

**MILITARY CONSTRUCTION PROJECTS: EXPLORING
ALTERNATE FUNDING SOURCES IN TIMES OF FISCAL
AUSTERITY**

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This will be a tough budget year, and almost every area of government will be affected by the austere funding levels caused by Sequestration. However, this legislation prioritizes spending to protect critical programs, including infrastructure for our troops, programs for our military families, and the quality care our nation's veterans deserve.¹

I. Introduction: Military Construction During Sequestration and Fiscal Austerity²

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¹ Press Release, U.S. House of Representatives, House Appropriations Committee to Consider Fiscal Year 2014 Military Construction (May 14, 2013), available at <http://www.appropriations.house.gov/news/documentsingle.aspx?DocumentID=333737>. Congressman Hal Rogers of the House Appropriations Committee commented on the impacts of Sequestration on projected Military Construction (MILCON) initiatives.

² See Paul M. Johnson, *A Glossary of Political Economy Terms*, AUBURN UNIV. DEP'T OF POLITICAL SCI., <http://www.auburn.edu/~johnspm/gloss/sequestration> (last visited Mar. 18, 2014) (providing a historical review of the term "sequestration"). The Budget Control Act (BCA) has been referred to using various forms of the word "sequestration."

Military Construction (MILCON), a congressionally appropriated funding measure for major construction projects, encompasses a wide expanse of Department of Defense (DoD) spending. Diminished MILCON funding can devastate vital “quality of life” infrastructure programs, including family housing, military medical treatment facilities, DoD schools, servicemember work centers, and Veterans Affairs (VA) construction.³ Despite the importance of these projects, in this era of fiscal austerity, and as Congressman Hal Rogers noted above, Congress will continue to scrutinize funding for these programs now and in the future.⁴

Proper MILCON funding ensures a strong and stable national defense by providing for the military’s overall infrastructure. Springing from the congressional budget process, fiscal law considerations drive military spending.⁵ The United States government’s monetary resources are declining, and the military must seek new and innovative ways to fund MILCON projects with lesser appropriations. In certain circumstances, Congress has allowed government agencies to partner with the private sector to bridge funding gaps. During this period of fiscal austerity, Congress needs to expand the DoD’s ability to leverage the private sector’s funding resources by allowing the military to engage in more robust private partnership ventures. This will strengthen the military’s ties with the private sector and will alleviate the demand for dwindling appropriated funds.

To support this proposition, this paper will explore a number of issues. The current fiscal environment and state of disrepair of many military buildings require a renewed look at alternate funding streams. Because of the Anti-deficiency Act (ADA), the military has been reluctant to partner with the private sector for fear of impermissibly augmenting MILCON projects. The United States Air Force Academy (USAFA) encountered such difficulties during one of its recent MILCON endeavors. There have been limited instances when Congress has provided statutory authority to engage in public-private partnerships, and those statutes assuage ADA concerns. For instance, the Military

³ See generally DANIEL H. ELSE, CHRISTINE SCOTT & SIDATH VIRANGA, CONG. RESEARCH SERV., R42586, MILITARY CONSTRUCTION, VETERAN AFFAIRS, AND RELATED AGENCIES: FY 2013 APPROPRIATIONS 1 (2012).

⁴ Press Release, *supra* note 1.

⁵ See generally OSCAR R. GONZALES, CONG. RESEARCH SERV., RL34709, ECONOMIC DEVELOPMENT ASSISTANCE FOR COMMUNITIES AFFECTED BY EMPLOYMENT CHANGES DUE TO MILITARY BASE CLOSURES (BRAC) 1 (2011).

Housing Privatization Initiative has substantially increased the quality of military family housing while saving appropriated funds. In another example, Congress has authorized the establishment of congressionally chartered organizations; this legislatively conferred status has allowed these entities to use federal and nonfederal monies to build and maintain their infrastructure.

Additionally, Congress has strongly supported the Fisher House program and has allowed it to combine appropriated and donor funds to assist wounded servicemembers and their families. Finally, Congress—noting a severe lack of appropriated funds—enacted a law that specifically *required* the use of private-sector funds to supplement appropriations set aside for the presidential-library program. In light of these examples, the conclusion is clear: it is time to extend more of these public-private partnership opportunities to MILCON so the military can fully benefit from these synergistic relationships.

II. Indicators of Decreased MILCON Appropriations

A. The Reality of Sequestration and Inadequate MILCON Funding

The 2013 Budget Control Act (BCA)⁶ required across-the-board budgetary cuts to all non-exempted executive agencies and also required the DoD to modify its budget downward to FY 2008 spending levels.⁷ The BCA capped future military expenditures to ensure the defense budget “remain[s] essentially flat for the next five years.”⁸ In response, Secretary of Defense Chuck Hagel commented, “To implement the steep and abrupt reductions that have been required under Sequestration, we’ve had to make very difficult decisions to reduce, stop and defer many activities and programs that keep our military prepared to fight.”⁹

⁶ 2 U.S.C.A. §901a (West 2013).

⁷ Todd Harrison, *Center for Strategic and Budgetary Assessments: Analysis of the FY 2013 Defense Budget and Sequestration*, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENTS 3 (2012), <http://www.csbaonline.org/wp-content/uploads/2012/08/Analysis-of-the-FY-2013-Defese-Budget.pdf>. Mr. Harrison is a senior fellow for Defense Budget Studies, Center for Strategic and Budgetary Assessments; his biography is available at <http://www.csbaonline.org/about/people/tharrison/>.

⁸ *Id.* at 17.

⁹ Amanda Terkel, *Sequestration Damaging to Military Readiness*, HUFFINGTON POST, Jul. 22, 2013, http://www.huffingtonpost.com/2013/07/22/sequestration-military-readiness_n_3635686.html.

Secretary Hagel's comments suggest that the DoD will have to continue protecting the United States with far fewer resources than in past years.

The joint chiefs testified to Congress on sequestration's projected impacts.¹⁰ While military personnel (MILPER) and operations and maintenance (O&M) appropriations received intense focus, the service chiefs also addressed the repercussions of MILCON cuts.¹¹ The service chiefs warned of the long-term impacts of decreased funding for ship-building, dormitory and barracks upgrades, and training-range construction; in the future, the military's overall quality of life will decline and its ability to achieve mission objectives will degrade.¹² Congress also learned that infrastructure issues—specifically the quality of life aspects of both family housing and military work centers—were common concerns to all the services.¹³ But even with those warnings, MILCON funding is nevertheless projected to decrease.¹⁴

Beyond the testimony of the joint chiefs, the numbers demonstrate sequestration's impact. In May of 2013, for example, the United States House Appropriations Committee released the initial FY 2014 Military Construction and Veterans Affairs Appropriations bill for subcommittee review. This legislation specifically addressed cuts to family housing, military medical facilities, and DoD schools. Congress proposed a \$646 million cut to MILCON programs, encompassing large, small, and rehabilitation projects. The bill additionally cut funding for ten proposed military-construction projects and reduced funding for six others. In addition, military family housing lost \$106 million from the previous fiscal year, the VA construction fund did not provide funding for any major new hospital construction projects, and the Arlington National Cemetery incurred a \$93.9 million cut from the previous fiscal year.¹⁵ The final 2014 MILCON and Veterans Affairs Appropriation Bill

¹⁰ Amaani Lyle, *Service Chiefs Testify on Risks of Sequestration*, ARMED FORCES PRESS SERV., <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/467469/service-chiefs-testify-on-risks-of-sequestration.aspx> (last visited Nov. 7, 2013).

¹¹ *Id.*

¹² *Id.*

¹³ DANIEL H. ELSE, CONG. RESEARCH SERV., RL31039, *MILITARY HOUSING PRIVATIZATION INITIATIVE: BACKGROUND AND ISSUES 2* (2001).

¹⁴ Andrew Tightman, *Top Brass Claims Personnel Costs are Swamping DoD, but Budget Figures Say Otherwise*, ARMY TIMES, Nov. 24, 2013, <http://www.armytimes.com/article/20131124/BENEFITS02/311240019>.

¹⁵ Press Release, *supra* note 1.

approved a spending level that fell \$1.4 billion below the President's request for these programs.¹⁶

The impacts are profound; twenty-three percent in FY 13 and beyond, outpacing the other DoD appropriation reductions.¹⁷ Congress has permitted the MILPER, research and development, and O&M budgets some funding flexibility, while MILCON has remained rather static.¹⁸ These facts demonstrate a stark future when the military may have to scale back future MILCON plans.¹⁹ With decreased appropriations, adequate MILCON funding is becoming an unfortunate and unevenly impacted casualty of fiscal austerity.

B. Base Realignment and Closure Initiatives and Global Realignment

Base Realignment and Closure (BRAC) initiatives and MILCON budgets are intertwined concepts; the shuffling and consolidating of personnel, goods, and equipment are long and costly endeavors. Since the 2005 Defense BRAC implementation, the DoD has had to build new infrastructure for displaced missions and personnel while simultaneously winding down operations on bases facing closure.²⁰ In an incredibly lengthy appropriations process, President Obama requested \$34.5 billion in the 2011 MILCON budget to fund the 2005 BRAC's recommendations.²¹

Rather than focusing on base closures, the 2005 BRAC instead acted as a springboard for a new expeditionary force concept and thus concentrated more on shifting forces and installation assets for rapid

¹⁶ Press Release, House Passes Fiscal Year 2014 Military Construction and Veterans Affairs Appropriation Bill (Jun 4, 2013), available at <http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=336730>.

¹⁷ See Harrison, *supra* note 7, at 4 (emphasizing the unequal budget cuts across the DoD's various appropriations). Mr. Harrison proposes that this is a result of long-range strategic planning emphasizing technology while leveraging a smaller total force and already existing MILCON infrastructure. Research, Development, Test, and Evaluation (RDT&E) funding is reduced by three percent. Military Personnel funding is seven percent less from previously accounted reductions in force, and the Operations and Maintenance (O&M) budget receives a four-percent reduction. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ DANIEL H. ELSE, CONG. RESEARCH SERV., R42376, MILITARY CONSTRUCTION: A SNAPSHOT OF THE PRESIDENT'S FY 2013 APPROPRIATIONS REQUEST 9 (2012).

²¹ *Id.*

global mobility.²² The GAO reported that many bases would gain missions and over 123,000 additional personnel.²³ For military families, the consequences of the BRAC pose significant challenges in ensuring the availability of affordable and adequate housing.²⁴ Simultaneously, the BRAC would leave a large footprint of unused infrastructure that would require continued care and upkeep.²⁵ In fact, the 2005 BRAC only eliminated a small percentage of excess DoD infrastructure.²⁶ Until BRAC rounds are coupled with corresponding military troop reductions, BRAC measures will only increase demands on MILCON appropriations.²⁷ Thus, the 2005 BRAC has increased the need for more infrastructure, thereby increasing the demand for MILCON funding.²⁸

C. Military Housing and Quality of Life

The DoD has recognized military family housing to be patently inadequate.²⁹ The military owns over 257,000 individual units worldwide, and they have fallen into various states of disrepair.³⁰ In the span of 30 years, over 50 percent of those units have lacked adequate maintenance and modernization.³¹ Under the traditional approach to MILCON funding, it would cost \$25 billion in appropriations and take over 20 years to improve that housing.³² Under these projections, the DoD—at least under its conventional funding procedures—would incur astronomical costs to provide statutorily required quality housing that is “comparable to that available in the local community.”³³

²² GONZALES, *supra* note 5, at 1.

²³ *Id.*

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-352, MILITARY HOUSING PRIVATIZATION: DoD FACES NEW CHALLENGES DUE TO SIGNIFICANT GROWTH AT SOME INSTALLATIONS AND RECENT TURMOIL IN THE FINANCIAL MARKETS 26 (2009) [hereinafter GAO-09-352].

²⁵ GONZALES, *supra* note 5, at 1.

²⁶ ELSE, *supra* note 19, at 11.

²⁷ *Id.* at 10.

²⁸ *Id.*

²⁹ GAO-09-352, *supra* note 24, at 5.

³⁰ *Military Housing Privatization*, OFF. OF THE DEPUTY UNDER SEC'Y OF DEF. INSTALLATIONS & ENV'T, <http://www.acq.osd.mil/housing/faqs.htm#4> (last visited Mar. 19, 2014).

³¹ *Id.*

³² *Id.*

³³ NAT'L ASS'N OF HOME BUILDERS, MILITARY FAMILY HOUSING STANDARDS STUDY 3 (2001), <http://www.acq.osd.mil/housing/docs/FH%20Stds%20Study%20-Rev%20Oct%202003.pdf>.

Additionally, the requirement to keep pace with the private sector is not a static target. Up until 2001, legislation enacted in the 1970s mandated the *maximum* limits for the construction and improvements of family housing based on pay grade and the number of occupants per household.³⁴ Relying on authority that had remained unchanged for three decades, the DoD essentially treated square footage as the only variable influencing quality of life.³⁵ While the amount of livable space for a military family is important, Congress wanted to expand the definition of what constitutes quality of life.³⁶

To remediate these housing inadequacies, Congress crafted legislation to help the military build and rehabilitate military housing “more rapidly than was possible using traditional funding and military construction methods.”³⁷ A complete departure from previous legislation, Congress suggested that newly constructed or renovated properties should not focus purely on square footage but instead on broad notions of room pattern and floor area that is comparable to local private communities.³⁸ Congress also authorized the Military Housing Privatization Initiative (MHPI) to incorporate appropriated funds with private investment to create adequate family housing.³⁹

In sum, this is an era of fiscal austerity. And this is a compelling reason to immediately explore alternative funding streams. Congress should allow the DoD to use private partnerships and donor gifts to complete underfunded MILCON projects. But to do so, Congress must also examine the restrictions that the ADA’s augmentation prohibition imposes upon the DoD.

III. Fiscal Law

At first glance, allowing the combination of appropriations with nonfederal sources to fund projects seems relatively simple and could save taxpayer money. This type of legislation, however, is the exception and not the rule. This is because congressional control of appropriations,

³⁴ *Id.* at ix (2001).

³⁵ *Id.*

³⁶ *Id.*

³⁷ GAO-09-352, *supra* note 24, at 9.

³⁸ HOME BUILDERS, *supra* note 33, at ix.

³⁹ ELSE, *supra* note 13, at 2.

generally, and the ADA, specifically, act to discourage innovative ways of funding new MILCON projects.

A. The Appropriations Clause

The United States Constitution states, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁴⁰ This clause gives the Congress the “power of the purse” and acts as a check on executive power.⁴¹ Throughout history, the executive has generally tested Congress’s appropriation power in two ways. First, the executive has obligated funds in excess of its allotted appropriations, thereby leaving Congress little choice but to pay any overruns.⁴² Second, the executive has mixed monies from multiple appropriations to fund a singular project.⁴³ Such actions tend to undermine congressional authority to control the expenditure of monies to fund the executive.⁴⁴

Furthermore, the United States Supreme Court has affirmed Congress’s “power of the purse.” In 1850, the Court succinctly summarized Congress’s budgetary control: “However much money may be in the Treasury at one time, not a dollar of it may be used in the payment of any thing not . . . previously [appropriated]. Any other course would give . . . dangerous discretion.”⁴⁵ Over 80 years later, the Court elaborated that Congress’s appropriation process is “a restriction upon the disbursing authority of the Executive department” and that “no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”⁴⁶

Finally, the Court has held that “Congress may attach conditions on the receipt of federal funds” as long as those conditions are “related to a

⁴⁰ U.S. CONST. art. I, § 9, cl. 7.

⁴¹ Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1343 (1988).

⁴² Raymond Natter, *Why Furloughed Federal Employees Cannot Volunteer to Provide Service to the Government Without Pay* 1–2 (2013) (unpublished manuscript), available at http://www.bsnlawfirm.com/newsletter/OP0413_Natter.pdf.

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 1.

⁴⁵ *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

⁴⁶ *See Cincinnati Soap Co. v. United States*, 301 U.S. 308, 320 (1937) (reinforcing that congressional control of funding through the appropriation process as settled in *Reeside*); *see also* *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (stating that any money, the rights of which have been vested in the United States and housed in the Treasury, can only be given to the original owner through appropriation by law).

national concern.”⁴⁷ Congress can require that its appropriations be (1) used for a specific purpose, (2) used only during a particular period of time, or (3) capped at a maximum amount. These restrictions allow Congress to effectuate policy objectives and prioritize federal programs.⁴⁸ When executive agencies use money in ways contrary to these principles, various violations of the Anti-deficiency Act (ADA) may occur.

B. The ADA, Appropriated Funds, and MILCON

The ADA is a body of statutory authority that acts as a safeguard against potential executive abuses of appropriated funds.⁴⁹ It prohibits executive agencies from “augmenting” funds beyond congressionally appropriated amounts.⁵⁰ Unless Congress provides an exception, agencies may not supplement their appropriations with outside sources of money.⁵¹ Any funds received from outside sources must immediately be deposited with the Treasury.⁵² The DoD is subject to these rules, and MILCON funding follows the appropriations process.

Military construction projects are funded through Title I and Title IV of the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act.⁵³ Military construction is further approved and delineated through the annual appropriations cycle in the National Defense Authorization Act (NDAA).⁵⁴ The NDAA includes the military construction, family housing, DoD Housing Improvement Fund, and

⁴⁷ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

⁴⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–5 (3rd ed. 2004).

⁴⁹ See 10 U.S.C.A. § 2601 (West 2014); 1 W. FED. ADMIN. PRAC. § 531 (West 2014) (providing statutory and administrative guidance of how 31 U.S.C.A. §§ 1341, 1342, and 1511–17 work together to form the body of law known as the ADA).

⁵⁰ *Carrier-Provided Computers for Electronically Filing Tariffs With the Interstate Com. Comm'n*, B-239903, 1991 WL 135554 (Comp. Gen. June 28, 1991). If a specific amount has been appropriated for a project, but a governmental agency then adds money provided from another source, this could be viewed as an impermissible MILCON augmentation in violation of the Anti-deficiency Act (ADA).

⁵¹ *Id.*

⁵² 31 U.S.C.A. § 3302 (West 2014).

⁵³ ELSE, *supra* note 20, at 7.

⁵⁴ *Id.* at 8.

BRAC MILCON appropriations.⁵⁵ The amounts assigned to these appropriations are congressionally set. If the DoD accepted additional funds from outside of these appropriations, this would constitute augmentation. Without other statutory authority, the DoD must use only these appropriations to fund MILCON activities to support the total force.⁵⁶

IV. The United States Air Force Academy and the Anti-deficiency Act

The United States Air Force Academy (USAFA) dealt squarely with the ADA and the augmentation issue. While the ADA does not prohibit military partnerships with the private sector in a general sense, its practical effect discourages these very useful relationships. The ADA consequently impeded the building of USAFA's Center for Character and Leadership Development (CCLD).⁵⁷

The CCLD's initial design was completed in December 2010 and contract proposals began in March 2011, but the initial bids came back much higher than anticipated, averaging \$10 million higher than the government's estimate.⁵⁸ The CCLD's roof design constituted the majority of the cost overrun; after multiple design revisions, the project's design was consequently curtailed, which resulted in a base bid that satisfied the appropriated amount.⁵⁹ The USAFA Endowment then presented a \$12 million gift offer to the Air Force, \$8 million of which was made available to fund the design with the originally envisioned roof.⁶⁰

⁵⁵ *Id.* at 6. Additional subaccounts under the Military Construction Appropriations Account include the North Atlantic Treaty Organization Security Investment Program, The Homeowners Assistance Fund, and Chemical Demilitarization Construction. *Id.*

⁵⁶ *Id.* at 7.

⁵⁷ See *The Center for Character & Leadership Development*, U.S. AIR FORCE ACAD., <http://www.usafa.edu/Commandant/cwc/index.cfm?catname=cwc> (providing a description of the CCLD's stated purpose, mission, and vision statements). The CCLD serves as a focal point of USAFA's commitment to developing leaders of character.

⁵⁸ See Memorandum from HQ USAFA/JA Legal Office to HQ USAFA/A7, subject: Clarification of Issues Related to Design of the Donor Component of Center for Character and Leadership Development (CCLD) Project (15 Sept. 2011) [hereinafter HQ USAFA/JA Memo] (on file with the author) (outlining the design and fiscal issues surrounding the CCLD project).

⁵⁹ *Id.*

⁶⁰ *Id.*

USAFA accepted the gift money pursuant to 10 U.S.C. § 2601, which states:

The [service] Secretary concerned may accept, hold, administer, and spend any gift, devise, or bequest of real property, personal property, or money made on the condition that the gift, devise, or bequest be used for the benefit, or in connection with, the establishment, operation, or maintenance, of a school, hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of the Secretary.⁶¹

Even with the statute's expansive language, USAFA found itself potentially running afoul of the ADA: namely, the use of gift money to augment a specific appropriation, which had been specifically enacted to build the CCLD.⁶² As such, USAFA could certainly accept the donor money but could not use it in the most effective way to complete the project.⁶³ In times past, USAFA used such monies to upgrade items such as carpeting, lighting, and other fixtures to existing structures. In the case of this particular project, USAFA would be leveraging donor money in a substantial upgrade to the CCLD. To avoid augmentation, USAFA spent several hundred thousand dollars and countless hours designing alternate roof plans that were never used.⁶⁴ That money and time could have been better used to perfect the original project that was ultimately funded with a combination of appropriated and gift monies.⁶⁵ Military installations truly benefit and save money when they are allowed to work with interested donors and private partnerships.⁶⁶ They should not be dissuaded from this practice because of unnecessary ADA hurdles. The following examples demonstrate the extraordinary initiatives that can be

⁶¹ 10 U.S.C.A. § 2601(a) (West 2014).

⁶² See 10 U.S.C.A. § 2601(2) (providing that gifts shall not be accepted if the acceptance thereof is inconsistent with applicable law and regulations).

⁶³ See HQ USAFA/JA Memo, *supra* note 58 (opining that it was unable to find a statutory exception that would allow augmentation of the MILCON appropriation for the CCLD).

⁶⁴ Telephone interview with Mr. Brian X. Bush, Senior Legal Advisor, HQ USAFA/JA (Sept. 23 2013).

⁶⁵ *Id.*

⁶⁶ USAFA has access to a number of alternative funding streams provided in the form of § 501(c)(3) non-profit organizations in which donors and benefactors can contribute. Information on the USAFA Endowment and the USAFA Association of Graduates, which provide such support, can be found at <http://www.usafa.org/AOG>.

achieved when Congress grants greater freedom to innovate with the private sector.

V. Potential Alternatives and Challenges: Models for Future Funding Streams

In certain instances, Congress has allowed the combination of appropriated funds with private money to complete governmental buildings, and these examples could serve as templates for wider MILCON applications. For instance, Congress approved the Military Housing Privatization Initiative (MHPI) to combine appropriated funds with private enterprise to improve family housing.⁶⁷ Second, Congress has created congressionally chartered organizations (CCOs) that can receive financial support from federal and nonfederal resources.⁶⁸ Third, the Fisher House Program combines appropriations with donor funds to provide wounded servicemembers and their families a home-like environment for convalescence.⁶⁹ Finally, the enactment of the Presidential Library Act, despite that program's importance to the public good, expressly requires private sector funds to supplement taxpayer-backed appropriations. These are models that could be used to mitigate the loss of appropriated funds.

A. The Military Housing Privatization Initiative

In 1996, Congress authorized the MHPI as a speedy and economical solution to create housing for military members and their families by leveraging appropriated funds with private investment.⁷⁰ In a very particularized sector of MILCON, the MHPI sought to increase the quantity and quality of family housing offered on DoD installations.⁷¹ The MHPI gave the DoD the ability "to entice private investment by

⁶⁷ ELSE, *supra* note 13, at 1–2.

⁶⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-549, CONGRESSIONALLY CHARTERED ORGANIZATIONS: KEY PRINCIPLES FOR LEVERAGING NONFEDERAL RESOURCES 1 (2013).

⁶⁹ THE FISHER HOUSE, <http://www.fisherhouse.org> (last visited Mar. 18, 2014).

⁷⁰ National Defense Authorization Act for FY 1996, Pub. L. No. 104-06, §§ 2801 *et seq.*, 110 Stat. 186 *et seq.* (codified at 10 U.S.C. §§ 2871-2885 (2000)), *amended by* National Defense Authorization Act for FY 2001, Pub. L. No. 106-398, § 2806.

⁷¹ ELSE, *supra* note 13, at 3–4.

encouraging it to act like private enterprise” when contracting for the construction of military housing.⁷²

The MHPI includes a variety of “alternative authorizations” as real estate, investment, and other financial tools, which effectively allow the DoD to adjust the amount needed in an appropriation to fund a family housing project.⁷³ The services have used these alternative authorizations to bargain with contracting offerors, giving the government and the contractor increased contracting flexibility.⁷⁴ Ultimately, the DoD can exercise any combination of these authorizations to structure the contractual terms with the private sector.⁷⁵

While the MHPI shows incredible promise and effectively combines appropriated funds and private enterprise, some of the outcomes have been mixed. For instance, while the GAO’s review of the MHPI revealed that seventy percent of the privatization projects had exceeded the DoD’s expected occupancy rate of ninety percent, all the services also had a number that fell below this goal.⁷⁶ The GAO reported that the DoD made significant progress in transferring inadequate military family housing from its inventory, but the privatization process had taken longer than anticipated.⁷⁷

The GAO also noted that these partnerships have the potential to expose the DoD to unpredictable market forces. Privatization is essentially a business venture with the contractor that carries inherent risk.⁷⁸ A down economy could endanger the overall aims of ensuring adequate quality of life for servicemembers and their families.⁷⁹ But

⁷² *Id.* at 4.

⁷³ *Id.* at 5. “Alternative authorizations” allow the DoD to bargain with potential contractors and encourage participation by offering a variety of incentives. There are a variety of alternative authorizations, including, *inter alia*, the conveyance of federal property to private ownership, relaxation of federal building specifications, direct deposits of rents collected, Government-backed loan guarantees for construction and guarantees for minimum occupancy rates. *Id.*

⁷⁴ *Id.* at 10.

⁷⁵ GAO-09-352, *supra* note 24, at 10.

⁷⁶ *Id.* at 6. The GAO noted that although many of the ongoing projects were only slightly below the DoD’s expected occupancy rate of 90%, the services reported that even slightly lower-than-expected occupancy rates could lead to insufficient revenue generation to meet multiple project expenses. *Id.* at 21.

⁷⁷ *Id.* at 17.

⁷⁸ *Id.* at 37.

⁷⁹ *Id.*

overall, the MHPI has improved the living conditions for military members, while simultaneously reducing the need for appropriated funds.⁸⁰ Showing its approval of the MHPI, Congress made the MHPI legislative authorities permanent in 2004.⁸¹ With the future of full appropriations in doubt, the MHPI concept should be expanded beyond family housing to other MILCON obligations.

B. Congressionally Chartered Organizations

Another solution to allow the combination of MILCON and private funds could be accomplished through the creation of a congressionally chartered organization (CCO). These organizations take on many forms and functions, and are probably best known for promoting patriotic, charitable, educational, and other public good activities, but they are not limited to those purposes.⁸² All CCOs are entities that are in part privately funded but operate under some level of government oversight, either through appointed board leadership or promulgated regulation.⁸³ They also possess broad authority to receive financial support from both federal and nonfederal resources to meet their core missions.⁸⁴

Congress lauded a number of CCOs for their business practices and promoted their expansions so they could aid the government in the construction and care for federal buildings.⁸⁵ Touting that “[CCOs] serve many diverse purposes and benefit from broad bipartisan support,” the assigned House Committee highlighted the Presidio Army Post as an example.⁸⁶ The Presidio Army Post successfully converted a series of failing buildings into a set of mixed-use, financially independent facilities, and the effort saved taxpayers \$1 billion in capital costs and \$45 million in the Post’s annual operating costs.⁸⁷

⁸⁰ *Id.* at 16–17.

⁸¹ *Military Housing Privatization*, *supra* note 29.

⁸² RONALD C. MOE, CONG. RESEARCH SERV., RL30340, CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS (“TITLE 36 CORPORATIONS”): WHAT THEY ARE AND HOW CONGRESS TREATS THEM 1 (2004).

⁸³ GAO-13-549, *supra* note 68, at 4–5.

⁸⁴ *Id.* at 2.

⁸⁵ H.R. REP. NO. 112-151 (2011), *reprinted in* 2011 WL 2853753.

⁸⁶ *Id.*

⁸⁷ *Id.*

But with a proposed expansion of CCOs to encompass a wider array of building construction, Congress expressed concern:

An underlying question is whether these . . . are areas that should be left to the private sector or whether they are examples of public private partnerships that enable the government to cost-share with the private sector. Beneath this question is the fundamental issue, “What ought government do?” The same question also applies to prospective museums and presidential memorials authorized by Congress to be built on or near the National Mall. The costs associated with constructing these museums and memorials place enormous additional pressure on already tight budgets to operate, maintain, and renovate existing assets and facilities.⁸⁸

This issue admits no simple resolution. Admittedly, the projects involved in CCOs are generally considered public interest, but the benefits of these partnerships are undeniable. The GAO studied four successful CCO programs—the Smithsonian Institute, the National Gallery of Art, the United States Holocaust Memorial Museum, and the Presidio Trust—and compiled six principles to guide future CCOs in leveraging resources through nonfederal partners.⁸⁹ These principles include the following: (1) make partnering decisions in line with the mission, (2) ensure top leadership support for partnering arrangements, (3) assess and manage risks, (4) select complementary partners and appropriate projects, (5) manage partnering arrangements, and (6) evaluate the partnering arrangements.⁹⁰ Applying these principles, the concern raised by Congress can be, to a degree, mitigated.

These principles that constitute successful CCOs could easily be applied in a military context, similarly to how the MHPI has fundamentally changed the notions of what the military must do alone and what can be improved with public-private partnerships. The military is already involved in the CCO process, but in a very limited fashion.⁹¹

⁸⁸ *Id.*

⁸⁹ GAO-13-549, *supra* note 68, at 5.

⁹⁰ *Id.* at 17.

⁹¹ MOE, *supra* note 82, at 6. From a military context, Congress and the DoD have previously conferred CCO status upon the Civilian Marksmanship Program. Both the Air Force Sergeants Association and the American GI Forum have either applied or been accepted into CCO status under the Title 36 non-profit organization. *Id.* at 13.

Expanding the military's footprint into the CCO construct would synergistically save taxpayer money while giving private enterprise an interest in military operations.

C. The Fisher House and the Non-appropriated Fund Instrumentality

The Fisher House presents yet another funding model that the military could use to fully leverage the private sector. To provide the families of wounded military members temporary lodging during times of convalescence, Congress drafted unique legislation for the Fisher House program, where new home construction could be funded in part with appropriations.⁹² On the whole, the Fisher House program consists of gift money, non-appropriated funds, and appropriated funds; when a Fisher House is built and gifted to the military, it is supported through congressionally approved non-appropriated funds and through donor money.⁹³

Like homes built under the MHPI, Fisher Houses are often found on military reservations. Under 10 U.S.C. § 2493, Fisher Houses are to be "located in proximity to a health care facility of the Army, the Air Force, or the Navy,"⁹⁴ so they may provide families convenient access to their wounded servicemembers. Structured as a non-appropriated fund instrumentality (NAFI), Fisher Houses can accept money, property, and services while also collecting fees for their use.⁹⁵

As a general matter, NAFIs like the Fisher House provide the DoD a limited ability to conduct certain base functions as a business enterprise.⁹⁶ It would appear as though the NAFI could provide the final solution to the MILCON augmentation problem; the DoDI plainly states, "NAFI program objectives are implemented using a combination of APF, NAF, and private resources."⁹⁷ Furthermore, the NAFI Group IV and V

⁹² THE FISHER HOUSE, <http://www.fisherhouse.org/about/faqs> (last visited Mar. 18, 2014).

⁹³ *Id.*

⁹⁴ Fisher Houses: Administration as Nonappropriated Fund Instrumentality, 10 U.S.C.A. § 2493 (West 2013).

⁹⁵ *Id.*

⁹⁶ U.S. DEP'T OF DEF., INSTR. 1015.15, ESTABLISHMENT, MGMT., AND CONTROL OF NONAPPROPRIATED FUND INSTRUMENTALITIES AND FIN. MGMT. OF SUPPORTING RES. para. 5.7.12.1.1 (17 Oct. 2006) [hereinafter DoDI 1015.15].

⁹⁷ *Id.* para. 5.2.

programs fund a variety of MILCON-related activities, such as temporary duty-related lodging, lodging facilities connected to permanent changes of station, and medical treatment facility support.⁹⁸ Upon a closer inspection of a NAFI's scope, however, it is easy to see that NAFIs have not been leveraged to their full potential for all MILCON projects.

NAFIs are usually limited to very particularized programs, such as military morale programs, golf course and bowling center care, child development, and exchange concessionaires.⁹⁹ Even Group IV and Group V NAFIs—which are directly connected to the construction of buildings on military installations—tend to cover only non-essential billeting functions.¹⁰⁰ The NAFIs have not been fully exploited to address work centers and other mission-oriented buildings. If appropriations continue to dwindle and BRACs act to expand the military's footprint, an expansion of NAFI programs could provide much needed support to all military building initiatives.

D. The Presidential Library Program and Section 501(c)(3) Organizations

The 1955 Presidential Library Act (PLA) is yet another example of legislation that encourages a combination of congressional appropriations, gift funds, and private sources to meet a public good.¹⁰¹ Congress acknowledged that presidential libraries serve a vital public interest, but it also found that funding them could be quite difficult. The presidential library system cost only \$63,745 in 1955 but ballooned to \$15,734,000 in 1985.¹⁰² In 1986, Congress amended the PLA to encourage private funding streams to help shift the construction and operating costs of these libraries from the taxpayer to endowment funds.¹⁰³ Since then, presidential libraries have enjoyed partnerships—

⁹⁸ *Id.* para. 5.2.1.3.

⁹⁹ *See id.* para. 5.2.1.1–5.2.1.2 (describing “Group I and Group II” NAFI activities).

¹⁰⁰ *Id.* para. 5.2.1.3.

¹⁰¹ WENDY R. GINSBERG & ERIKA L. LUNDER, CONG. RESEARCH SERV., R41513, THE PRESIDENTIAL LIBRARIES ACT AND THE ESTABLISHMENT OF PRESIDENTIAL LIBRARIES 1 (2010).

¹⁰² *Id.* at 10.

¹⁰³ *Id.*

usually with § 501(c)(3) charitable organizations—to fund purchases of land, construction, and equipment.¹⁰⁴

Subsequent amendments to the PLA not only indicate the program’s overall success using donor funds but also show a growing congressional reliance on this construct. Congress increased the original private funding requirement from 20% to 40% in 2003. In 2008, Congress again increased the 40% endowment threshold to 60% for overall project funding. Strikingly, the only area where Congress had required appropriated funding in lieu of endowments—the preservation of presidential documents, deemed an inherently governmental function to remain with the National Archives—has sorely languished. In fact, Congress challenged the National Archives to act more like its private endowment donors and find more ways to lower its costs while performing its document-preserving function.¹⁰⁵

The PLA plainly states that appropriated funds are in short supply, and the reluctance to provide taxpayer-backed support will continue well into the future. This exact scenario now falls squarely on the DoD. The PLA allows the government to partner with private entities to create buildings that are suitable for the public and serve a common good. As seen with the CCLD at USAFA, this analogous partnering framework worked well in a MILCON context, but there were far too many barriers and ADA concerns. These successes should serve as a catalyst to encourage more statutorily acknowledged military-private ventures and future donor relationships to accomplish MILCON projects.

VI. Conclusion

Adequate MILCON funding provides a sound infrastructure to support all service-members from cradle to grave. Military hospitals, DoD schools, work centers, family housing, the VA, and military cemeteries all depend on fully funded MILCON measures. As the United States enters a time of fiscal austerity and appropriations continue to diminish, the military’s infrastructure is at grave risk. The solution to this problem is clear: Congress needs to statutorily expand the DoD’s ability to leverage the private sector and its resources.

¹⁰⁴ *Id.* at 15.

¹⁰⁵ *Id.* at 14.

Without new authority, the ADA will continue to discourage the military from fully engaging in partnerships or using donor funds to accomplish MILCON goals. The difficulties USAFA experienced in contracting for the CCLD plainly identify the ADA's dissuasive effect. It is a shame that USAFA had to waste money creating multiple proposals to try and satisfy the ADA, especially when USAFA's 501(c)(3) donors were simply trying to help and not usurp congressional control of appropriated funds.

This type of statutory authority is not a novel idea; it only needs to be extended for wider MILCON applications. Congress has encouraged these activities with various agencies in the past, and the results have been astounding. Because of the MHPI, the DoD and the private sector have raised the quality and quantity of military housing, while simultaneously lowering the dependence on appropriated funds. Organizations such as the Smithsonian Institute and the Presidio Trust have used their CCO status to combine donor and appropriated funds to build and renovate multiple facilities. Additional NAFI programs like the Fisher House could allow the DoD to use appropriated, non-appropriated, and private funds in the most effective ways possible to complete MILCON projects. Finally, the PLA exemplifies why promoting partnerships with the private sector is so critical to MILCON. The PLA removed the ADA augmentation threat, saved millions of dollars in appropriated funds, and ensured the successful construction and maintenance of numerous buildings.

In the final analysis, fiscal austerity will remain painfully persistent in the years to come. But the solutions are clear, and multiple examples provide a roadmap for new legislation. With new statutory authority based on these examples, Congress has the power to unshackle the DoD from the unintended consequences of the ADA. Congress can unlock the potential that exists between the military and private sector for future MILCON projects. When that occurs, the DoD's infrastructure will be secured, and the military can then focus on its most important mission: to protect the United States of America.