approximately 24.5 million pounds of relief supplies and committed approximately \$100M in OHDACA resources.

In all likelihood, DoD organizations that will be tasked to immediately respond to disasters will have to do so initially using their O&M funds. A major consideration will be obtaining OHDACA funding reimbursement through DSCA. Accordingly, any tasked organization must determine, as quickly as possible, the appropriate code (APC [Account(ing) Processing Code] for the Army and ESP [Emergency and Special Programs] for the Air Force) and apply it to all expenditures relating to the disaster response.

- **Humanitarian Demining Assistance. 10 USC § 407.** Also known as *Humanitarian Mine Action*, this section authorizes activities for the detection and clearance of landmines and other explosive remnants of war, including necessary education, training, and technical assistance. Assistance can include training in the procedures of landmine clearance, mine

risk education, victims' assistance, and development of necessary leadership and organization skills to conduct a program. Reimbursable expenses include the travel, transportation, and subsistence expenses of DoD personnel providing the assistance, and the cost of any equipment, services, or supplies acquired for the purpose of carrying out the assistance (including certain equipment or supplies that are transferred or otherwise furnished to a foreign country as part of assistance under this section).

- **Excess Nonlethal Supplies. 10 USC § 2557.** Property (not weapons, ammunition or other equipment or material designed to inflict serious bodily harm or death) that is excess under DoDI 4160.21-M, *Defense Materiel Disposition Manual*, can be transferred to the Secretary of State, who is responsible for distribution. Examples of such property are medical supplies, furniture, ambulances, cargo trucks, dump trucks, fire trucks, forklifts, generators, tents, sleeping bags, blankets, lanterns, litters, and computers. This authority differs from the sale or grant of excess defense articles (EDA) (22 USC § 2321j, *Authority to Transfer Excess Defense Articles*), which may be lethal or nonlethal. Section 2557 authority does not include the transport of the excess nonlethal supplies, but, if necessary, the transport of the supplies may be accomplished through 10 USC § 2561. Excess property is transferred from DoD to the State Department, usually via the American Embassy in the country, to present to the intended recipient, normally a host nation government ministry, a charitable organization, or nongovernmental organization (NGO) in the host nation.
- **Humanitarian Assistance (HA). 10 USC § 2561.** The statute authorizes DoD to provide transportation of humanitarian relief and for other humanitarian purposes worldwide. In practice, two different types of transportation programs are conducted. The first is funded transportation of excess US government property that is being donated, generally pursuant to 10 USC § 2557.

The second type of funded transportation is for property that is being provided by NGOs. This is similar to the concept of the Denton Program, but is funded using OHDACA funds. Only a limited amount of OHDACA funding is available for funded transportation, so program requirements are very specific. Funded transport is limited only to surface modes, with funded airlift being reserved only for emergency (declared disaster) situations. Cargo is limited only to that which addresses basic humanitarian needs (for example, medical, food, shelter, and clothing), and the minimum cargo size to be shipped is one 20-foot shipping container (or 1,100 cubic feet equivalent). Typical property includes such items as medical supplies and equipment, clothing and shoes, wheelchairs, books, and dry milk, fruit, beans, and cereals. The Department of Defense, through DSCA, administers the funded transportation program. Information and application requirements for the funded transportation program are found at <http://dentonfunded.ohasis.org/AboutFT.htm>.

The "other humanitarian purposes worldwide" authority continues to be used for an ever-increasing variety of purposes. According to DSCA, this authority has been used for a variety of programs, including rudimentary construction and renovation of public facilities such as schools, hospitals, clinics, and orphanages; digging water wells and other sanitation and drinking water projects; and repairing and building rudimentary infrastructure such as roads and bridges. Although these projects appear at first to duplicate HCA under 10 USC § 401, there are

important distinctions between the two authorities. HCA projects are conducted using combatant command O&M funds and must be conducted in conjunction with an exercise or ongoing military operation, whereas HA projects are conducted using OHDACA funds and can be conducted as stand-alones. Also, HCA generally requires preplanned (often years in advance) activities and must promote specific operational skills of the US military participants—HA has no such requirements. Combatant commands review and endorse nominated HA projects to DSCA. DSCA coordinates proposed projects as appropriate with other DoD and interagency offices, and then approves or disapproves the projects. Once DSCA approves a project, the responsible combatant command funds the project, using OHDACA funding, and oversees project execution.

The Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations (ASD-PS&SO) and DSCA jointly manage OHDACA and periodically provide guidance for DoD's humanitarian assistance funded with the OHDACA appropriation. Their most recent message was issued 18 November 2009 and is entitled *Policy Guidance for DoD Overseas Humanitarian Assistance Program (HAP)*. Among other matters, the guidance stresses the need for cooperation and coordination among DoD and the other actors involved in HAP, particularly DoS, USAID, international organizations, and various NGOs. The guidance also stresses building the capacity of the host nation to sustain HAP projects by emphasizing knowledge and skills transfer and sustainable, indigenous capacity, and not simply donations of supplies and equipment.

Commanders' Emergency Response Program (CERP)

When US forces occupied Iraq in 2003, they began to find stashes of money that Saddam Hussein had looted from the Iraqi people. Under the authority of the Law of Armed Conflict, US commanders were able to use these funds to assist the Iraqi people. When the funds were expended, Congress authorized DoD to use O&M funds to conduct what is known as the Commanders' Emergency Response Program, or CERP. Section 1222 of the *National Defense Authorization Act for Fiscal Year 2010* continues the authorization of the CERP program, and authorizes the Secretary of Defense to use up to \$1.3B of FY10 O&M funds for the purpose of

...enabling [United States] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the people of Iraq [and Afghanistan].

Urgent has been defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of the local commander, calls for immediate action. CERP funds are intended to be used for small-scale projects that, optimally, can be sustained by the local population or government.

The funding authorization limit has been reduced from those for FYs 08 and 09; and contrary to recent NDAs, the funds will be available for only FY10. Section 1222 also continues the authority, created in Section 1202 of the *National Defense Authorization Act for Fiscal Year 2006*, for the Secretary of Defense to waive any provision of law that, if not waived, would prohibit, restrict, limit, or otherwise constrain the exercise of

authority under CERP. This provision avoids most, if not all, violations of the *Purpose Statute* and the *Antideficiency Act*. Finally, Section 1222 contains new provisions authorizing CERP funds to be used to support the Afghanistan National Solidarity Program, and to support the reintegration into Afghan society of those individuals who have renounced violence against the government of Afghanistan.

Current overall CERP guidance is contained in a December 18, 2008 Memorandum from the Office of the Under Secretary of Defense (Comptroller) and in Chapter 27 of Volume 12 of DoD 7000.14-R, *Department of Defense Financial Management Regulation*. United States Forces-Iraq (USFOR-I) provides Iraq-specific CERP guidance in the *Money as a Weapons System* standard operating procedures (SOP) (1 March 2010) and in various fragmentary orders (FRAGOs). United States Forces-Afghanistan provides Afghan-specific CERP guidance in USFOR-A Publication 1-06, *Money as a Weapons System-Afghanistan (MAAWS-A) CERP SOP*, dated December 2009. In April 2009, the Center for Army Lessons Learned (CALL) published CERP information in CALL Handbook 09-27, *Commander's Guide to Money as a Weapons System*. The handbook and various other CALL publications of interest to comptrollers and judge advocates are available online at <http://call.army.mil/call.htm>.

military operations which are not compensable under the *Foreign Claims Act*

- Payments to surviving spouses or next of kin of Iraqi or Afghan defense or police personnel killed as a result of US, Coalition, or supporting military operations (referred to as Hero or Martyr Payments)
- Payments to individuals upon release from detention from a nontheater internment facility
- Protective measures (fencing, lights, towers, guards) to enhance durability and survivability of critical infrastructure sites
- Other urgent humanitarian or reconstruction projects

However, CERP funding cannot be used for a number of costs.

- Direct or indirect benefit to US, Coalition, or supporting military personnel
- Providing goods, services, or funds to Iraqi or Afghan national armies, National Guard forces, border security forces, civil defense forces, infrastructure forces, highway patrol units, police, special police, or intelligence or other security forces
- Weapons buy-back programs or other purchases of arms or ammunition (separately authorized using other O&M funds by 10 USC § 127c)

The Commanders' Emergency Response Program has been a major factor in "winning hearts and minds" in Iraq and Afghanistan. In the words of a former Chairman of the Joint Chiefs of Staff, it is "The most effective means we have of persuading ordinary Iraqis that we are there to help them and their families." A major question will be whether Congress will apply CERP, or some variant of it, to future conflicts or peace missions.

A wide range of projects may be conducted using CERP funds.

- Water and sanitation
- Food production and distribution, agriculture, and irrigation
- Electricity, healthcare, education, telecommunications, and transportation
- Economic, financial, and management improvements
- Rule of Law and governance
- Civic cleanup activities and civic support vehicles
- Repair of civic and cultural facilities
- Battle damage, repair, or payment for repair, of property damage that results from US, Coalition, or supporting military operations and is not compensable under the *Foreign Claims Act* (10 USC § 2734-2736)
- Condolence payments to individual civilians for the death or physical injury resulting from US, Coalition, or supporting

- Entertainment costs except for light refreshments purely incidental to either an approved CERP project opening ceremony or a conference in support of a CERP project
- Reward programs (separately authorized using other O&M funds by 10 USC § 127b)
- Removal of unexploded ordnance (unless incidental to construction)
- Duplication of service available through municipal governments
- Salaries, bonuses, or pensions for Iraqi or Afghan military or civilian government personnel
- Training, equipping, or operating costs of Iraqi or Afghan security forces
- Conducting psychological operations, information operations, or other US, Coalition, Iraqi, or Afghan Security Force operations

Also, nonappropriated funds cannot be commingled with CERP funds.

The use of CERP in Iraq has been further complicated by the creation of the Iraq Commanders' Emergency Response Program, or I-CERP. In 2007, Congress indicated that it expected the government of Iraq to fund a certain amount of CERP-type projects to benefit the people of Iraq. Those include schools, water purification plants, health clinics, city planning facilities, and protective measures necessary to secure the I-CERP projects. All I-CERP projects must be approved by US forces and US funding offices will control the expenditure of funds. Certain other eligible projects (roads, sewers, and irrigation projects, and nonreconstruction projects that promote small business development) require approval by the commanding general of the involved US major support command. CERP and I-CERP funds cannot be commingled.

Combatant Commander Initiative Fund (CCIF), 10 USC § 166a

Since FY94, Congress has authorized the Combatant Commander Initiative Fund (CCIF), which is codified in 10 USC § 166a. For FY10, Congress has appropriated \$50M of O&M funds to the Chairman of the Joint Chiefs of Staff in order to fund 10 different CCIF activities, some of which duplicate other Title 10 or Title 22 authorities. The CCIF statute avoids *Antideficiency Act* violations by stating that the funds provided "shall be in addition to amounts otherwise available for [each CCIF] activity for that fiscal year." Among other purposes, the statute authorizes CCIF funds to be used for humanitarian and civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance.

The statute does not require that US forces obtain any training or other benefit, and does not prohibit providing assistance to foreign military forces. Guidance is contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01D, *Combatant Commander Initiative Fund*.

Foreign Excess Property Act (40 USC § 701 to 705)

Another authority for DoD, as well as other executive branches, to dispose of foreign excess property (property excess to DoD needs when closing a base or redeploying forces) is the *Foreign Excess Property Act*, found in 40 USC § 701 to 705, *Public Buildings, Property, and Works* of the US Code. Various host nation government organizations or NGOs can be proper recipients of the excess property.

The Act is implemented by DoD 4160.21-M, the *Defense Materiel Disposition Manual*. The DoD organization that wants to dispose of the property has to conduct an economic feasibility analysis to determine that:

- The estimated costs of care and handling of the property exceed the estimated proceeds of a sale (will cost us more to keep it than we could get for it)
- The estimated cost of disposal by abandonment or destruction (A/D) is less than the net sales cost (will cost us less to A/D it than to sell it)

The organization has to provide public notice of the proposed A/D, and has to obtain State Department coordination, so as to

best serve US foreign policy interests and objectives in the area and to determine the proper recipient. Proper recipients include, in priority order:

- Any US government organization, institution, or entity
- Any friendly foreign government or local subdivision
- Any nonprofit scientific, literary, educational, public health, public welfare, charitable institution, hospital or similar institution if its activities are not adverse to US interests
- Foreign nonprofit institutions, but preference must be given to those organized under US law or supported by US fundraising

The Defense Logistics Agency is responsible for overall management of the Foreign Excess Personal Property (FEPP) Program in Iraq, and has already accomplished much of the economic feasibility analysis. However, due to the extremely complex nature of the FEPP program, no disposition of property should be undertaken without coordination with USFOR-I.

Conclusion

As the Iraqi and Afghan governments and security forces begin to assume more responsibility for their own national defense, there will undoubtedly be changes in the nature and extent of the humanitarian assistance that the United States, and in particular the DoD, provides. However, as the focus of the Global War on Terrorism shifts to other locales, and disasters occur in various foreign countries, DoD's role will continue to expand and transform. The creation of United States Africa Command will undoubtedly lead to a closer engagement with the nations and peoples of Africa, and accompanying increases in humanitarian assistance. The Commanders' Emergency Response Program has been a major factor in "winning hearts and minds" in Iraq and Afghanistan. In the words of a former Chairman of the Joint Chiefs of Staff, it is "The most effective means we have of persuading ordinary Iraqis that we are there to help them and their families." A major question will be whether Congress will apply CERP, or some variant of it, to future conflicts or peace missions. Congress has shown a willingness and an ability to use fiscal law to effectuate political and military operations, and comptrollers and judge advocates must continue to monitor developments in this critical arena.

Mr Darrell Phillips is the Associate Chief of the Operations and International Law Division of The Judge Advocate General's School, Maxwell Air Force Base, Alabama. In that capacity, he lectures to American and international audiences on such topics as fiscal law during overseas deployments, the Law of Armed Conflict, rules of engagement, homeland defense law, and the roles and status of civilians during military operations. He graduated from Southern Methodist University (SMU) in 1967, from SMU Law School in 1969, and Auburn University in Montgomery (master of political science in international affairs) in 1989. He was a United States Air Force judge advocate from 1970 until 1991, when he retired and assumed his current position as a civilian employee of the Air Force.



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