

## Appendix A

### Department of Defense Legislation for Fiscal Year 2002

#### DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2002

President Bush signed the Department of Defense Appropriations Act, 2002, on 10 January 2002.<sup>1</sup> The Act appropriated about \$317.6 billion to the Department of Defense (DOD) for fiscal year (FY) 2002.<sup>2</sup> This amount is about \$19.1 billion more than Congress appropriated for FY 2001, but about \$1.9 billion less than President Bush requested for FY 2002.<sup>3</sup>

#### Military Personnel

##### *Department of the Army*

Congress appropriated about \$23.4 billion for “Military Personnel, Army.”<sup>4</sup> This amount is sufficient to support an active force composed of 480,000 soldiers.<sup>5</sup>

##### *Department of the Navy*

Congress appropriated about \$19.6 billion for “Military Personnel, Navy” and about \$7.3 billion for “Military Personnel, Marine Corps.”<sup>6</sup> This amount is sufficient to support an active force composed of 376,000 sailors and 172,600 marines.<sup>7</sup>

##### *Department of the Air Force*

Congress appropriated about \$19.8 billion for “Military Personnel, Air Force.”<sup>8</sup> This amount is sufficient to support an active force composed of 358,800 airmen.<sup>9</sup>

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1. Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, 115 Stat. 2230 (2002). The Department of Defense Appropriations Act is Division A of Public Law Number 107-117. *Id.* The joint conference report accompanying the Act requires the DOD to comply with the language and allocations set forth in the underlying House and Senate reports unless they are contrary to the bill or joint conference report. H.R. CONF. REP. NO. 107-350, at 129 (2001); *see also* H.R. REP. NO. 107-298 (2001); S. REP. NO. 107-109 (2001).

2. H.R. CONF. REP. NO. 107-350, at 462 (2001). The conference report breaks down the appropriations as follows:

Military Personnel	\$82,056,651,000;
Operations and Maintenance	\$105,047,644,000;
Procurement	\$60,864,948,000;
Research, Development, Test, and Evaluation	\$48,921,641,000;
Revolving and Management Tools	\$1,745,394,000;
Other DOD Programs	\$20,491,353,000.

*Id.* at 130, 162, 211, 305, 389-90.

3. *Id.* at 462.

4. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about \$2.6 billion for “Reserve Personnel, Army,” and about \$4 billion for “National Guard Personnel, Army.” *Id.*

5. *See* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 401, 115 Stat. 1012, \_\_\_ (2001).

6. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about \$1.7 billion for “Reserve Personnel, Navy,” and about \$466 million for “Reserve Personnel, Marine Corps.” *Id.*

7. *See* National Defense Authorization Act for Fiscal Year 2002, § 401.

8. Department of Defense Appropriations Act, 2002, div. A, tit. I. Congress also appropriated about \$1.1 billion for “Reserve Personnel, Air Force,” and \$1.8 billion for “National Guard Personnel, Air Force.” *Id.*

9. *See* National Defense Authorization Act for Fiscal Year 2002, § 401.

## Emergency and Extraordinary Expenses and CINC Initiative Funds

Congress authorized the Secretary of Defense (SECDEF) and the service secretaries to use a portion of their Operation and Maintenance (O&M) appropriations for “emergencies and extraordinary expenses.”<sup>10</sup> In addition, Congress gave the SECDEF the authority to make \$25 million of the Defense-wide O&M appropriation available for the Commander-in-Chief (CINC) initiative fund account.<sup>11</sup>

### Overseas Contingency Operations Transfer Fund (OCOTF)

This year, Congress made significant changes to the OCOTF. Congress appropriated \$50 million for “expenses directly relating to Overseas Contingency Operations by U.S. military forces.”<sup>12</sup> The joint conference report accompanying the Act explains that “[t]his amount provides a central response fund from which the Secretary of Defense can address unknown and unexpected overseas contingency costs.”<sup>13</sup>

The report goes on to explain that funds for operations in the Balkans and in Southwest Asia, previously provided through the OCOTF, had been provided through the Services’ operations and maintenance and military personnel appropriations.<sup>14</sup> As in past years, funds appropriated to the OCOTF remain available until expended; however, the SECDEF may transfer them to the military personnel accounts, O&M accounts, the Defense Health Program appropriation, procurement accounts, RDT&E accounts, and to working capital funds.<sup>15</sup> Transfer or obligation of these funds for purposes not directly related to the conduct of overseas contingencies is prohibited, and the SECDEF must submit a report each fiscal quarter detailing certain transfers to the congressional appropriations committees.<sup>16</sup>

### Overseas Humanitarian, Disaster, and Civic Aid

Congress appropriated \$49.7 million for the DOD’s Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) program.<sup>17</sup> These funds are available until 30 September 2003.<sup>18</sup>

### Drug Interdiction and Counter-Drug Activities

The Department of Defense received about \$843 million for drug interdiction and counter-drug activities.<sup>19</sup>

### End-of-Year Spending Limited

Congress continued to limit the ability of the SECDEF and the service secretaries to obligate funds during the last two months of the fiscal year to twenty percent of the applicable appropriation.<sup>20</sup>

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10. Department of Defense Appropriations Act, 2002, div. A, tit. II. Congress capped this authority at \$10,794,000 for the Army, \$4,569,000 for the Navy, \$7,998,000 for the Air Force, and \$33,500,000 for the DOD. *Id.*; *see also* 10 U.S.C. § 127 (2000) (authorizing the Secretary of Defense, the DOD Inspector General, and the Secretaries of the military departments to provide for “any emergency or extraordinary expense which cannot be anticipated or classified”).

11. Department of Defense Appropriations Act, 2002, div. A, tit. II (Operation and Maintenance, Defense-Wide); *see also* 10 U.S.C. § 166a (2000) (authorizing the Chairman of the Joint Chiefs of Staff to provide funds from the CINC Initiative Fund to combatant commanders for specified purposes).

12. Department of Defense Appropriations Act, 2002, div. A, tit. II (Overseas Contingency Operations Transfer Fund). This is a significant decrease from the nearly \$4 billion that Congress appropriated to DOD last year. *See* Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. 656, 661 (2001).

13. H.R. CONF. REP. No. 107-350, at 209 (2001).

14. *Id.*

15. Department of Defense Appropriations Act, 2002, div. A., tit. II (Overseas Contingency Operations Transfer Fund).

16. *Id.* § 8115.

17. *Id.* The DOD provides humanitarian, disaster, and civic aid to foreign governments pursuant to several statutes. *See, e.g.*, 10 U.S.C. §§ 401-402, 404, 2557, 2561 (2000).

18. Department of Defense Appropriations Act, 2002, div. A, tit. II (Overseas Humanitarian, Disaster, and Civic Aid).

19. *Id.* div. A, tit. VI (Drug Interdiction and Counter-Drug Activities, Defense).

## Multi-Year Procurement Authority

Congress again prohibited the service secretaries from awarding a multi-year contract that: (1) exceeds \$20 million for any one year of the contract, (2) provides for an unfunded contingent liability that exceeds \$20 million, or (3) is an advance procurement which will lead to a multi-year contract in which procurement will exceed \$20 million in any one year of the contract unless the service secretary notifies Congress at least thirty days in advance of award.<sup>21</sup> In addition, Congress prohibited the service secretaries from awarding multi-year contracts in excess of \$500 million unless Congress specifically provided for the procurement in the Appropriations Act.<sup>22</sup> The only two multi-year procurements that Congress specifically authorized in this year's Appropriations Act are the Air Force's procurement of C-17 cargo aircraft and Navy/Marine Corps' procurement of engines for the F/A-18E.<sup>23</sup>

## Military Installation Transfer Fund

Congress continued to authorize the SECDEF to enter into executive agreements that permit the DOD to deposit into a separate account the funds it receives from North Atlantic Treaty Organization (NATO) member nations for the return of overseas military installations to those nations.<sup>24</sup> The DOD may use this money to build facilities which have been approved by an Act of Congress to support U.S. troops in those nations, or for real property maintenance and base operating costs that are currently paid through money transfers to host nations.<sup>25</sup>

## Commercial Activities Studies

If an agency desires to convert a function it currently performs in-house to contractor performance, 10 U.S.C. § 2461 requires the agency to notify Congress of its intent and then conduct a cost analysis to determine whether it will be cheaper to perform via contractor. In this year's Act, Congress has once again granted a waiver to that study requirement, thereby permitting agencies to make direct conversion of their functions if performance of that function will go to: (1) a firm that is listed on the Procurement List established by the Javits Wagner O'Day (JWOD) Act, which employs severely handicapped or blind employees, or (2) a firm that is at least fifty-one percent under the control of an American Indian tribe or Native Hawaiian organization.<sup>26</sup> Congress also continued the prohibition on the use of funds to perform A-76 studies if the government exceeds twenty-four months to perform a study of a single function activity or forty-eight months to perform a study of a multi-function activity.<sup>27</sup>

## Limit on Transfer of Defense Articles and Services

The Act also prohibits the transfer of defense articles or services (other than intelligence services) to another nation or international organization during peacekeeping, peace-enforcement, or humanitarian assistance operations, without advance congressional notification.<sup>28</sup>

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20. *Id.* § 8004. This limitation does not apply to the active duty training of reservists, or the summer camp training of Reserve Officer Training Corps (ROTC) cadets. *Id.*

21. *Id.* Congress also continued to require a present-value analysis to determine whether a multi-year contract will provide the government with the lowest total cost as well as an advance notice at least ten days before terminating a multi-year procurement contract. *Id.*

22. *Id.*

23. *Id.* § 8008; *see also infra* notes 69-70 and accompanying text.

24. Department of Defense Appropriations Act, 2002, § 8019.

25. *Id.*

26. *Id.* § 8014.

27. *Id.* § 8024.

28. *Id.* § 8072. This provision originally appeared in the FY 1996 Appropriations Act. *See* Department of Defense Appropriations Act for Fiscal Year 1996, Pub. L. No. 104-61, § 8117, 109 Stat. 636, 677 (1995).

### **Limitation on Training of Foreign Security Forces**

Unless the SECDEF determines that a waiver is required, no funds may be used to support training of a unit of the security forces of a foreign country where “credible information” exists that the unit has committed a gross violation of human rights.<sup>29</sup>

### **Required Actions of DOD Chief Information Officer**

No funds appropriated in the Department of Defense Appropriations Act for FY 2002 are available for a mission critical or mission-essential information technology system until it is registered with the DOD Chief Information Officer (CIO).<sup>30</sup> In addition, for major automated information systems, the CIO must certify that the system is compliant with the Clinger-Cohen Act of 1996 before Milestone I, II, or III approval.<sup>31</sup>

### **Repeal of F-22 Restrictions**

The Act repeals restrictions placed upon the Air Force’s F-22 program in last year’s Appropriations Act,<sup>32</sup> including a prohibition on expending more than \$58 billion on engineering and manufacturing development and production.<sup>33</sup>

### **Matching Disbursements With Obligations**

Section 8106 of the Department of Defense Appropriations Act for 1997<sup>34</sup> required DOD, before making a disbursement in excess of \$500,000, to match that intended disbursement with an obligation. In this year’s Appropriation Act, Congress extends that requirement to cover disbursements made in FY 2002.<sup>35</sup>

### **Regional Defense Counter-Terrorism Fellowship Program**

The Act also appropriated separate funds in the amount of \$17.9 million to enable the SECDEF to establish a Regional Defense Counter-Terrorism Fellowship Program.<sup>36</sup> The program will fund the training of foreign military officers on counter-terrorism subjects at U.S. military schools.<sup>37</sup>

### **U.S.S. Greenville Claims**

The Secretary of the Navy has been granted the authority to settle any admiralty claims arising out of the collision between the U.S.S. Greenville and the Ehime Maru, regardless of their dollar amount.<sup>38</sup>

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29. Department of Defense Appropriations Act, 2002, § 8093. This same provision has been included in appropriations acts since FY 1999. See Department of Defense Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-262, § 8130, 112 Stat. 2279, 2335 (1998).

30. Department of Defense Appropriations Act, 2002, § 8104(a). Registration with the Chief Information Officer was required under section 8102(a) in last year’s appropriation act and under section 8121(a) in the Department of Defense Appropriations Act for Fiscal Year 2000.

31. *Id.* § 8104(b).

32. See Department of Defense Appropriations Act for Fiscal Year 2001, § 8125, Pub. L. No. 106-259, 114 Stat. 656, 702 (2000).

33. Department of Defense Appropriations Act, 2002, § 8091.

34. Pub. L. No. 104-208, § 8106, 110 Stat. 3009, 3111 (1996).

35. Department of Defense Appropriations Act, 2002, § 8118.

36. *Id.* § 8125. The funds are no-year funds. *Id.*

37. *Id.*

38. *Id.* § 8133 (indicating the source of payment will be Operations and Maintenance, Navy appropriations).

## **Congress Giveth and Congress Taketh Away**

From the \$22.3 billion that Congress appropriated for Operations and Maintenance, Army for FY 2002, Congress has already taken back \$5 million to reflect savings the Army has achieved (or is expected to achieve) in "Army acquisition management practices."<sup>39</sup>

### **Boeing Lease Program**

Congress has granted the Air Force authority to establish a multi-year pilot program to lease up to one hundred Boeing 767 and four Boeing 737 aircraft.<sup>40</sup> One of the more interesting aspects of this grant of authority is that Congress has exempted the pilot program from the normal lease versus purchase analysis that is required in government contracting.<sup>41</sup>

### **Aircraft Industrial Base**

The Act also notes congressional concern regarding the shrinking defense industrial base, particularly that related to the aircraft industry.<sup>42</sup> Congress has, therefore, tasked the SECDEF to study the impact that this shrinking industrial base has had on the ability to control costs and to obtain innovation. The SECDEF must submit a report containing the results of this study within six months of passage of the Act.<sup>43</sup>

### **Counter-Terrorism and Operational Response Transfer Fund**

Congress appropriated \$478 million to establish the Counter-Terrorism and Operational Response Transfer Fund. These funds are to be used to protect against terrorist attacks, to prepare for the consequences of such attacks, and to deny unauthorized users access to sensitive military data or networks.<sup>44</sup>

Of the amount provided, \$333 million is available only for improving force protection and defenses against chemical or biological attack and for response to attacks using weapons of mass destruction; \$70 million is available only for improving DOD capabilities relating to information assurance, critical infrastructure protection, and information operations; and \$75 million is available only for development and demonstration of systems to protect against unconventional nuclear threats. The Secretary may transfer these funds to any appropriation account of the DOD but, within ninety days of enactment of the Act, must submit a report to Congress identifying the projects and accounts to which he will transfer these funds.<sup>45</sup>

### **Former Soviet Union Threat Reduction**

Congress appropriated \$403 million for assistance to the republics of the former Soviet Union. This assistance is limited to activities related to the elimination, safe and secure transportation, and storage of nuclear, chemical, and other weapons in those countries, including efforts aimed at non-proliferation of these weapons. Significantly, however, Congress also included authority to use these funds for "defense and military contacts."<sup>46</sup>

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39. *Id.* § 8149.

40. *Id.* § 8159.

41. *Id.* § 8159 (exempting the program from 10 U.S.C. §2401a (2000)).

42. *Id.* § 8162.

43. *Id.* (noting that funding for the study and report will come from the Defense-wide procurement appropriations).

44. *Id.* div. A, tit. IX (Counter-Terrorism and Operational Response Transfer Fund).

45. *Id.*

46. *Id.* (Former Soviet Union Threat Reduction). Inclusion of this language appears to expand the purpose of the appropriation to include basic military-to-military contacts. Such contacts have been included in the National Defense Authorization Acts for years. *See, e.g.*, National Defense Authorization Act for 2002, Pub. L. No. 107-107, § 1302(a)(8), 115 Stat. 1012, \_\_\_ (2001). This expanded authority will greatly enhance the ability of DOD to interact with these countries.

## TRANSFERS FROM THE EMERGENCY RESPONSE FUND PURSUANT TO PUBLIC LAW 107-38<sup>47</sup>

On 18 September 2001, President Bush signed into law the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States.<sup>48</sup> This Act was passed in response to the terrorist attacks in New York City and the Pentagon and the aircraft crash in Pennsylvania on 11 September 2001. The Act appropriated \$40 billion dollars for activities related to disaster relief, counter-terrorism, increased transportation security, and national security.<sup>49</sup>

The Act was unusual both for the breadth of authority it provided with respect to the expenditure of these funds and for the fact that, of the \$40 billion, only \$20 billion actually was appropriated. The remaining \$20 billion was available for obligation “only when enacted in a subsequent emergency appropriations bill, in response to terrorist acts on September 11, 2001.”<sup>50</sup> The Emergency Supplemental Act, 2002, enacted as division B of Public Law 107-117, appropriates the remainder of these funds.<sup>51</sup> Those provisions applicable to DOD are discussed below.

### *DOD Military Operation and Maintenance*

The Act appropriates about \$4 billion for the Defense Emergency Response Fund (DERF), for expenses related to the 11 September attacks, to remain available until expended. This appropriation is broken out as follows:

- (1) For increased situational awareness, \$850,000,000;
- (2) For increased worldwide posture, \$1,495,000;
- (3) For offensive counterterrorism, \$372,000,000;
- (4) For initial crisis response, \$39,100,000;
- (5) For the Pentagon Reservation Maintenance Revolving Fund, \$475,000,000;
- (6) For relocation costs and other purposes, \$164,500,000.<sup>52</sup>

### *Defense Emergency Response Fund*

The Act clarifies that funds in the DERF may be used to reimburse other DOD accounts, but only for costs incurred on or after 11 September 2001.<sup>53</sup> The Act also provides that these funds may be used to liquidate obligations incurred under the authority of the Food and Forage Act.<sup>54</sup>

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47. Emergency Supplemental Act, 2002, Pub. L. No. 107-117, div. B, 115 Stat. 2230 (2002).

48. Pub. L. No. 107-38, 115 Stat. 220 (2001).

49. *Id.*

50. *Id.*

51. Emergency Supplemental Act, 2002.

52. *Id.* ch. 3. Of the funds appropriated for “relocation costs and other purposes,” \$500,000 is available only for the White House Commission on the National Monument of Remembrance. *Id.*

53. *Id.* § 301.

54. *Id.* The Food and Forage Act, 41 U.S.C. § 11 (2000), provides authority for the DOD to incur obligations in advance and in excess of available appropriations for certain purposes. The Deputy Secretary of Defense invoked the Food and Forage Act to authorize the incurrence of “deficiencies for clothing, subsistence, forage, fuel, quarters, transportation, and medical and hospital supplies” in response to the 11 September attacks. See Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments; Chairman of the Joints Chiefs of Staff; and Commander and Chief, U.S. Special Operations Command, subject: Obligations in Excess of Appropriations Subsequent to Terrorist Attacks and Aircraft Crashes at the World Trade Center, the Pentagon, and in Pennsylvania (16 Sept. 2001).

*Support to the Salt Lake City Winter Olympics*

The Act provides that DOD may use funds available in the Support for International Sporting Competitions, Defense (SISC) account<sup>55</sup> to support “essential security and safety” for the 2002 Winter Olympics.<sup>56</sup> The Act waives the statutory requirement that the Attorney General certify that “such assistance is necessary to meet essential security needs.”<sup>57</sup> The Act also expands DOD’s ability to use SISC funds to include payment of expenses incurred by Army National Guard and Air National Guard personnel in state active duty status and in full-time National Guard duty status in connection with providing essential security and safety support to the Olympic Games.<sup>58</sup>

*Support to Pakistan and Jordan*

The Act makes \$100 million available for payments to Pakistan and Jordan for support provided, or to be provided, in connection with U.S. operations in Operation Enduring Freedom. Interestingly, the Act provides that the SECDEF may make these payments “in amounts as [he] may determine in his discretion, and [his] determination is final and conclusive upon the accounting officers of the United States.”<sup>59</sup>

*Transfer Authority*

The Act contains an unusual transfer provision that authorizes the SECDEF to transfer up to one and one-half percent of the unobligated balances of Procurement and Research, Development, Test, and Evaluation (RDT&E) funds appropriated by the Defense Appropriations Act, 2002, to DOD’s O&M accounts for costs incurred in support of Operations Enduring Freedom and Noble Anvil. This authority may not be used until all of the emergency supplemental funds provided through Public Law 107-38 have been obligated. This transfer authority expires on 30 April 2002.<sup>60</sup>

*Assistance to U.S. Capitol Police*

The Act provides authority to DOD (and other federal agencies) to provide assistance to the U.S. Capitol Police in the form of services (including personnel), equipment, and facilities. Such support may be on a temporary, reimbursable basis (when requested by the Capitol Police Board) or on a permanent, reimbursable basis (when requested through an advance written request from the Capitol Police Board). The DOD and the Coast Guard may provide temporary support on a non-reimbursable basis when assisting the capital police in carrying out its statutory duties related to the protection of members of Congress and their families.<sup>61</sup>

*Military Construction*

The Act authorizes the SECDEF to use up to \$74.4 million in funds that were appropriated to DOD in the 2001 Emergency Supplemental Appropriations Act<sup>62</sup> to carry out emergency construction in response to the 11 September attacks.<sup>63</sup> Such construction

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55. See Pub. L. No. 104-208, div. A., § 5802, 110 Stat. 3009 (1996) (10 U.S.C. § 2564 note).

56. Emergency Supplemental Act, 2002, § 302.

57. See 10 U.S.C. § 2564(a) (2000).

58. Emergency Supplemental Act, 2002, § 302. The Act also authorizes provision of “logistical and security support” to the 2002 Paralympic Games. *Id.*

59. *Id.* § 304.

60. *Id.* § 306.

61. *Id.* § 911; see 40 U.S.C. § 212a-2 (2000).

62. Pub. L. No. 107-38, 115 Stat. 220 (2001).

63. Emergency Supplemental Act, 2002, ch. 10. The Act breaks this authority down by service, as follows:

Military Construction, Army	\$20,700,000;
Military Construction, Navy	\$2,000,000;
Military Construction, Air Force	\$47,700,000;
Military Construction, Defense-wide	\$35,000,000.

*Id.*

projects do not have to be authorized via the normal military construction (MILCON) project procedures,<sup>64</sup> so long as the SECDEF determines the project is designed to “respond to or protect against acts or threatened acts of terrorism.”<sup>65</sup> Before carrying out such project, the SECDEF must notify Congress of his intent and wait fifteen days.<sup>66</sup>

## NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2002<sup>67</sup>

The President signed the National Defense Authorization Act for FY 2002 into law on 28 December 2001.

### Procurement

#### *Sale of Articles and Services from Army Industrial Facilities*

The pilot program authorizing the Army to sell manufactured articles and services from its industrial facilities without regard to whether a commercial source of the article or service exists in the United States has been extended through 30 September 2002.<sup>68</sup>

#### *Multi-Year Procurement Authority*

Congress authorized the Navy to enter into a multi-year contract for engines for the F/A-18 E and F aircraft.<sup>69</sup> It also authorized the Air Force to enter into a multi-year contract for the procurement of up to 60 C-17 aircraft.<sup>70</sup>

#### *Osprey Aircraft Program*

Congress has prohibited the Navy from increasing the production rate for its V-22 Osprey Aircraft above the minimum sustaining production rate until the SECDEF certifies to Congress that: (1) operational testing of the V-22 has demonstrated the changes to the flight control software and hydraulic system are adequate to achieve low risk to passengers and crew, (2) the V-22 can achieve sufficient reliability and maintainability levels to ensure operational availability, and (3) the V-22 will be operationally effective both in terms of functioning in various operational settings and when employed with other types of aircraft.<sup>71</sup> The SECDEF is also directed to submit a report to Congress not later than thirty days before the resumption of flight testing of the V-22, which discusses the deficiencies in the hydraulics system and flight control software and any proposed remedies to these deficiencies.<sup>72</sup>

### Research, Development, Test, and Evaluation

#### *Ballistic Missile Defense*

The Act amends section 224 of Title 10 to permit the SECDEF to transfer a program from the Ballistic Missile Defense Organization to one of the services. Before transferring program management responsibility, however, the SECDEF must submit notice of such intent to Congress and wait a minimum of sixty days.<sup>73</sup> The Act also gives the SECDEF authority to use up to \$500 million in available RDT&E funds appropriated to DOD after FY 2001 to carry out construction projects necessary to establish and operate a Missile Defense System Test Bed.<sup>74</sup>

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64. See 10 U.S.C. § 2802 (2000).

65. Emergency Supplemental Act, 2002, § 1001.

66. *Id.* Compare with section 1504 of the National Defense Authorization Act for Fiscal Year 2002, discussed *infra* at notes 130-32, which contains similar authorization but without a notice-and-wait requirement.

67. Pub. L. No. 107-107, 115 Stat. 1012 (2001).

68. *Id.* § 112.

69. *Id.* § 122; see also *supra* note 23 and accompanying text.

70. National Defense Authorization Act for Fiscal Year 2002, § 131.

71. *Id.* § 123.

72. *Id.* § 124.

73. *Id.* § 231.

## *Science and Technology Demonstration Project*

The Act directs the Navy to carry out a demonstration project that provides access to and use of the Major Range and Test Facility Bases (MRTFB) operated by the Navy. Small businesses and universities are eligible if performing research work under a contract awarded by the Office of Naval Research pursuant to either the Small Business Innovative Research Program or the Small Business Technology Transfer Program.<sup>75</sup>

### **Operation & Maintenance**

#### *Reimbursement for Usage of Commissary Facilities*

The Act amends Title 10 to add a new section requiring military departments to reimburse the Defense Commissary Agency if they use a commissary facility for purposes other than commissary sales. Reimbursement is based on the depreciated value of the portion of the facility used for other than commissary purposes.<sup>76</sup>

#### *NAFI Recovery of Costs Related to Shoplifting*

The Act amends 31 U.S.C. § 3701(b)(1)(B) to revise the definition provided for civil recovery claims by the U.S. Government so that the government may now also recover the “actual and administrative costs related to shoplifting, theft detection, and theft prevention” at its Nonappropriated Fund Instrumentalities.<sup>77</sup>

#### *Limitations on Performance of Depot-Level Maintenance*

Since 1988, Congress has restricted DOD from performing more than fifty percent of its depot-level maintenance via contract unless a service secretary determined that national security required a waiver of the limitation.<sup>78</sup> The Act revises the waiver portion of this limitation by requiring the SECDEF—rather than the service secretary—to make this determination.<sup>79</sup> At the same time, the Act also revises 10 U.S.C. § 2474 to exclude maintenance work performed by contractors “pursuant to a public-private partnership” from the fifty-percent limitation.<sup>80</sup>

#### *Army Manpower Reporting*

Congress has directed the Army to submit annual reports for FY 02-04 indicating the number of work-year equivalents that contractors performed working on service contracts with the Army.<sup>81</sup>

#### *DOD Dependents Schools Auxiliary Services*

The Act amends the code section that requires DOD to operate a school system overseas for its dependents to permit dependents that are home-schooled to use the school system’s resources, including the library and after-school programs such as music and sports.<sup>82</sup>

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74. *Id.* § 235.

75. *Id.* § 262; *see also* 10 U.S.C. § 2681 (2000) (permitting commercial entities to utilize a DOD MRTFB, but also permitting DOD to charge the commercial entity for both the direct and indirect costs of such usage). The demonstration project requires the Navy to charge the participant at the same rate it charges DOD users, which essentially covers only the direct costs. National Defense Authorization Act for Fiscal Year 2002, § 262.

76. National Defense Authorization Act for Fiscal Year 2002, § 332.

77. *Id.* § 335.

78. *See* 10 U.S.C. § 2466 (2000).

79. National Defense Authorization Act for Fiscal Year 2002, § 341.

80. *Id.* § 342. Congress authorized DOD to enter into public-private partnerships beginning in 2001 to encourage greater usage of defense depots. *See* National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 341, 114 Stat. 1654 (2000).

81. National Defense Authorization Act for Fiscal Year 2002, § 345. The report must also be categorized by federal service code and indicate the appropriation as well as the major organizational element that funded the contract. *Id.*

82. *Id.* § 353 (amending 20 U.S.C. § 926 (2000)).

Last year, Congress imposed several restrictions on the Navy's ability to implement its purchase of intranet work stations. One of those restrictions was the requirement to purchase the work stations in increments, with a restriction on buying no more than fifteen percent of the total required work stations in the first increment.<sup>83</sup>

This year's Act permits the Secretary of the Navy to contract for a second increment of up to an additional 100,000 work stations conditioned upon the approval of both the Under Secretary of Defense for Acquisition, Technology, and Logistics and the DOD Chief Information Officer. It also permits the Secretary to contract for a third increment of up to an additional 150,000 work stations once the Navy demonstrates that it has 20,000 work stations successfully operating on the intranet. The Act also requires the Navy to submit a report to Congress on the status of testing and implementation of the intranet.<sup>84</sup>

### **Military Personnel Authorizations**

#### *Limitations on Personnel End Strengths*

During times of war or national emergency, the President can suspend statutory end strength limits.<sup>85</sup> The Act has amended this authority to permit the suspension of end strengths to remain in effect for up to nearly seven months after the termination of war or national emergency.<sup>86</sup>

### **Acquisition Policy, Acquisition Management, and Related Matters**

#### *Management of the Procurement of Services*

The Act adds sections 2330 and 2330a to Title 10, requiring DOD to establish a management structure for the procurement of services similar to the structure already in place for products. The Act specifically requires the services to appoint designated officials who will be responsible for managing services' procurement. It also requires the establishment of dollar thresholds applicable to certain acquisitions.<sup>87</sup>

The Act further requires that the designated official responsible for managing the acquisition of services to approve any procurement of services above these dollar thresholds when it is made through the use of a contract or task order that is not performance-based. This requirement also applies to any acquisition of services through a contract or task order awarded by an agency outside the DOD.<sup>88</sup>

Additionally, the management structure must collect and maintain data concerning purchases of services in excess of the simplified acquisition threshold. Data that must be accumulated includes the type of service purchased, the form of contract action used to acquire the service, and whether the purchase was performance-based and if so, whether it was done on a firm-fixed-price basis.<sup>89</sup>

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83. See National Defense Authorization Act for Fiscal Year 2001, § 814.

84. National Defense Authorization Act for Fiscal Year 2002, § 362.

85. See 10 U.S.C. § 123a (2000).

86. National Defense Authorization Act for Fiscal Year 2002, § 421. Previously, the suspension could last no longer than 30 November of the year following the termination of war or national emergency. See 10 U.S.C. § 123a (2000). Thus, for terminations occurring in the latter part of the fiscal year, this amendment provides expanded authority to suspend strength limitations for greater periods of time (for example, if a national emergency ended on 1 June, the President may now defer end strength limitations until 31 December, versus 30 November under prior law). For terminations that arise early in the fiscal year, however, the amendment actually reduces the President's ability to suspend end strengths (for example, if a national emergency ended on 1 April, the President may now defer end strength limitations only until 31 October, versus 30 November under prior law).

87. National Defense Authorization Act for Fiscal Year 2002, § 801.

88. *Id.*

89. *Id.*

## *Services Procurement Savings Goals*

To give the management system added teeth, Congress has given DOD the goal of achieving specified reductions in the amount expended on services over the next ten fiscal years. By FY 2011, Congress expects DOD to achieve a ten-percent reduction in expenditures measured against the amount spent in FY 2000. More imminently, Congress believes DOD should achieve a three-percent reduction during the current fiscal year. Congress anticipates DOD will achieve these reductions through greater use of competition on task orders, increased use of performance-based services contracting, and improved management practices.<sup>90</sup>

### *Enhanced Competition Under Multiple Award Contracts for Services*

The Act also requires the promulgation of new DFARS regulations requiring DOD to purchase on a “competitive basis” all services in excess of \$100,000 made under a multiple award contract.<sup>91</sup> The Act permits exceptions to this requirement that parallel the current exceptions to the general rule, requiring that awardees be given a “fair opportunity to compete” for task orders issued under a multiple award contract.<sup>92</sup> The Act also defines “competitive basis” to generally require fair notice to all multiple award contractors as well as an opportunity to make an offer.<sup>93</sup> Finally, the Act prohibits the award of a task order not made on a “competitive basis” unless: (1) offers are received from at least three qualified contractors; or (2) the contracting officer determines, in writing, that no additional qualified contractors could be identified, despite reasonable efforts to do so.<sup>94</sup>

### *Preference for Federal Prison Industries Clarified*

Federal agencies are required to purchase products made by the Federal Prison Industries (FPI) if those products meet the agency’s requirements, are timely available, and are not more expensive than current market prices.<sup>95</sup> The FAR provisions that implement this statutory preference do not track the statute, however.<sup>96</sup> Specifically, the FAR requires agencies to obtain a “clearance” or waiver from the FPI before making an outside purchase, and it indicates that clearances would not normally be issued merely because other sources could provide the supply at a lower price.<sup>97</sup>

The Act adds a new section 2410n to Title 10 that emphasizes the prerequisites that must be met for the FPI preference to come into play. Under this new section, DOD must conduct market research to determine whether the FPI product is comparable in price, quality, and timeliness to other products. If the FPI product is not comparable, the item must be purchased using competitive procedures. Any timely offer from FPI should be considered and evaluated, along with all other offers, in accordance with the evaluation criteria set forth in the solicitation.<sup>98</sup>

### *Extension of Mentor-Protégé Program*

The Mentor-Protégé Program established by section 831 of the National Defense Authorization Act for Fiscal Year 1991<sup>99</sup> has been extended for an additional three years.<sup>100</sup> Businesses now have until the end of FY 2005 to become protégés and enter into mentor-protégé agreements, and mentors are eligible for reimbursement of mentoring costs incurred through the end of FY 2008.<sup>101</sup>

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90. *Id.* § 802.

91. *Id.* § 803.

92. *Id.* § 803(b)(1); see 10 U.S.C. § 2304c(b) (2001); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. § 16.505(b)(2) (June 1997) [hereinafter FAR].

93. National Defense Authorization Act for Fiscal Year 2002, § 803(b)(2).

94. *Id.* § 803(b)(4).

95. See 18 U.S.C. § 4124 (2000).

96. See FAR, *supra* note 92, subpt. 8.6.

97. *Id.* § 8.605.

98. National Defense Authorization Act for Fiscal Year 2002, § 811.

99. Pub. L. No. 101-510, 104 Stat. 1498 (1990).

100. National Defense Authorization Act for Fiscal Year 2002, § 812. The program establishes incentives for defense contractors to serve as mentors for small disadvantaged businesses. See U.S. DEP’T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. app. I (Aug. 2000).

### *Conformity of Acquisition Phase and Milestone Terminology*

When DOD Directive 5000.1, The Defense Acquisition System, and DOD Instruction 5000.2, Operation of the Defense Acquisition System, were revised on 23 October 2000, the terminology used to describe some of the phases and milestones for major systems was revised, causing a lack of conformity between the regulations and several pieces of legislation. This year's Authorization Act revised the terminology used in these pieces of legislation to make it conform with that used in the regulations.<sup>102</sup>

### *Follow-on Production Contracts Authorized for Prototype-Developed Products*

In 1989, Congress authorized the Defense Advance Research Projects Agency (DARPA) to enter into Other Transactions (OTs)—a contract action not subject to the FAR—to acquire research from firms unwilling to conduct business with the government under the terms of the FAR.<sup>103</sup> In 1993, that authority was expanded to permit DOD to enter into OTs to acquire prototypes of products—in addition to research—so long as the product was relevant to an actual or proposed weapon system.<sup>104</sup>

The National Defense Authorization Act for Fiscal Year 2002 now permits DOD to award a follow-on contract for production quantities on a sole-source basis if competitive procedures were used to select the party(ies) the government contracted with in the initial OT. To take advantage of this provision, the parties will have to address the follow-on production contract in the initial OT, with the production quantity determined by balancing the investment made by the other party(ies) in the project against the interest of the government in having the project's end-product acquired through competition.<sup>105</sup>

### *Extension of Test Program for Commercial Items*

The test program authorizing the use of simplified acquisition procedures to acquire certain commercial items has again been extended and is now set to expire on 1 January 2003.<sup>106</sup>

### *Exceptions to Educational Qualifications for Acquisition Workforce*

To receive an appointment or assignment in the GS-1102 occupational specialty or a similar occupational specialty filled by a military member, a person must meet certain educational qualifications, including receipt of a baccalaureate degree and completion of at least twenty-four semester credit hours in business disciplines.<sup>107</sup>

The Act eases these qualification requirements for certain types of individuals. First, the Act makes these requirements inapplicable to: (1) individuals who served in a GS-1102 or similar position on or before 30 September 2000, and (2) individuals currently serving in the contingency contracting workforce. Second, the Act permits appointment of individuals not meeting these requirements and grants a three-year reprieve from the requirements from the time of appointment for that individual to attain the necessary qualifications.<sup>108</sup>

### *Identification and Recovery of Erroneous Payments*

The Act adds a new section 3561 to Title 31, which requires any executive agency that annually awards total contracts in excess of \$500 million to develop a program that will identify erroneous payments made to contractors. The Act also adds a new section 3562 to Title 31 which permits agencies to use any recovery of erroneous payments to: (1) reimburse the actual administrative expenses incurred by the agency in executing the program, and (2) to pay a contractor a contingency amount for its services rendered in recovering the erroneous payment from another contractor.<sup>109</sup>

101. National Defense Authorization Act for Fiscal Year 2002, § 812.

102. *Id.* § 821.

103. *See* Department of Defense Authorization Act for Fiscal Years 1990/1991, Pub. L. No. 101-189, § 251, 103 Stat. 1403 (1989) (codified at 10 U.S.C. § 2371).

104. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1721 (1993).

105. National Defense Authorization Act for Fiscal Year 2002, § 822.

106. *Id.* § 823; *see also* FAR, *supra* note 92, subpt. 13.5 (describing the implementation of this program).

107. *See* 10 U.S.C. § 1724(a) (2000).

108. National Defense Authorization Act for Fiscal Year 2002, § 824.

### *Codification of Berry Amendment*

Section 9005 of the Department of Defense Appropriations Act for Fiscal Year 1993,<sup>110</sup> better known as the Berry Amendment, prohibits DOD from spending appropriated funds on a number of foreign items including food, clothing, textile products, specialty metals, hand tools and measuring tools. This year's Authorization Act codifies that prohibition by adding a new provision, 10 U.S.C. § 2533a.<sup>111</sup>

### *Overseas Personal Services Contracts*

The State Department has had broad authority to enter into personal services contracts in overseas locations for several years.<sup>112</sup> This year's Authorization Act gives the State Department the authority to enter personal service contracts on behalf of DOD and other agencies.<sup>113</sup>

### *Defense Against Terrorism or Chemical/Biological Attack*

For any procurement to "facilitate the defense against terrorism or biological or chemical attack against the United States" using funds appropriated to DOD in FY 2002 or FY 2003, Congress has raised the micro-purchase threshold to \$15,000 and the simplified acquisition threshold to \$250,000 if operating inside the United States, and \$500,000 if operating outside the United States in support of a contingency operation. The Act also provides authority to treat any such purchase of biotechnology property or services as a commercial item acquisition.<sup>114</sup>

### *Counter-Drug Activities*

Section 1004 of the National Defense Authorization Act for Fiscal Year 1991<sup>115</sup> provided DOD with broad authority to participate in counter-drug activities. This year's Act restates that authority and extends it through 2006.<sup>116</sup>

### *Combating Terrorism Readiness Initiative Funds*

Section 1512 of the Act amends Title 10 to add a new section 166b.<sup>117</sup> This section codifies the longstanding practice of making funds available for high-priority, unforeseen requirements related to combating terrorism. These funds are in addition to any other funds available for the same purpose.<sup>118</sup>

109. *Id.* § 831.

110. Pub. L. No. 102-396, 106 Stat. 1900 (1992).

111. National Defense Authorization Act for Fiscal Year 2002, § 832.

112. *See* 22 U.S.C. § 2669(c) (2000).

113. National Defense Authorization Act for Fiscal Year 2002, § 833.

114. *Id.* § 836.

115. Pub. L. No. 101-510, § 1004, 104 Stat. 1684 (1990).

116. National Defense Authorization Act for Fiscal Year 2002, § 1021.

117. *Id.* § 1512.

118. Detailed procedures regarding the fund may be found in CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5261.01B (1 July 2001).

## General Provisions

### *Bosnia/Kosovo Funding Limitations*

The DOD is prohibited from obligating more than \$1,315,600,000 for the Bosnia peacekeeping operation or more than \$1,528,600,000 for the Kosovo peacekeeping operation from the Overseas Contingency Operations Transfer Fund.<sup>119</sup>

### *Clarification on Interest Penalties for Late Service Contract Payments*

In the National Defense Authorization Act for FY 2001, Congress directed federal agencies to pay an interest penalty under a cost-reimbursement services contract that required the agency to make interim payments if the agency failed to do so within thirty days after receiving a proper invoice. The FY 2001 Act indicated the penalty provision would go into effect on 15 December 2000.<sup>120</sup> This year's Act clarifies that the penalty will apply to payments that are due after 15 December 2000 even if the contract was entered into before 15 December 2000.<sup>121</sup>

## Civilian Personnel Matters

### *Reimbursement for Professional Credentials*

Congress has added 5 U.S.C. § 5757, which permits an agency to use appropriated funds to pay for its competitive service employees' expenses associated with obtaining professional credentials.<sup>122</sup> Included within these expenses are the following: professional accreditation, state-imposed and professional licenses, professional certification, and examinations to obtain such credentials.<sup>123</sup>

### *Retention of Travel Perquisites*

In section 6008 of the Federal Acquisition Streamlining Act of 1994,<sup>124</sup> Congress required the GSA to implement regulations that required federal employees to use travel perquisites they accrued performing official travel only for other future official travel purposes. This year's Authorization Act repealed that provision and specifically permits federal employees, military service members, and their family members and dependents to use these perquisites for personal use so long as the perquisite is obtained under the same terms as those offered to the general public and causes the government to incur no additional cost.<sup>125</sup>

## Matters Relating to Other Nations

### *Logistical Support for Security Forces*

The Act amends 22 U.S.C. § 3424 to permit DOD to use contractors, in addition to in-house resources, to provide logistical support to the Multinational Force and Observers.<sup>126</sup> The amendment also permits the President to waive reimbursement whenever he determines that "such action enhances or supports the national security interests of the United States."<sup>127</sup>

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119. National Defense Authorization Act for Fiscal Year 2002, § 1005. The changes to the OCOTF, see *supra* note 12 and accompanying text, make these ceilings largely irrelevant.

120. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1010, 114 Stat. 1654A-251 (2000).

121. National Defense Authorization Act for Fiscal Year 2002, § 1007.

122. *Id.* § 1112. There is no corresponding provision for payment of a military member's professional credentials expenses.

123. *Id.*

124. Pub. L. No. 103-355, § 6008, 108 Stat. 3243, 3367 (1994).

125. National Defense Authorization Act for Fiscal Year 2002, § 1116.

126. *Id.* § 1211. This authority extends only to support provided to the Multinational Force and Observers operating in the Sinai as part of the peace accords reached between Egypt and Israel. See generally 22 U.S.C. §§ 3421-3427 (2000).

127. National Defense Authorization Act for Fiscal Year 2002, § 1211.

## *Allied Defense Burden Sharing*

Congress indicates it believes the President should seek greater defense burden sharing by our allies. In particular, the Act suggests the United States should negotiate host nation support agreements with any allied country in which it has military personnel assigned, whereby it obtains financial contributions from that ally in an amount equal to seventy-five percent of the non-personnel costs incurred by the United States.<sup>128</sup>

### **Activities Relating To Combating Terrorism**

#### *Military Construction Project Funding*

The Act authorizes the SECDEF to use certain emergency defense appropriations to carry out military construction projects that were not authorized via the normal specified MILCON project procedures,<sup>129</sup> so long as he determines the project is “necessary to respond to or protect against the terrorist attacks on the United States that occurred on September 11, 2001.”<sup>130</sup> In carrying out these projects, the SECDEF may only use funds that were appropriated to DOD in the 2001 Emergency Supplemental Appropriations Act<sup>131</sup> and that are authorized for use in sections 1502 and 1503 of the National Defense Authorization Act for Fiscal Year 2002.<sup>132</sup>

### **Military Construction General Provisions**

Congress has increased the thresholds for military construction projects that may be funded with operations and maintenance appropriations to \$1,500,000 for projects intended to correct a deficiency that threatens life, health, or safety, and \$750,000 for all other projects.<sup>133</sup> It has also increased the threshold for military construction projects that do not require the advance approval of the service secretary to \$750,000.<sup>134</sup>

### **Extension of Alternative Authority to Acquire Military Housing**

In 1996, Congress granted DOD additional authority to acquire military housing via non-traditional means, including use of loan and rental guarantees, conveyance of existing housing and facilities, and differential lease payments.<sup>135</sup> In this year’s Appropriations Act, Congress extended the ability to make use of this alternative authority through 31 December 2012.<sup>136</sup>

### **Pentagon Memorial**

Congress has authorized the SECDEF to establish a memorial at the Pentagon to remember the victims of the 11 September 2001 terrorist attack, and has authorized use of the Pentagon Reservation Maintenance Revolving Fund (PRMRF) as a source of the funds to construct and maintain the memorial. Congress has also authorized DOD to accept monetary gifts into the PRMRF and to use such gifted funds towards the establishment of the memorial as well as the repair of the portion of the Pentagon that was damaged in the attack.<sup>137</sup>

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128. *Id.* § 1214.

129. *See* 10 U.S.C. § 2802 (2000).

130. National Defense Authorization Act for Fiscal Year 2002, § 1504(a).

131. Pub. L. No. 107-38, 115 Stat. 220 (2001)

132. National Defense Authorization Act for Fiscal Year 2002, § 1504(c). *See* section 901 of Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, 115 Stat. 2230 (2002), discussed *supra* notes 64-66, which contains the additional requirement to notify Congress and wait fifteen days before carrying out the construction project.

133. National Defense Authorization Act for Fiscal Year 2002, § 2801(b) (to be codified at 10 U.S.C. § 2805(c)(1)).

134. *Id.* § 2801(a) (to be codified at 10 U.S.C. § 2805(b)(1)).

135. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186, 547 (1996) (amending Title 10 to add subchapter IV to chapter 169).

136. National Defense Authorization Act for Fiscal Year 2002, § 2805.

137. *Id.* § 2864.

## MILITARY CONSTRUCTION APPROPRIATIONS ACT, 2002

President Bush signed the Military Construction Appropriations Act, 2002, on 5 November 2001.<sup>138</sup> This Act appropriated \$10.5 billion for military construction, family housing, and base closure activities.<sup>139</sup> This amount exceeds the FY 2001 total by more than \$1.5 billion, or nearly a fifteen percent increase in funding. It is also nearly \$530 million more than the administration requested.<sup>140</sup> Included in these appropriations are nearly \$100 million for unspecified minor military construction and \$10 million for contingency construction.<sup>141</sup> The Act also raised the amount of money that may be spent annually on each general or flag officer's quarters without notifying Congress; the new amount is \$35,000.<sup>142</sup>

## DEFENSE PRODUCTION ACT AMENDMENTS OF 2001<sup>143</sup>

The President signed the Defense Production Act Amendments of 2001 into law on 5 October 2001, extending the Defense Production Act of 1950<sup>144</sup> through 30 September 2003.<sup>145</sup> The House initially sought to extend the term by three years,<sup>146</sup> while the Senate

138. Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001).

139. H.R. REP. No. 107-246, at 56. The Military Construction Appropriations Act breaks the appropriations down as follows:

Military Construction, Army	\$1,778,256,000;
Military Construction, Navy	\$1,144,221,000;
Military Construction, Air Force	\$1,194,880,000;
Military Construction, Defense-wide	\$840,558,000;
Military Construction, Army National Guard	\$405,565,000;
Military Construction, Air National Guard	\$253,386,000
Military Construction, Army Reserve	\$167,019,000;
Military Construction, Naval Reserve	\$53,201,000;
Military Construction, Air Force Reserve	\$74,857,000;
NATO Security Investment Program	\$162,600,000;
Family Housing Construction, Army	\$312,742,000;
Family Housing Operation & Maintenance, Army	\$1,089,573,000;
Family Housing, Navy and Marine Corps	\$331,780,000;
Family Housing Operation & Maintenance, Navy and Marine Corps	\$910,095,000;
Family Housing Construction, Air Force	\$550,703,000;
Family Housing Operational & Maintenance, Air Force	\$844,715,000;
Family Housing, Defense-wide (earmarked for construction)	\$44,012,000;
	\$250,000;
DOD Family Housing Improvement Fund	\$2,000,000;
Defense Homeowners Assistance Fund	\$10,119,000;
Defense Homeowners Assistance Fund	\$632,713,000.

Military Construction Appropriations Act, 2002, 115 Stat. at 474-78. The sum total of these appropriations amount to \$10,802,995,000, but Congress also rescinded a total of \$302,995,000, leaving a net amount of \$10,500,000,000 in new obligational authority.

140. H.R. REP. No. 107-246, at 56.

141. The conference report accompanying the Act provides the following amounts for unspecified minor military construction:

Unspecified Minor Construction, Army	\$19,565,000;
Unspecified Minor Construction, Navy	\$12,679,000;
Unspecified Minor Construction, Air Force	\$11,750,000;
Unspecified Minor Construction, Defense-wide	\$24,492,000;
Unspecified Minor Construction, Army National Guard	\$16,526,000;
Unspecified Minor Construction, Air National Guard	\$6,713,000;
Unspecified Minor Construction, Army Reserve	\$2,625,000;
Unspecified Minor Construction, Air Force Reserve	\$4,996,000.

*Id.* at 50-51.

142. Military Construction Appropriations Act, 2002, § 127, 115 Stat. at 482. Previously, this limit had been set at \$25,000 per quarter. *See, e.g.*, Military Construction Appropriations Act, 2001, Pub. L. No. 106-246, § 127, 114 Stat. 511, 518 (2000).

143. Pub. L. No. 107-47, 115 Stat. 260 (2001).

144. 50 U.S.C. app. § 2061 (2000). This authority permits the President to compel contractors to fulfill government contractual requirements before commercial contract requirements even if the government contract was subsequent to the commercial contract. *Id.* app. § 2071.

thought the Act should only be extended for one year.<sup>147</sup> A compromise of a two-year extension was reached just days before the Act was set to expire.<sup>148</sup>

## UNITED NATIONS PEACEKEEPING OPERATIONS

In 1999, Congress enacted legislation that restricted the Secretary of State's ability to pay the United States' share of United Nations (UN) assessments.<sup>149</sup> This Act specifically required the Secretary of State to certify that no UN member was assessed more than twenty-five percent for any peacekeeping operation before making payment to the UN.<sup>150</sup> Congress enacted an amendment to that legislation on 24 September 2001, which the President signed into law on 5 October 2001, raising the percentage limit to 28.15%.<sup>151</sup>

## USA PATRIOT ACT OF 2001

Section 2465 of Title 10 of the U.S. Code generally prohibits DOD from entering into contracts for security and firefighting services on installations within the United States unless such services were already performed by a contractor on 24 September 1983.<sup>152</sup> Following the September 11th attacks on the World Trade Center and Pentagon, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, which the President signed into law on 26 October 2001.<sup>153</sup> One of the provisions of this Act grants DOD a temporary exception to the prohibition on procuring security services for the duration of Operation Enduring Freedom and for 180 days thereafter. The exception requires DOD to contract with state or local governments to procure security services.<sup>154</sup>

## FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED APPROPRIATIONS ACT, 2002<sup>155</sup>

The Foreign Operations, Export Financing, and Related Appropriations Act provides funding for U.S. foreign and security assistance programs which are administered primarily by the State Department and its subordinate agencies. Because some of these programs impact DOD operations, a brief overview of the highlights of the Act follows.

### Economic Support Fund

The Act appropriates \$2.24 billion for the Economic Support Fund (ESF).<sup>156</sup> Of this amount, \$720 million is available only for support to Israel and \$655 million is available only for support to Egypt.<sup>157</sup>

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145. Defense Production Act Amendments of 2001, 115 Stat. at 260.

146. H.R. CONF. REP. NO. 107-173, at 1 (2001).

147. See 147 CONG. REC. S9673 (daily ed. Sept. 21, 2001).

148. See 147 CONG. REC. S9856-57 (daily ed. Sept. 26, 2001).

149. See Pub. L. No. 106-113, tit. IX, 113 Stat. 1501 (1999).

150. *Id.* § 931(b)(2), 113 Stat. at 1501A-480.

151. Pub. L. No. 107-46, 115 Stat. 259 (2001); see S. 248 (2001); 147 CONG. REC. H5941 (daily ed. Sept. 24, 2001) (for insight into the rationale for the passage of the Act).

152. 10 U.S.C. § 2465 (2000).

153. Pub. L. No. 107-56, 115 Stat. 272 (2001).

154. *Id.* § 1010, 115 Stat. at 395-96. It also does not provide an exception to the prohibition on procuring firefighting services. *Id.*

155. Pub. L. No. 107-115, 115 Stat. 2118 (2002).

156. Foreign Operations Appropriations Act, 2002, tit. II, 115 Stat. at \_\_\_\_ (2002). The ESF provides funding for foreign economic development through programs involving such things as balance of payment support, infrastructure and technical assistance development projects, and health, education, agriculture, and family planning. See 22 U.S.C. §§ 2346-2346d (2000).

157. Foreign Operations Appropriations Act, 2002, tit. II.

## **International Military Education and Training**

Congress appropriated \$75 million for the International Military Education and Training (IMET) Program.<sup>158</sup> Of this amount, not less than \$600,000 is available for assistance to Armenia.<sup>159</sup>

## **Foreign Military Financing Program**

The Act provides \$3.674 billion for the Foreign Military Financing Program (FMFP).<sup>160</sup> Of this amount \$2.04 billion is earmarked for grants to Israel and \$1.3 billion is earmarked for grants to Egypt.<sup>161</sup>

## **Former Yugoslavia War Crimes Tribunal Drawdown**

Congress authorized the President to drawdown up to \$30 million of commodities and services under section 552(c) of the Foreign Assistance Act<sup>162</sup> for the United Nations War Crimes Tribunal for the former Yugoslavia. Before exercising this authority, the President must determine that providing goods or services through the drawdown “will contribute to a just resolution of charges regarding genocide or other violations of humanitarian law.”<sup>163</sup>

## **Governments Destabilizing Sierra Leone**

None of the funds appropriated by the Act may be made available to any government that the Secretary of State determines has directly or indirectly provided assistance to any group “intent on destabilizing the democratically elected government of Sierra Leone.”<sup>164</sup> This provision specifically identifies the Sierra Leone Revolutionary United Front and the Liberian Armed Forces as such groups.<sup>165</sup> The Act also prohibits assistance to any government that the Secretary of State determines “has aided or abetted . . . in the illicit distribution, transportation, or sale of diamonds mined in Sierra Leone.”<sup>166</sup>

## **Democracy and Human Rights in Muslim Countries**

The Act provides that not less than \$10 million of the funds appropriated for the Economic Support Fund<sup>167</sup> “shall be made available for programs and activities to foster democracy, human rights, press freedoms, and the rule of law in countries with a significant Muslim population . . . where such programs and activities would be important to the United States efforts to respond to, deter, or prevent acts of international terrorism.”<sup>168</sup>

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158. *Id.* DOD administers the IMET program through which DOD personnel provide training to foreign military and defense personnel in the United States, and in participating foreign countries, on a grant basis. *See* 22 U.S.C. §§ 2347-2347d (2001).

159. Foreign Operations Appropriations Act, 2002, tit. II.

160. *Id.* Through the FMFP, eligible countries receive grants of U.S. funds to help them purchase U.S. defense articles, services, or training through one of the Foreign Military Sales (FMS) programs. *See* 22 U.S.C. §§ 2763-2754 (2001).

161. Foreign Operations Appropriations Act, 2002, tit. II.

162. 22 U.S.C. § 2348a(c) (2000). Under this authority, the President may direct any federal agency to provide goods or services to another country or international organization (in this case, the United Nations War Crimes Tribunal). Goods or services to be drawn down must come from an agency’s stock, and, generally, an agency is not reimbursed for the costs of goods or services it provides. *See id.*

163. Foreign Operations Appropriations Act, 2002, tit. V, § 547.

164. *Id.* § 574(a).

165. *Id.*

166. *Id.* § 574(b).

167. *See supra* note 156 and accompanying text.

168. Foreign Operations Appropriations Act, 2002, tit. V, § 526(b).

## Afghan Women and Children Relief Act of 2001

The Act provides the President the authority to “provide educational and health care assistance for women and children living in Afghanistan and as refugees in neighboring countries.”<sup>169</sup> The President must provide the assistance in a manner that promotes and protects the human rights of all people in Afghanistan, “utilizing indigenous institutions and nongovernmental organizations, especially women’s organizations”<sup>170</sup> to the maximum extent possible. The Act authorizes the use of funds appropriated under the 2001 Emergency Supplemental Appropriations Act<sup>171</sup> to carry out the purpose of the Act.

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169. Afghan Women and Children Relief Act of 2001, § 3(a), Pub. L. No. 107-81, 115 Stat. 811.

170. *Id.* at § 3(b)(1).

171. Pub. L. No. 107-38, 115 Stat. 220 (2001). The Act also mandates periodic reporting requirements to inform Congress of the activities carried out under the Act and the condition of women and children in Afghanistan and in refugee camps. Afghan Women and Children Relief Act of 2001, § 3(b)(2).