

## Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand

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*The war on terror [will] be a lengthy war, a different kind of war, fought on many fronts in many places . . . . This will take time and require sacrifice. Yet we will do what is necessary, we will spend what is necessary, to achieve this essential victory in the war on terror, to promote freedom, and to make our own nation more secure.*<sup>2</sup>

### Introduction

The Global War on Terror (GWOT) has required U.S. forces to re-deploy from their Cold War garrisons to new battlefields throughout the world.<sup>3</sup> Commanders have quickly built small, temporary bases to support military forces in underdeveloped countries worldwide. Some of these bases are required for staging, logistics, and training, while others directly support joint and combined combat operations. While U.S. forces have had great tactical success in meeting new threats, the legal framework for funding military construction has not adapted to the new security environment. Maintaining the initiative in the GWOT requires agile forces able to deploy, operate, and sustain themselves on short notice anywhere in the world. Military construction funding, however, remains mired in a multi-year budgeting cycle, with appropriations geared toward maintaining the existing Cold War infrastructure.

Commanders want to avoid this cumbersome process by using their operations and maintenance (O&M) funds to pay for combat and contingency construction. Fiscal law, however, generally prevents the use of O&M dollars to fund military construction projects that cost more than \$750,000 or more than \$1.5 million to correct threats to life, health, or safety.<sup>4</sup> Faced with this constraint, commanders often pressure their operational lawyers to find fiscal law solutions to satisfy mission requirements.<sup>5</sup> Judge advocates (JA) may be tempted to interpret fiscal law creatively, funding projects with O&M dollars rather than more scarce military construction (MILCON) funds. Given the congressional response to previous attempts at finessing fiscal law, however, such a course of action would be unwise and ultimately counterproductive. The solution to the problem requires clear recognition of the conflicting interests of the legislative and the executive branches. Any lasting solution must balance commanders' responsibilities for mission accomplishment with Congress's responsibility to ensure public funds are wisely spent.

This article begins by identifying the constitutional tension between Congress's power of the purse and the President's executive power as the Commander-in-Chief. The article then examines the rise and fall of the *Reres* Doctrine, which attempted to solve the problem of funding combat and contingency-related construction.<sup>6</sup> Finally, the article suggests military approaches and legislative alternatives that can assist in reconciling these competing interests in ways that will support ultimate victory in the GWOT.

### Checks and Balances: The Constitutional Tension

In a 1998 *Military Law Review* article, Colonel (COL) Richard D. Rosen presented the operational lawyer's dilemma concerning O&M funding of military construction, as well as the inevitable conclusion that fiscal law requires.

To operational lawyers, the proposition that a presidential spending authority exists independent of Congress is particularly alluring. During military operations, intense pressure exists to find fiscal

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<sup>2</sup> President's Address to the Nation on the War on Terror, 39 WEEKLY COMP. PRES. DOC. 1164 (Sept. 7, 2003).

<sup>3</sup> "From Pakistan to the Philippines to the Horn of Africa, we are hunting down al Qaeda killers." *Id.* at 517 (quoting the President's Remarks from the USS *Abraham Lincoln* at Sea off the Coast of San Diego, California, on 1 May 2003).

<sup>4</sup> 10 U.S.C. S. § 2805(c)(1) (LEXIS 2005). This article refers to this as the statutory O&M threshold throughout.

<sup>5</sup> "The [staff judge advocate's] contract law responsibilities include . . . providing legal advice to the command concerning battlefield acquisition, contingency contracting, Logistics Civil Augmentation Program (LOGCAP) . . . and overseas real estate and construction . . . . The [staff judge advocate's] fiscal responsibilities include furnishing legal advice on the proper use and expenditure of funds." U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-6 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>6</sup> See *infra* note 48.

tools—any fiscal tools—to accomplish the mission. The notion that either congressional inaction or congressionally prescribed prohibitions may be disregarded is indeed seductive. If the proposition is sustainable, it would greatly simplify the operational lawyer’s job, ensuring that, at least in situations the President deems essential to national security, funding authority will always be available . . . . [H]owever, neither the Constitution nor the nation’s experience supports such a conclusion. Congress’s power to appropriate—while not plenary—is certainly exclusive.<sup>7</sup>

The Constitution provides the foundation for understanding why the military must conduct its operations within the constraints of fiscal law, even when the need to accomplish the mission seems paramount. To secure liberty, the Constitution first limits the power of government to certain spheres. To prevent the abuse of even these limited powers, the Constitution then divides the government’s powers through a system of checks and balances. As one of the Founding Fathers explained:

[S]eparate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty . . . . But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>8</sup>

The current problems encountered by commanders exasperated by fiscal constraints are therefore not unique to the GWOT. This tension between Congress and the executive branch is an integral and necessary feature of our political system, and its resolution requires identifying and satisfying the legitimate interests of both branches of government.

### The Congressional Power of the Purse

Article I of the Constitution vests the power of the purse in Congress. “No money shall be drawn from the treasury, but in consequence of Appropriations made by law.”<sup>9</sup> The power of the purse is Congress’s most powerful institutional check on the executive branch. For the Founding Fathers, this legislative check on the executive branch, and especially the President’s capacity to make war, was essential to the preservation of liberty.<sup>10</sup> The Constitution assigns Congress the responsibility of guarding the public fisc, and therefore also bestows the opportunity to influence the Executive’s conduct of foreign policy.<sup>11</sup>

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<sup>7</sup> Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL L. REV. 1, 13 (1998).

<sup>8</sup> THE FEDERALIST NO. 51, at 159-60 (James Madison) (Roy P. Fairfield ed., 1981).

<sup>9</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>10</sup> In debating the Constitution, one anti-federalist observed, “[T]he subject of revenue . . . requires . . . the most numerous and exact provisions of the legislature. The command of the revenues of a state gives the command of everything in it. — He that has the purse will have the sword, and they that have both, have everything.” Brutus, *Letter to the People of the State of New York V*, N.Y. J., Dec. 13, 1787, reprinted in DEBATE ON THE CONSTITUTION 503 (Bernard Bailyn ed., 1993). A federalist contrasted the army fielded by the English King to the proposed army under the U.S. Constitution. “The Army when raised is the Army of the People, it is they who raise & pay them [and] it is they who judge of the Necessity of the Measure . . . . I think we are safe in the Exercise of those Powers by Congress.” Letter from Samuel Parsons, to William Cushing (Jan. 11, 1778), reprinted in DEBATE ON THE CONSTITUTION *supra*, at 750. When Thomas Jefferson praised the Constitution for checking “the Dog of war by transferring the power . . . of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay,” he referred not only to Congress’ sole power to declare war, but also to Congress’s power of the purse as a limit on the Executive’s capacity to make war. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander-in-Chief*, 80 VA. L. REV. 833, 834 (1994) (citing a Letter from Thomas Jefferson, to James Madison (Sept. 6, 1789)), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958). Alexander Hamilton counseled Congress to maintain close oversight and to “deliberate upon the propriety of keeping a military force on foot . . . . [Congress is] not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence . . . .” THE FEDERALIST NO. 26, at 73 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (emphasis in original).

<sup>11</sup> See Louis Fisher, *The United States Constitution in Its Third Century: How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758, 761-66 (1989).

Congress has used its power of the purse to create an extensive body of fiscal law to control military spending, and thereby check executive power.<sup>12</sup> Before undertaking any mission, a commander must have express legal authority for each expenditure of public funds.<sup>13</sup> Furthermore, all expenditures must meet three basic fiscal controls. First, an expenditure must be necessary and incident to the general purpose of a congressional appropriation or make a material contribution to an authorized function.<sup>14</sup> This concept is known as having the proper “color of money.”<sup>15</sup> Second, an expenditure must occur within the time limits applicable to a congressional appropriation.<sup>16</sup> Third, an expenditure cannot exceed the amount appropriated by Congress or established by a subdivision of funds within the executive branch.<sup>17</sup> Additionally, for construction expenditures in particular, any official who “knowingly contracts for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined . . . or imprisoned not more than one year, or both.”<sup>18</sup> An official who obligates funds for an improper purpose or with the wrong “color of money” will therefore be culpable because Congress has not appropriated any amount at all for that purpose.<sup>19</sup>

Failure to observe these requirements may result in a violation of the Anti-Deficiency Act (ADA), which requires an immediate report to the President and Congress.<sup>20</sup> A violation of the ADA can carry mandatory administrative sanctions or even criminal penalties, depending on the circumstances of the case.<sup>21</sup> Violations of the ADA require mandatory disciplinary action that can include suspension from duty without pay or relief from office.<sup>22</sup> As the investigative arm of Congress, the Government Accountability Office (GAO) monitors expenditures to ensure compliance with fiscal laws and regulations.<sup>23</sup>

Under the Constitution, the executive branch has traditionally directed foreign affairs. Through a number of fiscal mechanisms, however, Congress can often influence and sometimes control the President’s conduct of foreign policy. First,

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<sup>12</sup> “Fiscal law is the application of domestic statutes and regulations to the funding of military operations.” FM 27-100, *supra* note 5, para. 3-6. For a useful methodology to analyze fiscal law issues in the area of construction funding, see INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 274-78 (2005) [hereinafter OPLAW HANDBOOK].

<sup>13</sup> “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>14</sup> The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made.” 31 U.S.C. § 1301(a) (2000).

It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless . . . Congress has specifically legislated for certain expenses [elsewhere] . . . creating the implication that such expenditures should not be incurred except by [that] express authority.

Comptroller General McCarl to Major General Anton Stephan, Commanding Officer, D.C. Militia, Comp. Gen. A-17673, Mar. 25, 1927, 6 Comp. Gen. 619 (1927); see also I.R.S. Fed. Cred. Union, 66 Comp. Gen. 356, 359 (1987) (“Under [the Purpose] test, an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law.”).

<sup>15</sup> Brigadier General James C. Roan Jr., USAF, TJAGSA Practice Notes, *Streamlining Government Acquisition (Or, “Why Can’t the Government Figure Out How to Use Commercial Practices?”)*, ARMY LAW., May 1995, at 60.

<sup>16</sup> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability. . . . However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502.

<sup>17</sup> An officer or employee of the U.S. Government may not “(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made.” *Id.* §§ 1341(a)(1), 1511-19 (prohibiting violations of administrative apportionment).

<sup>18</sup> 18 U.S.C. § 435.

<sup>19</sup> “However much money may be in the Treasury at any one time, not one dollar of it can be used in payment of any thing not previously sanctioned. Any other course would give fiscal officers a most dangerous discretion.” *Reese v. Walker*, 52 U.S. 272, 291 (1851).

<sup>20</sup> “If an officer . . . violates section 1341(a) . . . , the head of the agency . . . shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. § 1351.

<sup>21</sup> *Id.* § 1350 (“An officer . . . knowingly and willfully violating [the ADA] . . . shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.”).

<sup>22</sup> *Id.* § 1349.

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO STRATEGIC PLAN 2004-2009, GAO-04-543SP, at 4 (2004).

Congress determines the total amount of appropriations.<sup>24</sup> Second, Congress can specify exactly how an appropriation must be spent.<sup>25</sup> Third, Congress can forbid the expenditure of appropriations for certain purposes when policy disagreements with the executive branch develop.<sup>26</sup> Finally, Congress can require the Executive to account for the expenditure of funds through regular reporting requirements.<sup>27</sup> Given the powerful tools granted to Congress by the Constitution, it is small wonder that “hardly an important executive branch decision is taken without considering the reaction in Congress.”<sup>28</sup>

### The Executive as Commander in Chief

The Constitution provides that “the Executive Power shall be vested in a President of the United States . . . . The President shall be the Commander in Chief of the Army and Navy of the United States.”<sup>29</sup> As the Commander in Chief, the President is responsible for U.S. national security. Executive authority flows from the President through many channels to the Secretary of Defense, the Service Secretaries, the Joint Staff, the Combatant Commanders, and finally down to all of the subordinate commanders in the field. During the Cold War, the military construction funding process was cumbersome indeed, but it did not straightjacket the Executive’s strategic reach. United States forces were already forwardly deployed in permanent bases or available for projection from bases in the United States directly to a theater of combat. During the Cold War, most military construction projects aimed at improving these permanent bases, while contingency construction usually involved joint or combined exercises or humanitarian assistance.<sup>30</sup> Since the end of the Cold War, however, the Army has shifted its doctrine to become more deployable, and the GWOT has required rapid worldwide force projection and the construction of U.S. bases in a matter of weeks rather than years.<sup>31</sup>

To defend the nation, the Commander in Chief requires maximum flexibility in determining the time and place to commit U.S. forces.<sup>32</sup> During combat and contingency operations, subordinate commanders must be capable of undertaking emergency construction of facilities for supply, storage, power, mobility, communications and life support. Commanders

<sup>24</sup> “The following sums are appropriated . . . for military construction, family housing, and base realignment and closure functions administered by the Department of Defense [DOD], for the fiscal year [FY] ending September 30, 2005, . . . in support of the functions of the Commander-in-Chief, \$1,981,084,000.” Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220, 1222 (2004) [hereinafter FY 2005 MILCON Appropriation Act].

<sup>25</sup> “For the United States share of the cost of the [NATO] Security Investment Program for the acquisition and construction of military facilities and installations (including international military headquarters) and for related expenses for the collective defense of the North Atlantic Treaty Area . . . , \$165,800,000, to remain available until expended.” *Id.* at 1223

<sup>26</sup> Under the Cooper-Church Amendments, Congress denied the expenditure of any military assistance funds in Cambodia. “None of the funds authorized or appropriated pursuant to this Act may be used to finance the introduction of ground combat troops into Cambodia.” Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, 84 Stat. 1942, 1943 (1971). The Boland Amendment prohibited the DOD and the Central Intelligence Agency from using appropriated funds to support the Contras in overthrowing the Sandinista government in Nicaragua. Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1982). Violations of this fiscal law resulted in the Iran-Contra Affair. *See generally* THE IRAN-CONTRA AFFAIR: REPORT OF THE CONGRESSIONAL COMMITTEES 19-25 (Daniel K. Inouye & Lee H. Hamilton eds., 1988).

<sup>27</sup> “None of the funds made available in this Act may be used to initiate a new installation overseas without prior notification to the Committees on Appropriations of both Houses of Congress.” FY 2005 MILCON Appropriations Act of 2005, *supra* note 24, § 110.

<sup>28</sup> Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 751 (1989).

<sup>29</sup> U.S. CONST. art. II, §§ 1-2.

<sup>30</sup> OPLAW HANDBOOK, *supra* note 12, at ch. 12, §§ VII-X, XIV.

<sup>31</sup> Within two weeks of 11 September 2001, the Commander in Chief had deployed U.S. forces throughout the world to defeat global terrorism. Consistent with the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) and Senate Joint Resolution 23, Authorization for the Use of Force, 107 Pub. L. No. 40, 115 Stat. 224 (2001), President Bush informed Congress that:

In response to these attacks on our territory, our citizens, and our way of life, I, [President George Bush, have] ordered the deployment of various combat-equipped and combat support forces to a number of foreign nations in the Central and Pacific Command areas of operations . . . . I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive.

President’s Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1157, 1157 (Sept. 24, 2001).

<sup>32</sup> Again, consistent with the War Powers Resolution and Senate Joint Resolution 23, President Bush informed Congress, that:

In the future, as we act to prevent and deter terrorism, I may find it necessary to order additional forces into these and other areas of the world, including into foreign nations where U.S. Armed Forces are already located . . . . It is not now possible to predict the scope and duration of these deployments, and the actions necessary to counter the terrorist threat to the United States. It is likely that the American campaign against terrorism will be a lengthy one.

*Id.*

must also satisfy obligations imposed by international law. The Geneva and Hague Conventions, for instance, set minimum standards for the care of civilians and enemy combatants, and place responsibility for the administration of occupied territory squarely on the occupying power.<sup>33</sup> Commanders must construct these necessary facilities quickly, effectively, and efficiently. Fiscal constraints on the resources available inevitably impede mission accomplishment, and create pressures to find a way out of the fiscal conundrum.

### A Cautionary Tale: The Fort Lee Fiasco

Commanders in the field often chafe at fiscal laws, especially when a mission imperative requires military construction. Fiscal law requires MILCON dollars, but a commander often only has O&M funds available. To meet the commanders' intent, JAs may be tempted to skirt the fiscal law issue by creating an imaginative solution that would permit O&M funding. Rather than giving in to temptation, however, a JA should firmly resist engaging in any subterfuge. As the following incident illustrates, Congress takes violations of fiscal law extremely seriously.

In June 1962, the House Committee on Government Operations (the Committee) examined illegal actions in the construction of an airfield at Fort Lee, Virginia. Though requests for \$876,000 in MILCON funds to build the airfield had been repeatedly denied, the post commander decided to build the airstrip anyway, and directed his staff to use available O&M funds.<sup>34</sup> "The mission having been decided by higher command . . . , the subordinate officers and officials regarded the fulfillment of the mission as paramount and the means for doing so merely incidental, even if illegal."<sup>35</sup> To skirt the fiscal constraints, the command low-balled cost estimates, engaged in project-splitting, and arrived at tortured definitions to justify the use of O&M funding.<sup>36</sup> The Committee found these practices unacceptable: "This particular incident furnishes an almost unbelievable example of the workings of the military and bureaucratic mind. A change in nomenclature, clever gimmick, and an easy acceptance of subterfuge cannot change a fact, no matter how much a military mind wants them to do so."<sup>37</sup> Perceived military requirements do not permit a commander to disobey fiscal law.

The Committee censured the conduct of the responsible military officers, including the staff judge advocate (SJA) by name.<sup>38</sup> Referring to the ADA and Department of the Army (DA) regulations governing construction (*AR 415-series*), the Committee found that "a number of statutes and sections of the Uniform Code of Military Justice had been deliberately violated by several officers . . . who had deliberately expended or conspired to expend moneys in excess of statutory and administrative limitations."<sup>39</sup> Though recognizing that "sometimes, military people get put in a terribly bad position,"<sup>40</sup> the Committee drew particular attention to its finding that:

Subordinate officers felt compelled to go along with their superiors in the performance of acts which they knew were illegal and improper, . . . [and] the superiors felt they could compel such subservience on the part of the subordinates. These officers were disloyal to their public trust, to their subordinates, and to the Army. Conduct of this kind which brings into public disrepute high-ranking officers can only result in loss of confidence in the integrity of our Military Establishment.<sup>41</sup>

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<sup>33</sup> See CENTER FOR LAW & MILITARY OPERATIONS [CLAMO], THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED: AFGHANISTAN AND IRAQ: VOLUME I: MAJOR COMBAT OPERATIONS [11 SEPTEMBER 2001 - 1 MAY 2003], at 125 (2004) [hereinafter CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ]; see also Jonathan D. Clark, *Overcoming the Critical Challenges of Contingency Contracting: Understanding the Flexibility Permitted by CICA, Simplified Acquisition Procedures, and Small Purchases*, 28 PUB. CONT. L.J. 503, 509 (1999); Memorandum for Record, Captain Thomas E. Randall, U.S. Navy, Deputy Legal Adviser, subject: Funding for operation [sic] Provide Comfort (16 Apr. 1991) (recording Deputy Legal Counsel, Joint Chiefs of Staff, advice to use O&M funds to build Kurdish refugee camps in Iraq).

<sup>34</sup> H.R. REP. NO. 87-1858, at 4 (1962).

<sup>35</sup> *Id.* at 36.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.* at 36.

<sup>38</sup> The U.S. Department of Justice initiated a criminal investigation into the matter and pursued a civil action for personal liability against the commander and comptroller. Secretary of the Army, B-133316, 1963 U.S. Comp. Gen. LEXIS 2448 (June 20, 1963).

<sup>39</sup> H.R. REP. NO. 87-1858, at 2.

<sup>40</sup> *Id.* at 38.

<sup>41</sup> *Id.* at 2.

The Committee observed that the officers' disregard of fiscal law to complete the mission as they saw fit, rather than in accordance with the law, was "exceedingly dangerous to the principle of civilian control, [and] it led directly to an erosion of honor and respect for the law among the officers concerned."<sup>42</sup> The Committee further denounced as intolerable the spread of a mindset where "the interests of the taxpayers generally and the concern of Congress with the expenditure of funds seem to be of no particular importance to the officers."<sup>43</sup> Finally, the Committee stated:

It is obvious to the committee that in these days when hundreds of billions of dollars are being spent on the military services, many military officers cannot be trusted to police their own ranks to see that the laws governing these expenditures are carried out. To them, such laws and the related regulations, directives, and orders are merely troublesome, civilian-imposed obstacles which are to be violated or evaded with impunity unless one is caught by civilians . . . . For these reasons, constant surveillance by the General Accounting Office [sic] and the appropriate committees of Congress is necessary and must be maintained.<sup>44</sup>

It would be difficult to find a clearer rejection by Congress of the notion that the military can operate in disregard of fiscal law.<sup>45</sup>

### **The Legal Framework of Military Construction**

Judge advocates should have a clear understanding of the entire statutory and regulatory framework that controls military construction when reviewing proposals for combat and contingency construction. Until recently, the military had two broad approaches ("colors of money") to fund combat and contingency construction. The first approach used the statutory framework of the Military Construction Codification Act (MCCA) provided by Congress, which broadly defines military construction and provides certain funding mechanisms for military construction projects.<sup>46</sup> The second approach, known as the *Reres* Doctrine, transmogrified<sup>47</sup> some types of "military construction" projects into expenses necessary and incident to combat and contingency operations thereby "permitting" the use of O&M funds.<sup>48</sup> The following sections examine both approaches. This section establishes the statutory framework that governs the proper method of funding military construction. The next section chronicles the rise of the *Reres* Doctrine, and its ultimate fall at the hands of Congress in a rebuke very similar to the reprimand Congress issued in the Fort Lee fiasco of forty years ago.

### **Military Construction Defined**

In the field of military construction, Congress exercises its power of the purse by channeling appropriations through a multi-year military construction funding process.<sup>49</sup> Consistent with the congressional desire to provide close oversight on military construction projects, the definitions provided by the MCCA sweep very broadly, both physically and geographically. Under the MCCA, the term "military construction" means "any construction, development, conversion, or extension carried out with respect to any military installation, whether to satisfy *temporary or permanent* requirements."<sup>50</sup> The term "military installation" is defined as every structure that the military might use for any amount of time, including

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<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 14.

<sup>45</sup> Congress periodically revisits the issue of improper use of O&M funds. In 1989, the House Armed Services Committee issued a blistering report concerning the improper use of O&M appropriations to fund military repair projects. The Committee objected to the Air Force building a new officers' club with \$10 million in O&M funds, the Army renovating a building with \$26 million in O&M funds, and the Navy restoring a building with \$13 million in O&M funds. Major M. Warner Meadows, *Military Construction Funding: Variation in Cost Rules*, ARMY LAW., Aug. 1998, at 24 nn.43-44 (citing H.R. REP. NO. 101-21 (1989)).

<sup>46</sup> See Major Earle D. Munns, *An Analysis of the Military Construction Codification Act*, ARMY LAW., Nov. 1987, at 19 (examining the legislative intent behind the MCCA).

<sup>47</sup> In the comic strip *Calvin and Hobbes*, a transmogrifier is a simple corrugated cardboard box that has the power to change one object into any other object desired. See BILL WATTERSON, WEIRDOS FROM ANOTHER PLANET! 55 (1990), available at <http://dlazechk.dl.funpic.org/weedaytransmogrifyintoatiger.html>. The *Reres* Doctrine mystically transmogrified O&M dollars into MILCON funds.

<sup>48</sup> Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) [hereinafter *Reres* Memo] (on file with the author). The *Reres* doctrine takes its name after the Deputy General Counsel who approved the policy, Matt Reres.

<sup>49</sup> See generally Munns, *supra* note 46, at 19-21 (detailing the MILCON appropriations process in Congress).

<sup>50</sup> Military Construction Codification Act, 10 U.S.C. § 2801(a) (LEXIS 2005) (emphasis added).

such facilities as “a base, camp, post, station, yard, center, or other activity under [military jurisdiction] or, in the case of an activity in a foreign country, under [military] operational control, *without regard to the duration of operational control.*”<sup>51</sup> Because of these broadly defined terms, the MCCA is designed to regulate every kind of military construction anywhere, and of every size, from Camp Victory, Iraq, to the Pentagon in Washington, D.C.

The MCCA further specifies that a “military construction project” includes “all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.”<sup>52</sup> The process of determining what constitutes a “complete and usable facility” is called scoping the project. The purpose of scoping is to ensure that the military construction project encompasses *all* military construction work necessary to produce the *complete and usable* facility. The exclusion of structures necessary to construct a complete and usable facility is known as project-splitting.<sup>53</sup> Illegal project-splitting occurs when a military construction project is broken down into several smaller projects to reduce its cost below applicable statutory thresholds.<sup>54</sup> The temptation to engage in project-splitting occurs most frequently when the command contemplates the construction of several projects contemporaneously and in close proximity. To prevent project-splitting, the JA should determine the proper scope by analyzing two questions. First, what components are necessary to meet the mission’s requirements and fulfill the commander’s intent? For example, the commander requires the establishment of a base camp in a foreign country. The base camp will be used for an indeterminate duration, but certain facilities such as a perimeter fence and a command and control bunker are required immediately. Other facilities, such as a helipad and a motor pool, would be welcome, but are not strictly necessary.<sup>55</sup> Second, the JA should determine whether the individual components (in this case, the fence, the bunker, the helipad, and the motor pool) are interdependent or merely interrelated. Interdependent components must be aggregated to determine the total cost of the military construction project; interrelated components may be funded separately.

Interdependent facilities are “mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space, and lighting are mutually dependent to accomplish the intent of the construction project.”<sup>56</sup> In other words, a project that is interdependent with another project is not a “complete and usable facility” if built by itself. *All* of the construction costs related to making the facility “complete and usable” must be lumped together to determine the total cost. In the base camp example, the command could not scope the project to fund the perimeter fence separately from the command and control bunker. The command would not build the fence, but for the necessity of protecting the bunker, and the command would not build the bunker, but for the protection offered by the security fence. Based on these facts, the two projects are interdependent.

In contrast, interrelated facilities:

have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities. Their common purpose to support health, welfare, and morale creates an interrelationship. However, neither facility is necessary for the operation of the other.<sup>57</sup>

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<sup>51</sup> *Id.* § 2801(c)(2) (emphasis added).

<sup>52</sup> *Id.* § 2801(b). The definition of construction excludes maintenance and repair of military installations. “The term ‘repair project’ means a project to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.” *Id.* § 2811(e). Maintenance is “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” U.S. DEP’T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF PUBLIC WORKS 16 (15 Apr. 1997) [hereinafter AR 420-10]. Construction of new facilities or additions to existing facilities may not be mischaracterized as maintenance or repair to avoid funding thresholds. *See id.* para. 4-6.

<sup>53</sup> U.S. DEP’T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING 12 (15 Apr. 1998) [hereinafter AR 415-32].

<sup>54</sup> *Id.* Neither is it permissible to spread construction of separate components of the same project over several fiscal years to avoid a statutory threshold. The entire cost of the complete and usable facility must be determined up front. Breaking a project down into sequential tasks where one “phase” of the project will not produce a complete and usable facility without construction of subsequent companion “phases” is illegal. U.S. DEP’T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION para. 3-2(f) (4 Sept. 1998) [hereinafter AR 415-15].

<sup>55</sup> This hypothetical example is based upon an actual proposed construction project in Tuzla, Bosnia. Major Paul Manq *in* CENTER FOR LAW & MILITARY OPERATIONS (CLAMO), THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, FISCAL LAW LESSONS LEARNED 19 n.1 (10 Aug. 1999) (PowerPoint presentation (fiscal II.ppt)) (on file with CLAMO)). Scoping determinations are extremely fact-intensive. Since sound legal conclusions will depend upon the specific facts (time, location, and purpose) pertaining to each proposal, the judge advocate must carefully examine the base camp master plan.

<sup>56</sup> AR 415-32, *supra* note 53, at 12. One might wonder whether the abuses found in the Fort Lee case influenced the selection of an airfield to illustrate the regulatory definition.

<sup>57</sup> *Id.*

Interrelated facilities are each “complete and usable” in their own right, and may be properly funded as separate military construction projects. In the base camp example, the command could scope the helipad and motor pool separately from the command and control bunker and perimeter fence only if the former are not necessary for the operation of the latter. Whether the helipad and motor pool will be built at all will be highly fact-specific, and will likely depend on a number of unknown factors, such as their purpose, the durability of the material used, and the length of the overall mission.

Defining a military construction project as encompassing *all* military construction work necessary to produce a *complete and usable* facility also prevents illegal incrementation, or what Congress has called “the foot in the door technique.”<sup>58</sup> Under this fiscal dodge, a minor project “will arrive at a point of construction where new and allegedly unanticipated requirements for the project become apparent.”<sup>59</sup> This incomplete project is then used as the basis for a request for “further funds . . . necessary to protect or enhance an already large investment which has not yet resulted in full realization of its objective.”<sup>60</sup> Congress and executive budget authorities are then placed on the horns of a dilemma: either continue the flow of funds to complete the project or write off the sunk costs at a loss.<sup>61</sup> The Fort Lee case provides a prime example. The commander illegally engaged in project-splitting just to initiate the project for \$536,373. Then, to make matters worse, the command requested incremental appropriations of another \$1 million in order to make the airstrip functional.<sup>62</sup> Congress has made abundantly clear that it “condemns all such stratagems as violating both the letter and the spirit of [the law].”<sup>63</sup>

After completing the first and most important step of scoping a military construction project, the JA must ensure that the cost of the project is correctly calculated. Only then can the appropriate funding mechanism and approval authority be determined.<sup>64</sup> For purposes of determining the cost of a military construction project, the funded cost is the amount “charged to the appropriation designated to pay for the project.”<sup>65</sup> Funded costs are “out-of-pocket” expenses, and include, but are not limited to, materials, supplies, and services applicable to the project (including those owned by the government), installed capital equipment, transportation costs, civilian labor costs, overhead and support costs, travel and per diem costs, O&M costs for government equipment (e.g., fuel and repair parts), and site preparation costs.<sup>66</sup> Unfunded costs are “sunk” costs “charged to a different appropriation from that which is paying for the project.”<sup>67</sup> Unfunded costs include, among other items, military labor, depreciation of government-owned equipment, excess materials, supplies, and equipment obtained on a non-reimbursable basis from another federal entity, and some licenses, permits, and fees.<sup>68</sup> Often, the most effective way to reduce the cost of a project is to use military labor instead of civilian labor because military labor is not charged to the project.<sup>69</sup> Once the total funded cost of the project is determined, the JA should consult the statutory cost thresholds of the MCCA to determine what color of money is required to fund the project.

### Military Construction Funding

Congress makes annual military construction appropriations in the Military Construction Appropriation Act (MCAA),<sup>70</sup> and in the DOD Appropriations Act,<sup>71</sup> at times adding other pots of money through emergency supplemental

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<sup>58</sup> H.R. REP. NO. 87-1858, at 22 (1962).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> *Id.* Apparently, in the command’s attempt to skirt fiscal regulations, it also skirted flight safety regulations. The airfield was built in an area where at least nine other structures obstructed flight patterns. *Id.* at 8.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> OPLAW HANDBOOK, *supra* note 12, at 275.

<sup>65</sup> AR 420-10, *supra* note 52, at 16.

<sup>66</sup> *Id.* para. 4-6(c).

<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* para. 4-6(f). Because the actual cost of a project may exceed projected estimates, the Secretary is authorized to approve small variances that might bump a project over a statutory threshold. See 10 U.S.C. §§ 2805(a)(1), 2853 (LEXIS 2005); see also AR 415-15, *supra* note 54, para. 5-16.

<sup>69</sup> U.S. GOV’T ACCOUNTABILITY OFF., MILITARY OPERATIONS: DOD’S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT, GAO-04-854, at 40-41 (2004) [hereinafter GAO REP.: LOGISTICS SUPPORT].

<sup>70</sup> See, e.g., FY 2005 MILCON Appropriation Act, Pub. L. No. 108-324, § 110, 118 Stat. 1220 (2004). This appropriation provides funds for both specified and unspecified military construction programs.

<sup>71</sup> See, e.g., Dep’t of Def. Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004) [hereinafter FY 2005 Defense Appropriations Act]. This appropriation provides funds for miscellaneous specific construction projects.



appropriations.<sup>72</sup> Judging by the comprehensive definitions in the MCCA, Congress has clearly manifested its desire to regulate the entire field of military construction.<sup>73</sup> To reduce the monitoring costs of oversight, however, Congress has also narrowed its direct interest by creating a three-tier system that divides military construction projects into distinct categories with different monetary thresholds and separate funding sources.

#### *MILCON Funds (\$1.5 Million and Greater)*

In the appropriations acts and their related authorization acts, Congress provides annual funding to permit the DOD to carry out military construction projects specifically selected by Congress.<sup>74</sup> These specified projects usually cost more than \$1.5 million, and the military may not undertake projects expected to exceed that threshold without specific congressional authorization. These funds provide for large-scale, long-term (five or more years) permanent projects. The MCAA for FY 2005 authorized over \$1.75 billion for military construction projects in the United States and overseas.<sup>75</sup> Although the MILCON appropriation is arguably sufficient to maintain and improve existing military bases, this color of money is neither timely enough nor flexible enough to provide authority for combat and contingency construction.

#### *Unspecified Minor Military Construction (UMMC) (\$750,000 to \$1.5 Million)*

Congress also provides annual funding which permits the DOD to carry out other military construction projects not specifically selected by Congress. These unspecified projects must cost less than \$1.5 million, unless the project is “intended solely to correct a deficiency that threatens life, health, or safety,” in which case the project threshold rises to \$3 million.<sup>76</sup> If the unspecified minor military construction project costs more than \$750,000, the Service Secretary must approve the project, notify Congress, and then wait fourteen days to commence construction.<sup>77</sup> Congress provides these funds for “small, unforeseen projects that cannot wait for the normal military construction process.”<sup>78</sup> Although the special \$3 million threshold provides greater flexibility, the amount of UMMC funds available are limited. In FY 2005, the Army was limited to spending \$20 million on unspecified minor military construction (or the equivalent of fewer than seven \$3 million projects).<sup>79</sup>

#### *UMMC: O&M Construction (\$750,000 and Less)*

An important statutory exception to the MILCON/UMMC framework lies in 10 U.S.C. § 2805(c). This provision permits the Secretaries to use O&M funds to finance UMMC projects that cost less than \$750,000. If the project is “intended solely to correct a deficiency that threatens life, health, or safety,” the threshold rises to \$1.5 million.<sup>80</sup> In fact, to conserve

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<sup>72</sup> See, e.g., Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003) [hereinafter FY 2004 Emergency Supplemental].

<sup>73</sup> “[Where] Congress has specifically legislated for certain expenses, . . . expenditures should not be incurred except by [that] express authority.” Comp. Gen. McCarl to Major General Anton Stephan, Commanding Officer, D.C. Militia, Comp. Gen. A-17673, Mar. 25, 1927, 6 Comp. Gen. 619 (1927).

<sup>74</sup> 10 U.S.C. § 2802 (LEXIS 2005).

<sup>75</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2101 (2004) [hereinafter FY 2005 National Defense Act].

<sup>76</sup> 10 U.S.C. § 2805(a)(1). Prior congressional notification of the project’s justification and cost is required. *Id.* § 2805 (b)(2). Neither DOD nor DA have issued written standards defining what constitutes a threat to “life, health, or safety,” but U.S. Army Forces Command (FORSCOM) has issued some limited guidance. The FORSCOM policy “requires installations to document the life, health or safety (LHS) deficiencies, and . . . discuss the project and the LHS justification with FORSCOM engineers before approving O&M funded projects . . . to ensure that any decision to use the LHS authority is well reasoned, supportable, and rational.” Major Louis A. Chiarella et al., *U.S. Army Forces Command Issues Funding Guidance on the Use of the Expanded Life, Health, or Safety Authority*, ARMY LAW., Jan. 2001, at 99 (citing Memorandum, U.S. Forces Command, U.S. Army, to Deputy Chief of Staff for Personnel and Installation Management, subject: Funding and Approval Authority (6 Mar. 2000)).

<sup>77</sup> 10 U.S.C. § 2805(b).

<sup>78</sup> *FY 2005 Air Force Budget Overview for Military Construction: Hearing Before the Military Construction Subcommittee, Senate Appropriations Committee*, 108th Cong. (2004) (testimony of The Hon. Nelson F. Gibbs, Assistant Secretary of the Air Force (Installations, Environment, and Logistics)), available at [http://www.globalsecurity.org/military/library/congress/2004\\_hr/040330-gibbs-fox-brubaker-rajczak.htm](http://www.globalsecurity.org/military/library/congress/2004_hr/040330-gibbs-fox-brubaker-rajczak.htm).

<sup>79</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, 118 Stat. at 2103.

<sup>80</sup> 10 U.S.C. § 2805(c)(1) provides:

scarce UMMC funds, Army regulations actually *require* the use of O&M funds for construction projects that fall beneath the threshold.<sup>81</sup> This authority provides the military with a flexible and responsive mechanism to fund construction required by combat and contingency operations, and the services have sought to maximize use of this authority. Unfortunately, commanders in the field often require projects that exceed this O&M threshold, but only have O&M funds available. Faced with this rigid statutory framework, operational lawyers have provided some flexibility by seeking relief elsewhere.

### The Rise and Fall of the *Reres* Doctrine

Congress created the three-tiered system of MILCON, UMMC, and O&M funding in 1982.<sup>82</sup> During peacetime, Congress provided close oversight, maintaining the existing Cold War military infrastructure while delivering pork barrel spending to their home districts.<sup>83</sup> While the system worked reasonably well under normal circumstances, during contingencies the system was cumbersome and slow.<sup>84</sup> Even Congress recognized that “the lack of a dedicated source of funding for contingency construction needs . . . [can] impede timely response to urgent requirements of armed conflict.”<sup>85</sup> Paradoxically, the end of the Cold War actually increased the number of contingency operations, and in the case of military construction funding, necessity became the mother of invention. Starting in Operation Desert Shield and continuing through Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), the military struggled to fund necessary construction projects when MILCON funds were simply not available.<sup>86</sup> To respond to these combat and contingency construction requirements, the Army created a fiscal construct to transmogrify O&M funds into MILCON funds—a mechanism that eventually became known as the *Reres* Doctrine.<sup>87</sup>

### Operations Desert Shield and Desert Storm

During the Cold War, the United States could project power from a string of permanent bases worldwide. Contingency construction was limited to projects required for joint and combined exercises.<sup>88</sup> The first large-scale, post-Cold War U.S. military operation that required long-term deployment to an immature theater occurred during Operations Desert Shield and Desert Storm. For example, U.S. Central Command (CENTCOM) required the construction of a \$1 million heliport to support operations in Kuwait. The cost greatly exceeded the statutory O&M threshold, which was only \$200,000 at the time.<sup>89</sup> The SJA, 22nd Support Command, determined that:

The heliport did not fall under the statutory provisions governing minor military construction. Accordingly, it was not subject to the O&M expenditure cap applicable to such construction. DESERT SHIELD was an operation . . . . Paving the desert was a project more akin to building bunkers or constructing anti-tank revetments. As limits to spending O&M funding did not apply to real-world operations or to combat-related military construction, no bar existed to building the heliport.<sup>90</sup>

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The Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than-- (A) \$ 1,500,000, in the case of an unspecified minor military construction project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening; or (B) \$750,000, in the case of any other unspecified minor military construction project.

<sup>81</sup> AR 420-10, *supra* note 52, para. 4-1(c). The regulation has not been updated to reflect the increase in the statutory threshold from \$500,000 to \$750,000. The DA Assistant Chief of Staff for Installation Management, however, issued a memorandum increasing the regulatory thresholds to match the statutory thresholds. Memorandum, Assistant Chief of Staff for Installation Management, U.S. Dep’t of Army, to Commanders, subject: MACOM Maintenance and Repair Project Approval Authority (18 Jan. 2002) (on file with author).

<sup>82</sup> Munns, *supra* note 46, at 28.

<sup>83</sup> George C. Wilson, *Pentagon Choking on Congressional Pork*, 34 NAT’L J. 484, 484 (2002).

<sup>84</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>85</sup> *Id.*

<sup>86</sup> FREDRIC L. BORCH, JUDGE ADVOCATES IN COMBAT 145-46 (2001).

<sup>87</sup> CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATION JOINT ENDEAVOR, AFTER-ACTION REVIEW I-232 to I-252 (1997) [hereinafter OPERATION JOINT ENDEAVOR AAR] (on file at CLAMO).

<sup>88</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., HONDURAS: U.S. NATIONAL GUARD CONSTRUCTION EXERCISES, GAO-87-66, at 1-12 (1987).

<sup>89</sup> 10 U.S.C.S. § 2805(c) (LEXIS 2005) (amended by Act of Dec. 5, 1991, to \$300,000; amended by Act of Sept. 23, 1996, to \$500,000; amended by Act of Dec. 28, 2001, to current amount of \$750,000); see also Lieutenant General William G. Pagonis & Colonel Michael D. Krause, *Observation on Gulf War Logistics*, ARMY LOGISTICIAN, Sept.-Oct. 1992, at 8.

<sup>90</sup> BORCH, *supra* note 86, at 145-46.

The Chief Counsel of the Army Corps of Engineers concurred, and the opinion served as the legal basis for many other combat construction projects during Operations Desert Shield and Desert Storm.<sup>91</sup> The flaw in the analysis, of course, is that the statutory definition does not create any “real-world” or “combat-related” exception to the all-encompassing definition of “construction” provided by Congress. Bunkers, anti-tank revetments, and helipads all fall within the statutory definition of “military construction,” and the notion of an operational exception to the statutory framework was simply manufactured out of whole cloth.

### Humanitarian Intervention: Somalia, Haiti, and the Balkans

Similar fiscal issues arose in Somalia, Haiti, and the Balkans. In those operations, the tension involved the added wrinkle of whether O&M funds could be used, not just as a substitute for military construction appropriations, but also as a substitute for humanitarian assistance appropriations. In Haiti, commanders spent more than \$96 million of O&M funding on LOGCAP support.<sup>92</sup> “Missions included electrifying 23 buildings, installing perimeter lighting and security fencing, [and] constructing base camps.”<sup>93</sup> In Bosnia, the Dayton Peace Accords required the construction of a two-lane, all-weather road to link separated Bosnian enclaves. Construction of the road fell to U.S. forces.<sup>94</sup> In Kosovo, virtually all military construction, including Camps Bondsteel and Monteith, were deemed exempt from the restrictive cap on O&M funding.<sup>95</sup> Using logic similar to the Desert Shield reasoning concerning helipads, the consensus legal opinion was that these projects were temporary operational requirements and not military construction. Therefore, O&M funds were the appropriate funding source.

### The Army Patents the Transmogrifier

During these earlier operations, the legal authority for O&M-funded military construction in excess of the statutory threshold was informal and granted only on a case-by-case basis.<sup>96</sup> In February 2000, however, the Army recognized the utility of the transmogrifier, and formalized the practice by issuing a policy memorandum “regarding the proper funds to use for construction of facilities to support military operations.”<sup>97</sup> Relying on the Purpose statute, the Department of the Army’s Office of the General Counsel reasoned that “O&M funds were the primary funding source supporting contingency or combat operations.”<sup>98</sup> Therefore, O&M funds were “the appropriate funding source for acquisition of materials and/or costs of erection of structures . . . that are clearly intended to meet a temporary operational requirement [during] combat or contingency operations.”<sup>99</sup> The memorandum sought to distinguish these contingency “acquisitions” from “military construction” by noting that “such structures may not be used for the purpose of satisfying the requirements of a permanent nature at the conclusion of combat or contingency operations.”<sup>100</sup>

While the memorandum did reinforce the fiscal rule that MILCON funds “shall be used in all other situations, including all construction . . . after the termination of military operations,” the *Reres* Doctrine resurrected COL Rosen’s alluring myth

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<sup>91</sup> *Id.*

<sup>92</sup> LOGCAP is an acronym for Logistics Civil Augmentation Program. U.S. DEP’T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) 7 (16 Dec. 1985) [hereinafter AR 700-137].

<sup>93</sup> See CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 138-42 (2004) [hereinafter CLAMO LESSONS LEARNED: HAITI].

<sup>94</sup> Rosen, *supra* note 7, at 2.

<sup>95</sup> E-mail from Lieutenant Colonel Roger Washington, Office of the Judge Advocate, U.S. Army Europe, to Matt Reres, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep’t of Army (July 29, 1999) (on file with CLAMO).

<sup>96</sup> CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 148-49 (13 Nov. 1998) [hereinafter CLAMO LESSONS LEARNED: BALKANS] (discussing language in the 1995 *Oplaw Handbook* that presaged the *Reres* Doctrine and implied an “operational exemption to fiscal law”); see also The Judge Advocate General’s Legal Center & School, TJAGSA Practice Note: *Contract Law Note (Funding Issues in Operational Settings)*, ARMY LAW., Oct. 1993, at 38 n.69 (citing a presentation by Army Deputy Counsel for Fiscal Law and Policy, Matt Reres, at the 1993 Government Contract Law Symposium held at The Judge Advocate General’s Legal Center & School on 12 Jan. 1993).

<sup>97</sup> *Reres* Memo, *supra* note 48.

<sup>98</sup> Major James M. Dorn, *Combat and Contingency Related Construction: “Upon this Point, a Page of History is Worth a Volume of Logic,”* ARMY LAW., Jan. 2005, at 178.

<sup>99</sup> *Reres* Memo, *supra* note 48.

<sup>100</sup> *Id.*

of presidential spending power.<sup>101</sup> The *Reres* Doctrine defined “construction supporting combat operations” as different from “construction” generally, and purported to authorize the use of O&M funds for combat and contingency construction. This legerdemain allowed commanders to divert funds from the purpose for which Congress originally appropriated them (O&M) to another purpose for which Congress had specifically appropriated elsewhere (MILCON). Whereas the MCCA requires the use of MILCON funds for all but the smallest projects costing under \$750,000, the *Reres* Doctrine transmogrified O&M dollars into any amount of MILCON funds necessary to accomplish the mission. In its broad effect, therefore, the *Reres* Doctrine eliminated congressional limitations as to both purpose and amount.

### **The Department of Defense Buys a Transmogrifier Too**

Three years after the initial *Reres* memo and while the U.S. military was conducting Operation Enduring Freedom in Afghanistan and staging forces for Operation Iraqi Freedom, the DOD General Counsel recognized the usefulness of the Army policy and endorsed the DA position.<sup>102</sup> In February 2003, the Undersecretary of Defense, with the concurrence of the DOD General Counsel, authorized using O&M funds for construction under “narrowly limited conditions.”<sup>103</sup>

Specifically, operations and maintenance appropriations may be obligated and expended for construction *if*:

- There is a properly documented determination that the construction is necessary to meet an urgent military operational requirement of a temporary nature, while U.S. Forces are participating in armed conflict or contingency operations . . . ;
- The construction will not be carried out at a military installation, as defined under 10 U.S.C. § 2801, or at a location where the U.S. is reasonably expected to have a long-term interest or presence; and
- The United States has no intention to use the construction after the operational requirement has been satisfied and the nature of the construction is the minimum necessary to meet the temporary operational need.<sup>104</sup>

Thus, as in the *Reres* memo, the DOD granted commanders authority to use O&M funds for combat and contingency construction, regardless of whether the total cost of the project exceeded the statutory O&M threshold.

### **Operation Iraqi Freedom**

The timely DOD adoption of the *Reres* Doctrine was a critical factor in the successful build-up for Operation Iraqi Freedom where military operations required the completion of thousands of construction projects in Kuwait and Iraq. Many projects executed by small units fit easily beneath the \$750,000 threshold because the construction was rudimentary and the majority of the projects’ costs were classified as unfunded. For example, under the regulatory accounting definitions, the cost of military labor incurred to create berms around field camps qualifies as an unfunded cost, while the cost of fuel and repair parts for the earthmovers count as funded costs.<sup>105</sup> Army engineers, constructed dozens of base camps and Logistical Support Areas (LSAs), hundreds of helipads, C-130 airstrips, and unmanned aerial vehicle landing strips, and improved hundreds of kilometers of roads and pipelines.<sup>106</sup> On occasion, these projects exceeded the basic \$750,000 threshold for O&M funding, and, just as often, the expanded \$1.5 million life, health, or safety threshold as well. For example, “during its planning for the invasion of Iraq, the I Marine Expeditionary Force (I MEF) identified a need for more bridging assets to cross the numerous rivers along its attack route through the eastern regions of Iraq.”<sup>107</sup> To accomplish the mission, I MEF

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<sup>101</sup> See Rosen, *supra* note 7, at 13.

<sup>102</sup> Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management & Comptroller) et al., subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) (on file with author).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Recall that funded costs count against the statutory threshold whereas unfunded costs do not. AR 420-10, *supra* note 52, at 16-17. Since the troops are paid whether building berms or conducting training, the cost of military labor is a sunk cost, and counts as unfunded. Fuel and repair parts, on the other hand, would not have been expended, “but for” the construction of the berms, and are therefore funded costs charged against the project. *Id.*

<sup>106</sup> Colonel Gregg F. Martin & Captain David E. Johnson, *Victory Sappers, V Corps Engineers in Operation Iraqi Freedom, Part I: The Attack to Baghdad and Beyond* . . . , ENG’R, July-Sept. 2003, at 5.

<sup>107</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 149.

wanted to purchase pre-fabricated bridges that cost several million dollars each, well over the statutory O&M threshold. The Marine SJA and Comptroller relied upon the DA and the DOD memos to recommend the use of O&M funds as a “legally defensible alternative course of action.”<sup>108</sup>

### The Global War on Terror

To fight the GWOT, the military has established many forward operating bases throughout Eastern Europe, the former Soviet Republics, and the Horn of Africa.<sup>109</sup> Using the *Reres* Doctrine, the U.S. spent nearly \$4 million to improve the infrastructure of an airbase in Romania, including a \$900,000 fence to secure the airfield as a staging area for OIF.<sup>110</sup> Given the necessity of striking quickly in the GWOT, the DOD could not have waited for the completion of an entire appropriations cycle before making the deployments.<sup>111</sup> Furthermore, the DOD simply could not anticipate its actual requirements at any single location in advance. The utility of any particular forward base depended on the support of allied nations, the enemy’s reaction, and our own success in accomplishing the mission. Since the end of the Cold War, the uncertain security environment has prevented the DOD from relying solely on annual MILCON appropriations to project U.S. forces. The unresponsiveness of the multi-year budgeting and appropriations process has practically forced a reliance upon the more flexible and forgiving gadgetry of the *Reres* Doctrine.

### Congress Rejects the *Reres* Doctrine and Dismantles the Transmogripher

For more than a decade, from Desert Shield through the opening stages of Operation Iraqi Freedom, the *Reres* Doctrine allowed commanders to unilaterally redefine “military construction” to effectively exclude contingency and combat construction from the statutory definition provided by Congress. As in the Fort Lee fiasco, Congress eventually responded to this military disregard of fiscal controls by reasserting its power of the purse and dismantling the O&M transmogrifier. In April 2003, only two months after the DOD adopted the *Reres* Doctrine, Congress passed the FY 2003 Emergency Wartime Supplemental Appropriations Act.<sup>112</sup> “Unfortunately for DOD, buried in the Act’s conference report was harsh language stating the conferee’s legal objections to the [*Reres* Doctrine]. The Conference Report had the practical effect of invalidating the [*Reres* Doctrine].”<sup>113</sup> Significantly, Congress amended the MCCA definition of “military installations” to include:

not only buildings, structures, and other improvements to real property under the *operational* control of the Secretary of a military department or the Secretary of Defense, but also any building, structure, or other improvement to real property to be used by the Armed Forces, *regardless of whether such use is anticipated to be temporary or of longer duration.*<sup>114</sup>

By amending the statutory definitions to include even temporary requirements built at installations that are under only the operational control of the military, Congress stripped the gears that drove the transmogrifier.

In explaining their decision, congressional appropriators complained that “approximately \$750 million appropriated to operation and maintenance accounts has been obligated for construction activities supporting the global war on terrorism and operations in Iraq. Funds for these projects have been expended without providing notice to Congress despite repeated

<sup>108</sup> I Marine Expeditionary Force ultimately chose a different course of action, and acquired the bridges with procurement dollars. *Id.* at 150.

<sup>109</sup> Peter Slevin, *U.S. May Set Up Bases in Former Soviet Republics*, WASH. POST, Jan. 27, 2004, at A16.

<sup>110</sup> Josh White, *Romania Lobbies to Host U.S. Military Base*, WASH. POST, Oct. 12, 2004, at A24.

<sup>111</sup> The appropriations process is a long, tortuous affair. See Munns, *supra* note 46, at 19-21 (detailing the lengthy legislative process behind how a bill becomes a law). To meet the annual military construction appropriations cycle for FY 2002, the DOD submitted its budget request on 27 June 2001. CONG. RES. SERV., APPROPRIATIONS FOR FY 2002: MILITARY CONSTRUCTION ii (2002). Because of the 11 September attacks, Congress began serious consideration of the request on 20 Sept. 2001, and passed the appropriations act on 18 Oct. 2001. *Id.* at 4. The President signed the FY 2002 Military Construction Appropriations Act on 5 Nov. 2001. *Id.* Meanwhile, the United States had begun military operations in Afghanistan on 7 Oct. 2001. CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 11. The next annual appropriations cycle did not begin until June 2002, and the FY 2003 Military Construction Appropriations Act did not become law until 23 Oct. 2002. Pub. L. No. 107-249, 116 Stat. 1578, 1578 (2005).

<sup>112</sup> Pub. L. No. 108-11, § 1901, 117 Stat. 559, 587 (2003) [hereinafter FY 2003 Emergency Supplemental].

<sup>113</sup> Dorn, *supra* note 98, at 178.

<sup>114</sup> FY 2003 Emergency Supplemental, Pub. L. No. 108-11, § 1901(d), 117 Stat. 559, 587 (2003) (emphasis added). The National Defense Authorization Act for Fiscal Year 2004 codified this amended definition, and also re-defined “military construction” as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, *whether to satisfy temporary or permanent requirements.*” Pub. L. No. 108-136, § 2808(c)(1), 117 Stat. 1392, 1723 (2003) [hereinafter FY 2004 National Defense Act] (emphasis added).

requests for information . . . and as required by law.”<sup>115</sup> Congress observed that the DOD had circumvented “the statutorily mandated military construction process” and “created a class of construction activities for which it deemed operation and maintenance funds could be expended.”<sup>116</sup> “[W]ithout benefit of legal authority or regulation, the statutory definition of ‘military construction’ was obviated for certain types of construction projects.”<sup>117</sup> Congress went on to reject the DOD’s argument that “long-standing practice [enabled] it to utilize this legal construct under certain circumstances despite its effect of vitiating and/or amending the underlying statute.”<sup>118</sup> Specifically, Congress denied the DOD the authority to issue a policy that “turns an alleged practice into de facto law.”<sup>119</sup> As in the Fort Lee fiasco, this harsh language should serve as an unmistakable warning to JA to strictly adhere to fiscal controls on military construction funding. Meanwhile, the demise of the *Reres* Doctrine right in the middle of OIF operations cast the entire fiscal rationale for combat and contingency construction in doubt, and left operational lawyers scrambling for new solutions.

### **Permissible O&M Funding: The Same Old Rules and a Temporary New One**

As a result of the congressional rejection of the *Reres* doctrine, military construction projects may now use O&M funds in only two situations.<sup>120</sup> First, under 10 U.S.C. § 2805(c), O&M funds can still be used for projects that cost less than \$750,000 or less than \$1.5 million for projects that correct threats to life, health, or safety.<sup>121</sup> Second, while specifically rejecting the *Reres* Doctrine, Congress did recognize the military’s untenable position. The FY 2004 Emergency Supplemental therefore provided the Secretary of Defense with a new Temporary Authority to use O&M funds for combat or contingency construction projects outside the United States, subject to certification of certain requirements and notification to Congress.<sup>122</sup> The amount for this Temporary O&M Authority was initially set at \$150 million,<sup>123</sup> and was later raised to \$200 million.<sup>124</sup> The \$200 million cap provided by the Temporary O&M Authority may be exceeded, if the Secretary of Defense determines the project vital to national security.<sup>125</sup> In FY 2005, Congress continued the Temporary O&M Authority at the same funding level, but made the use of O&M funds contingent on the submission of quarterly reports by the Secretary of Defense (SECDEF).<sup>126</sup>

To use the Temporary O&M Authority, the SECDEF must certify the following:

- (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. [§] 1621), or a contingency operation.
- (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence.
- (3) The United States has no intention of using the construction after the operational requirements have been satisfied.

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<sup>115</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> The temporary authority provided by [§ 1301 of the FY 2004 Emergency Supplemental] and the limited authority provided by [10 U.S.C. § 2805(c)] to use appropriated funds available for operation and maintenance to carry out a construction project are the only authorities available to use appropriated funds available for operation and maintenance to carry out construction projects.

FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301(e), 117 Stat. 1209, 1221 (2003).

<sup>121</sup> 10 U.S.C.S. § 2805(c) (LEXIS 2005).

<sup>122</sup> FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301, 117 Stat. 1209, 1221 (2003). This article refers to this authority as the Temporary O&M Authority throughout.

<sup>123</sup> *Id.* § 1301(b).

<sup>124</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(c)(1), 117 Stat. 1392, 1723 (2003).

<sup>125</sup> *Id.* § 2808(c)(2).

<sup>126</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2103 (2004).

(4) The level of construction is the minimum necessary to meet the temporary operational requirements.<sup>127</sup>

Furthermore, the SECDEF must notify Congress within seven days of obligating the O&M funds, and describe the purpose and estimated cost of the project.<sup>128</sup> Finally, the SECDEF must also provide a quarterly roll-up of the status of all such expenditures.<sup>129</sup>

When examining the military's justification for seeking relief in the *Reres* Doctrine from the inflexibility of the annual MILCON funding process, Congress candidly admitted that "the statutorily-mandated military construction process is cumbersome and can be slow. Another complication is the lack of a dedicated source of funding for contingency construction needs."<sup>130</sup> Congress also frankly acknowledged that "these problems impede timely response to urgent requirements of armed conflict."<sup>131</sup> Nevertheless, Congress also asserted that a return to the strict statutory framework would not "hamstring the commanders in the field who need to execute projects quickly and efficiently."<sup>132</sup> At first, however, the DOD's implementation of the Temporary O&M Authority firmly contradicted that assertion. The DOD did not even issue implementing guidance until more than ten months later.<sup>133</sup> Furthermore, the DOD imposed bureaucratic procedures that required approval by the Joint Staff, DA, and the DOD before combat or contingency construction could begin.<sup>134</sup> Far from adequately replacing the *Reres* Doctrine, DOD's implementation of Congress's rather generous grant of Temporary O&M Authority was initially burdensome, time-consuming, and unresponsive to tactical requirements. Operational lawyers therefore continued to search the U.S. code for other fiscal authorities that might provide other sources of funding for combat and contingency construction.

### Other Available Authorities During a National Emergency

On 14 September 2001, President Bush declared that "a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."<sup>135</sup> The events of 11 September 2001, and the subsequent GWOT, activated latent authorities that exist in the MCCA. These statutory authorities permit reprogramming MILCON funds to address urgent requirements during national emergencies. Unfortunately, they also carry their own problems, and commanders have not widely used them.

### Emergency Construction (10 U.S.C. § 2803)

Under this statutory authority, the SECDEF and the Service Secretaries may undertake a "military construction project not otherwise authorized by law if the Secretary determines (1) that the project is vital to the national security . . . , and (2) that the requirement for the project is so urgent that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security."<sup>136</sup> The Secretary must first notify Congress of the decision by providing a report that justifies the project and estimates its cost, and then the DOD must wait at least twenty-one days before beginning construction.<sup>137</sup> The main disadvantage to the Emergency Construction Authority is that § 2803 merely provides authorization to spend funds, and not an actual appropriation.<sup>138</sup> "[F]unds to finance the authorization must be

<sup>127</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(a), 117 Stat. at 1391, 1723.

<sup>128</sup> *Id.* § 2808(b).

<sup>129</sup> *Id.* § 2808(d); FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810(2), 118 Stat. at 2128.

<sup>130</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Memorandum, Deputy Secretary of Defense, to Secretary of the Army et al., subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 Apr. 2004) [hereinafter Temporary O&M Authority] (on file with the author).

<sup>134</sup> *Id.*

<sup>135</sup> Proclamation No. 7,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring a "State of National Emergency by Reason of Certain Terrorist Attacks").

<sup>136</sup> 10 U.S.C.S. § 2803(a) (LEXIS 2005). Procedures for requesting this authority can be found in chapter 5 and Appendix C of AR 415-15, *supra* note 54, and U.S. DEP'T OF DEFENSE, DIR. 4270.36, DOD EMERGENCY, CONTINGENCY, AND OTHER UNPROGRAMED [sic] CONSTRUCTION PROJECTS (17 May 1997) [hereinafter DOD DIR. 4270.36].

<sup>137</sup> The authority is limited to \$45 million in any fiscal year. Only a seven-day wait is required if notification is made electronically. 10 U.S.C.S. § 2803(a) and (b).

reprogrammed (with congressional approval) from unobligated MILCON funds . . . , [and] Congress would be reluctant to approve cancellation of a required project to fund an emergency construction project unless there were a truly dire need.”<sup>139</sup> Given these limitations and an aversion to robbing Peter’s congressional district in order to pay Paul for contingency construction somewhere else, the military rarely invokes the Emergency Construction authority.

In 2004, however, the Army did propose reprogramming \$19.5 million in MILCON funds for emergency construction of temporary facilities for the units of action (UAs) organized at Fort Stewart, Georgia.<sup>140</sup> The request, however, did nothing to enhance the Army’s credibility with Congress. After all, Congress granted § 2803 authority to the DOD to provide “flexibility in dire situations. A true emergency project should be confined to facilities without which a critical weapons system or mission could not function.”<sup>141</sup> Since the Army has been planning the transformation to UAs for several years, failure to anticipate the military construction requirements was not a very confidence-inspiring rationale. Office space and barracks do not seem to be in the same league as facilities necessary for a critical weapons system. Congress did not object, but undoubtedly, the request raised familiar suspicions in Congress that the Army was sandbagging its budget requests.

### Contingency Construction (10 U.S.C. § 2804)<sup>142</sup>

When funds are specifically appropriated, the MCCA also allows the SECDEF and Service Secretaries to undertake “military construction project[s] not otherwise authorized by law if the SECDEF determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.”<sup>143</sup> The SECDEF must first notify Congress of the decision by providing a report that justifies the project and estimates its cost. The DOD must then wait at least twenty-one days before commencing the military construction project.<sup>144</sup> When Congress voided the *Reres* Doctrine, the accompanying Conference Report clearly indicated that 10 U.S.C. § 2804 should be the primary authority for contingency construction that exceeds the statutory thresholds for the use of O&M funds.<sup>145</sup> In fact, the FY 2003 Emergency Supplemental authorized the SECDEF to transfer \$150 million of O&M funds to this statutory authority for combat and contingency construction. Contrary to its own declared preference, however, Congress has not fully funded 10 U.S.C. § 2804 in subsequent years.<sup>146</sup> The FY 2005 National Defense Act only provides \$10 million for contingency construction under 10 U.S.C. § 2804.<sup>147</sup> Instead, Congress simply extended the separate Temporary O&M Authority from FY 2004 through FY 2005.<sup>148</sup>

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<sup>138</sup> “The use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or canceling other military construction projects.” S. REP. NO. 97-474, at 14 (1982).

<sup>139</sup> AR 415-15, *supra* note 54, para. C-4.

<sup>140</sup> Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep’t of Army, to Assistant Secretary of the Army (Installations & Environment), subject: Proper Source of Funding for Unit of Action Modular Building Complexes (10 Aug. 2004) (on file with the author).

<sup>141</sup> H.R. REP. NO. 99-275, at 23 (1985).

<sup>142</sup> Although the title of § 2804 is “Contingency Construction,” this authority is separate and distinct from the Temporary O&M authority provided in § 1301 of the FY 2004 Emergency Supplemental, Pub. L. No. 108-106, 117 Stat. 1209, 1221 (2003).

<sup>143</sup> Unlike the § 2803 Emergency Construction authority to re-program funds, the § 2804 Contingency Construction authority requires a dedicated appropriation. 10 U.S.C.S. § 2804(a) (LEXIS 2005). Procedures for requesting projects under the Contingency Construction authority are found in DOD DIR. 4270.36, *supra* note 136.

<sup>144</sup> 10 U.S.C.S. § 2804(b). Only a fourteen-day wait is required if notification is made electronically.

<sup>145</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>146</sup> FY 2003 Emergency Supplemental, Pub. L. No. 108-11, 117 Stat. 559, 587 (2003). Contingencies are by definition unknown, and the Army finds it difficult to forecast requirements for unknown activities. In past years, the Army budget request has been so meager that Congress has not fully funded § 2404. For example, in FY 92, the Army used § 2404 to fund just one project. It did not use the authority at all between FY 93 and FY 95, and again funded a single project in FY 96. In FY 97, the Army requested \$9.5 million, but Congress only appropriated \$5 million. OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at I-145.

<sup>147</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, § 2404(a)(5), 118 Stat. 1811, 2114 (2004).

<sup>148</sup> Compare FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808, 117 Stat. 1391, 1723 (2003), with FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2128 (2004) (striking out only the year and keeping all other statutory text the same).



## Construction Authority in a National Emergency (10 U.S.C. § 2808)<sup>149</sup>

Upon declaration of a national emergency, the SECDEF may undertake construction projects that are necessary to support the armed forces by reprogramming funds from unobligated MILCON funds, even if not otherwise authorized by law.<sup>150</sup> The SECDEF must notify Congress of the decision and the estimated cost of the emergency construction project.<sup>151</sup> Unlike 10 U.S.C. §§ 2803 and 2804, the DOD can commence construction immediately without waiting for a period of time to elapse after notifying Congress. On 16 November 2001, President Bush issued Executive Order 13,235 which specifically invoked 10 U.S.C. § 2808 in response to the terrorist attacks.<sup>152</sup> The only other time a president has invoked this authority was during the first Gulf War.<sup>153</sup> The SECDEF, however, has not made use of the available authority, and DA has not issued any specific guidance on procedures for undertaking military construction under this authority.<sup>154</sup> While possessing the virtue of greater responsiveness than the normal three-tier system of the MCCA, these chronically ignored and underfunded emergency statutory authorities ultimately do not solve commanders' combat and contingency construction problems.

### Military Solutions

Unless modified, the statutory framework for funding military construction will continue to be complicated, burdensome, and unresponsive.<sup>155</sup> In the past, when faced with chronic shortages in contingency construction funds, the Army resorted to the *Reres* Doctrine to accomplish the mission. Although the *Reres* Doctrine no longer exists, the military does have a few approaches still available for operational lawyers to consider, including down-scoping the project, using relocatable buildings, and placing a task order under LOGCAP. This section explores the advantages and limitations of each of these alternatives.

### Down-scope the Project

Commanders have a responsibility to use resources efficiently to complete the mission. When auditors examine military construction projects, they commonly find excessive costs that result from "gold-plated" requirements.<sup>156</sup> A critical analysis of mission requirements may permit down-scoping a project until its cost is below an applicable statutory threshold. The contracting team should therefore re-examine the proposed construction, and consider whether any component can be eliminated without jeopardizing the mission.<sup>157</sup> When considering whether to down-scope a project, however, the commander must guard against the twin dangers of project-splitting and mission failure. To avoid project-splitting, the commander must ensure that the project still results in "a complete and usable facility."<sup>158</sup> "Only truly unnecessary work

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<sup>149</sup> Congress created further confusion by placing the Temporary O&M authority at § 2808 of the FY 2004 National Defense Act, Pub. L. No. 108-136, 117 Stat. 1392, 1723 (2003). The Emergency Construction authority at 10 U.S.C. § 2808 is a separate and distinct authority with different restrictions with respect to source of funds, reporting requirements, and approval authorities. The Temporary Authority currently resides at § 2810 of the FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2128 (2004).

<sup>150</sup> 10 U.S.C. § 2808 (LEXIS 2005).

<sup>151</sup> *Id.*

<sup>152</sup> Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 20, 2001) (invoking "National Emergency Construction Authority").

<sup>153</sup> Lieutenant Colonel Michael Benjamin et al., *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan.-Feb. 2003, at 157 (citing Exec. Order No. 12,734, 55 Fed. Reg. 48,099 (Nov. 14, 1990)).

<sup>154</sup> See AR 415-15, *supra* note 54, at app. D-2. The DOD, on the other hand, does have procedures for requesting this authority. DOD DIR. 4270.36, *supra* note 136. The Army has probably declined to issue specific guidance for the same reason it has avoided use of § 2803 reprogramming authority. Since members of Congress loathe shifting MILCON dollars from their districts, the Army can lobby instead for a supplemental appropriation.

<sup>155</sup> See, e.g., The Judge Advocate General, U.S. Army, After Action Report: Operation Desert Shield/ Operation Desert Storm III-B-2 (n.d.) ("[H]igh unprogrammed costs of the operation and the limited funding available raised a number of fiscal issues. With the need for facilities in theater and the limitations on construction . . . , the restrictions on expenditure of funds for construction did cause considerable difficulty; the normal MILCON budget process obviously took too long.") (on file with CLAMO).

<sup>156</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., ARMY SHOULD DO MORE TO CONTROL CONTRACT COSTS IN THE BALKANS, GAO-00-225, at 13-14 (2000) [hereinafter GAO REP.: CONTROLLING CONTRACT COSTS].

<sup>157</sup> See, e.g., DEPUTY CHIEF OF STAFF, ENGINEERS, U.S. ARMY EUROPE, BASECAMP FACILITY STANDARDS 22-24 (1999) (placing responsibility for reviewing construction proposals on a Joint Acquisition Review Board (JARB)); CLAMO LESSONS LEARNED: BALKANS, *supra* note 96, at 144 (establishing the judge advocate role as the legal adviser to the JARB); OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at III-53 (discussing the judge advocate's ability to advise the JARB on limiting the scope of proposed projects).

<sup>158</sup> Military Construction Codification Act, 10 U.S.C. § 2801(b) (LEXIS 2005).

[can] be deleted.”<sup>159</sup> Judge advocates need to be especially aware that down-scoping a project, if made with the idea in mind that the project can later be expanded, will almost certainly be considered illegal project-splitting.<sup>160</sup> At the other extreme, aggressive down-scoping can also jeopardize future mission success by constructing “a facility that lacks capacity for future growth, making it potentially inadequate in future years.”<sup>161</sup>

By prudently down-scoping a project, the commander may be able to adopt a less ambitious proposal that both successfully meets the O&M threshold and accomplishes the mission. For example, in Bosnia, the command originally planned to construct a thirty-stall wash rack to prepare vehicles for redeployment. Since the estimated \$2 million cost was well over the statutory O&M threshold, one acceptable proposal was to down-scope the project to a ten-stall wash rack costing less than \$300,000.<sup>162</sup> Other commonly identified excesses include unnecessary redundancies, such as back-up power for non-essential systems and comfort items like climate control, flooring, and personalizing the project to the unit.<sup>163</sup> Another successful down-scoping tactic is to swap funded costs for unfunded costs. Because only funded costs count toward the statutory thresholds, the use of military labor and excess supplies, for instance, can result in significant cost-savings.<sup>164</sup> If there is no way to down-scope the project while still maintaining a “complete and usable” facility, then the only legal solution is to use the Temporary O&M Authority or seek bona fide MILCON funds.

### Relocatable Buildings<sup>165</sup>

When analyzing a construction project, one option for the command to consider is whether the use of relocatable buildings will meet mission requirements.<sup>166</sup> Relocatable buildings are “designed to be readily moved, erected, disassembled, stored, and reused.”<sup>167</sup> Theoretically, almost any structure could be relocated brick-by-brick.<sup>168</sup> To prevent abuse, Army regulations had required that the set-up and teardown costs of a relocatable building amount to less than thirty percent of the total funded and unfunded cost.<sup>169</sup> As of October 2004, a new policy, however, has restricted the definition of relocatable buildings even further. According to the new Army policy, to qualify as a relocatable building, “the estimated funded and unfunded cost for average building disassembly, repackaging, (including normal repair and refurbishment of components),

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<sup>159</sup> If construction has already commenced, then the MACOM must approve the deletion of any unnecessary work. AR 415-15, *supra* note 54 at app. B-4(b)(3).

<sup>160</sup> Meadows, *supra* note 45, at 26.

<sup>161</sup> U.S. GOV'T ACCOUNTABILITY OFF., DEFENSE INFRASTRUCTURE: LONG-TERM CHALLENGES IN MANAGING THE MILITARY CONSTRUCTION PROGRAM, GAO-04-288, at 6 (2004) [hereinafter GAO REP.: DEFENSE INFRASTRUCTURE]. If the project is scaled back so far that it is no longer functional, either the mission will fail or subsequent attempts to add necessary functions will look suspiciously like illegal incrementation.

<sup>162</sup> OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at III-243.

<sup>163</sup> “When Marine Corps forces replaced Army forces in Djibouti in December 2002 (to provide humanitarian assistance and fight the Global War on Terrorism), they also took over responsibility for funding LOGCAP services. Marine commanders immediately undertook a complete review of the statement of work,” and eliminated or reduced \$2.8 million in building and construction projects. GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 37. This anecdote is included not to compare the relative “standard of living” between services, but to show that a second set of eyes on a project can reduce waste; the Marines later added their own requirements which actually raised the final costs. *Id.* at 38 n.27.

<sup>164</sup> The U.S. Army saved \$5 million in labor costs in the construction of Camp Montieth, Kosovo, by using military labor rather than contractors. GAO REP.: CONTROLLING CONTRACT COSTS, *supra* note 156, at 11. In Bosnia, the command re-used gravel and plywood from other projects to lower the funded costs of projects. Interview by Major Steve Castlen with Colonel Denise Vowell, Staff Judge Advocate, 1st Armored Division, Charlottesville, Virginia (27 Jan. 1998) (on file with CLAMO).

<sup>165</sup> See Memorandum, Assistant Chief of Staff for Installation Management, U.S. Dep't of Army, to Director, Installation Management Agency et al., subject: Interim Army Policy for Relocatable Buildings (21 Oct. 2004) [hereinafter Army Interim Relocatable Building Policy] (providing the procedures to acquire relocatable buildings) (on file with the author). See Lieutenant Colonel Brian J. Godard, Relocatable Buildings—The Rules for Classifying and Funding Them (9 Mar. 2004) [hereinafter Godard Info Paper] (providing the fiscal rules applying to relocatable buildings) (information paper on file with the author).

<sup>166</sup> E-mail from Major Brian Brady, Command Judge Advocate, Army Central Command (ARCENT), to Major Tyler Randolph, The Judge Advocate General's Legal Center & School (12 Aug 1999) (on file with CLAMO) (“Here's an issue all JAGs need to be prepared to tackle: Relocatable Buildings . . . you [sic] may feel pressure to ok the purchase—know that this is a sensitive issue.”).

<sup>167</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(b)(1).

<sup>168</sup> For example, the famous London Bridge is now in Lake Havasu City, Nevada. In 1962, an American oil tycoon bought the 130-year old bridge for \$2.5 million, and spent another \$7 million dismantling it, shipping the pieces, and reassembling them. David Orkin, *The Complete Guide to the Monuments of America*, INDEPENDENT (London), Mar. 5, 2005, at 5.

<sup>169</sup> U.S. DEP'T OF ARMY, REG. 420-18, FACILITIES ENGINEERING MATERIALS, EQUIPMENT, AND RELOCATABLE BUILDING MANAGEMENT para. 5-2(c) (3 Jan. 1992). *But see* U.S. DEP'T OF DEFENSE, INSTR. 4165.56, RELOCATABLE BUILDINGS para. 4.1 (13 Apr. 1988) (establishing twenty per cent as the threshold) [hereinafter DOD INSTR. 4165.56]. The discrepancy between the AR and the DOD Dir. is inexplicable, and may be the basis for superseding Chapter 5 of AR 420-18 with the Army Interim Relocatable Building Policy, *supra* note 165.

and nonrecoverable building components, including typical foundations [may] not exceed 20 percent of the acquisition cost.”<sup>170</sup> Given this definition, relocatable buildings typically include such structures as mobile homes, trailers, or prefabricated, pre-assembled modular buildings.<sup>171</sup>

While procuring relocatable buildings may meet mission requirements quickly and at less cost, their use does not relieve the command of the constraints of fiscal law. Relocatable buildings may be used only when they “constitute the most practical or economical means of satisfying an interim facility requirement.”<sup>172</sup> The command should consider the use of relocatable buildings as only one *means* of satisfying a construction requirement, and not as an avenue of escape from restrictions on O&M funding. The command must still abide by the applicable monetary thresholds and obligate funds from the appropriate source. The appropriate funding source for relocatable buildings is determined by their expected duration of use.

Relocatable buildings may be used in one of two ways, either as a substitute for permanent construction or as an interim facility requirement. Relocatable buildings “can be used instead of conventional permanent construction, particularly overseas, when the requirement duration is unknown.”<sup>173</sup> When the relocatable building is a substitute for permanent construction, “the project will be programmed by using proper military construction procedures and totally funded from military construction appropriations.”<sup>174</sup> Therefore, just as in any other military construction project, the JA must properly scope the project by determining what constitutes the complete and usable facility, including all clearly interdependent components to arrive at the total funded cost.<sup>175</sup> The command must then follow the normal construction funding rules, and obligate MILCON funds if the total cost is above the statutory O&M threshold. The command can only use O&M funds if the total cost is less than the statutory O&M threshold or the command gains approval to use the new Temporary O&M Authority.

Similar rules apply when using relocatable buildings to meet an interim facility requirement, rather than as a substitute for permanent construction. A relocatable building may meet interim facility requirements where “military missions, deployments, military contingency operations, disaster relief,” or other unforeseen short-term situations are expected to last fewer than three years.<sup>176</sup> In these situations, the relocatable building cannot be used beyond the three-year limit, and must be removed unless an exception is granted.<sup>177</sup> When the relocatable building is intended to be used for fewer than three years, it qualifies as personal property, not real property, and an additional source of funds may be available. Since personal property is usually classified as an investment item, the relocatable building must normally be purchased with Other Procurement-Army (OPA) funds.<sup>178</sup> If the cost is less than \$250,000, however, then O&M funds should be used instead.<sup>179</sup>

Legitimate disagreements may arise in deciding whether to classify relocatable buildings as substitutes for permanent construction or as temporary facilities. Within weeks of 9/11, the United States began establishing a military base in Karshi Kharnabad (K2), Uzbekistan, to support the hunt for Osama Bin Laden.<sup>180</sup> The command proposed spending \$3 million to buy CONEX containers and trailers to position on foundations equipped with electricity and plumbing.<sup>181</sup> The operational lawyer for Combined Joint Task Force (CJTF)-180 thought that the relocatable buildings could be classified as personal

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<sup>170</sup> “If the estimated funded and unfunded costs . . . exceed 20 percent of the acquisition cost of the relocatable building, the building will be considered real property and will be approved [and] funded under the normal MILCON process.” Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(b)(2). Note that, unlike the calculation for a normal military construction project, both the funded and the unfunded costs are included—to include the military labor involved in setting up the relocatable building.

<sup>171</sup> U.S. DEP’T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION 15 (7 Oct. 1994).

<sup>172</sup> DOD INSTR. 4165.56, *supra* note 169, para. 4.1.

<sup>173</sup> *Id.* para. 5.2.2.

<sup>174</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-5(a).

<sup>175</sup> See The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991).

<sup>176</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(a).

<sup>177</sup> The Assistant Secretary of the Army (Installations & Housing) can approve continued use where the relocatable building is being used in a contingency operation. The MACOM commander can approve continued use when a military construction project for a replacement facility has been authorized and appropriated for by Congress through the normal MILCON process. *Id.* para. 5-5(a).

<sup>178</sup> Commanders must coordinate acquisition through the Director, Installation Management Agency (IMA). *Id.* app 5-A.

<sup>179</sup> The investment/expense threshold can be found in the annual Defense Appropriation Act. See, e.g., FY 2005 Defense Appropriations Act, Pub. L. No. 108-287, § 8040, 118 Stat. 951, 979 (2004).

<sup>180</sup> Robert G. Kaiser, *U.S. Plants Footprint in Shaky Central Asia*, WASH. POST, Aug. 27, 2002, at A1.

<sup>181</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 165.

property and purchased with procurement funds because they were only for temporary use and could be moved if necessary.<sup>182</sup> In contrast, the operational lawyers for the Combined Forces Land Component Commander (CFLCC) concluded that the duration of use was more properly characterized as “undetermined,” rather than “temporary,” since the structures might in fact be used for more than three years.<sup>183</sup> Furthermore, the structures could not be “readily disassembled and moved.”<sup>184</sup> To qualify as a relocatable building, it is not enough that the structure be moveable. In this case, “the estimated funded and unfunded cost for average building disassembly, repackaging, (including normal repair and refurbishment of components), and nonrecoverable building components, including typical foundations” probably would have exceeded twenty percent of the acquisition cost.<sup>185</sup> The relocatable buildings, therefore, qualified as a substitute for permanent construction. As real property, the command either had to use MILCON funds or seek permission to use the Temporary O&M Authority.<sup>186</sup>

Given the limitations on the use of relocatable buildings, commanders at the lowest levels have not gained any real fiscal advantage. Most commanders do not have access to a large pot of uncommitted OPA funds, and they can already spend up to the statutory O&M threshold out of their own budget. Furthermore, the same fiscal rules that prohibit project-splitting in construction also apply to relocatable buildings.<sup>187</sup> The total funded cost is the cost of the complete system, and encompasses all of the components necessary to accomplish the mission.<sup>188</sup> Neither the components nor the requirements can be “fragmented to circumvent application of the expense/investment [threshold].”<sup>189</sup> Although relocatable buildings represent an excellent means of satisfying a construction requirement, the same fiscal laws apply to the acquisition of relocatable buildings. They are simply not a panacea for the problems of funding combat and contingency construction.

### LOGCAP: A Necessary Solution or the Next Congressional Target?

Another attractive option for meeting construction requirements is the use of LOGCAP.<sup>190</sup> Under an umbrella contract run by the U.S. Army Materiel Command (AMC), Halliburton Kellogg Brown & Root (KBR) will provide commanders with comprehensive logistics, engineering, and construction support during a deployment anywhere in the world on a cost-plus-award-fee basis.<sup>191</sup> Since December 2002, the military has contracted for more than \$12 billion in LOGCAP services in more than half a dozen countries, including \$5.6 billion in Iraq through May 2004.<sup>192</sup> “When LOGCAP is used in support of a mission, the operational commander becomes responsible for defining services to be provided by the contractor, integrating contractor personnel into the mission, and ensuring that funding is provided.”<sup>193</sup> In Somalia, Haiti, and the Balkans, “the contractor [was] paid from the operational command’s operations and maintenance appropriation account.”<sup>194</sup> The demise of the *Reres* Doctrine, however, has called that practice into question.

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Robin Wright, *U.S. Evicted from Air Base in Uzbekistan*, WASH. POST, K JULY 30, 2005, AT A1.

<sup>185</sup> DOD DIR. 4165.56, *supra* note 169, para. 3.2.1.

<sup>186</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 165. The CFLCC’s legal opinion was correct in predicting that the construction would be for more than temporary use. K2 remains “a key transit and support point for operations in Afghanistan.” Associated Press, *U.S. Forces Digging in for the Long Haul, But Walking on Eggshells* (May 3, 2004), at <http://msnbc.msn.com/id/4898751> (last visited Aug. 22, 2005) (noting that the U.S. has subsequently built a \$5 million airfield, a \$1 million dining hall, a \$500,000 fitness center, and new barracks for 1750 personnel). On 30 July 2005, however, the government of Uzbekistan gave the United States 180 days to close the base. The eviction notice, no doubt, came in response to United States criticisms of Uzbekistan’s human right record.

<sup>187</sup> AR 415-32, *supra* note 53, at 12.

<sup>188</sup> Godard Info Paper, *supra* note 165, at n.19.

<sup>189</sup> “[I]f the requirement is to house 500 soldiers, one must consider the aggregate cost of the total number of relocatable buildings needed to house all 500 soldiers, because they constitute the system needed to satisfy the housing requirement.”

*Id.* Each relocatable building cannot be considered individually to be a “complete and usable facility.” *Id.*

<sup>190</sup> AR 700-137, *supra* note 92, at 1.

<sup>191</sup> LOGCAP Homepage, <http://www.amc.army.mil/logcap> (last visited Aug. 22, 2005). Under the LOGCAP III contract (DAAAA09-02-D-0007), the “general SOW [Statement of Work] provides for the award of task orders for construction. Paragraph 1.5 discusses the types of services that can be provided under LOGCAP and paragraph 1.5.3 specifically identifies construction and construction services.” ARMY FIELD SUPPORT COMMAND, AFSC LEGAL NEWSLETTER, Feb. 10, 2005, at 1 [hereinafter AFSC NEWSLETTER].

<sup>192</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 1.

<sup>193</sup> U.S. GOV’T ACCOUNTABILITY OFF., CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, GAO-97-63, at 2 (1997).

<sup>194</sup> *Id.*

Under the *Reres* Doctrine, construction performed by a LOGCAP contractor could be paid for with O&M funds where the construction was “clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations.”<sup>195</sup> Since LOGCAP was only available during wartime or contingency operations, and since the services required were always related to the Army’s operational mission, no fiscal issues arose. The LOGCAP contractor was tasked with a service, such as troop bed-down or mess support, and then built the facilities required to perform that service.<sup>196</sup> The LOGCAP contractor charged the cost of the facility as part of the contractor’s overhead, and title to the building passed to the Army.<sup>197</sup> Funneling construction through LOGCAP, therefore, allowed the Army to accomplish indirectly what fiscal laws prohibited it from doing directly. Until the demise of the *Reres* Doctrine, units in Iraq took full advantage of the LOGCAP loophole.

In July 2003, CFLCC extended the deployment of most U.S. forces in Iraq until February 2004.<sup>198</sup> To provide some comfort to the soldiers, CFLCC also ordered its subordinate commands to move soldiers out of tents and into adequate billeting.<sup>199</sup> To accomplish the mission, the 101st Airborne Division, based in Mosul, Iraq, considered three alternative courses of action.<sup>200</sup> First, the 101st could have used its organic engineer brigade to build its own housing by purchasing construction materials on the local market.<sup>201</sup> Although the troop labor constituted an unfunded cost, the estimated funded costs still amounted to nearly \$25 million for the complete and usable facilities, which included showers, power generation, and heating and air conditioning.<sup>202</sup> The 101st had to reject this course of action because fiscal law requires MILCON funds for a project of that size, and MILCON funds not available. Second, the 101st briefly considered dividing the entire housing requirement into thirty-three separate, smaller projects, each costing less than \$750,000.<sup>203</sup> All of the projects were then below the statutory threshold, and thus permitted O&M funding. The operational lawyers, however, quickly identified this course of action as a textbook case of project-splitting, and it too was summarily rejected.<sup>204</sup> Under the final course of action, which was ultimately selected, the Division obtained the housing under LOGCAP using O&M funds. In a fiscal law trifecta, the Division re-evaluated the mission to down-scope the project, used LOGCAP to contract for provide bed-down services, and then bought relocatable buildings to house the soldiers.<sup>205</sup> Unfortunately, the LOGCAP contract cost about \$65 million. That figure represented \$40 million more than the cost that the 101st estimated they would have incurred by building the camp themselves. Moreover, that did not even include another \$8 million in potential administrative costs and award fees.<sup>206</sup>

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<sup>195</sup> *Reres* Memo, *supra* note 48.

<sup>196</sup> In Haiti, for example,

the contract create[d] a generic apparatus for receiving, housing, and sustaining 20,000 troops in five base camps for 180 days. Within 15 days of notification (of an “event”), the contract requires Brown and Root to receive and support 1,300 troops per day. Within 30 days, Brown and Root is required to support 20,000 troops in one rear and four forward base camps for up to 180 days, with options to increase the size of the supported force to 50,000 troops and to extend support to 360 days. The contract provisions call for each base camp to provide billeting, mess halls, food preparation, potable water, sanitation, showers, laundry, transportation, utilities and other logistical support . . . [including] construction support, general logistics services, augmentation to engineer units, and facility engineer support.

CLAMO LESSONS LEARNED: HAITI, *supra* note 93, at 134-35 n.448.

<sup>197</sup> GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.245-5 (Government Property) (March 2005 [hereinafter FAR]).

<sup>198</sup> Vernon Loeb, *Pentagon Unveils Plan to Bolster Forces in Iraq: Year-Long Deployments for U.S. Troops to Be Revived for First Time Since 1985*, WASH. POST, July 24, 2003, at A8.

<sup>199</sup> Memorandum, Deputy Staff Judge Advocate, to Chief of Staff, Coalition Forces Land Component Command, subject: Legal Analysis of Funding Problems Surrounding the Concrete Masonry Unit Construction Project (13 June 2004) [hereinafter CMU Construction Project Memo] (on file with the author).

<sup>200</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 39.

<sup>201</sup> *Id.*

<sup>202</sup> Colonel Rich Whitaker, Staff Judge Advocate, 101st Airborne Division, U.S. Army, Operation Iraqi Freedom After Action Report 7 (n.d.) (report on file with CLAMO).

<sup>203</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 40.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* As it is now called, Camp Maerz is one of fourteen “enduring bases” in Iraq, and includes “satellite television and Internet cafes. The facility’s dining hall is the size of an airport hangar. The facility’s physical-fitness facility offers access to not only dozens of weight-training equipment, but also an aerobics room and a basketball court. As of mid-April 2004, a movie theater was scheduled to open.” GlobalSecurity.org, Mosul Airport, <http://www.globalsecurity.org/military/world/iraq/mosul-airbase.htm> (last visited Aug. 22, 2005).

<sup>206</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 40.

When this LOGCAP acquisition was approved in October 2003, the full implications of the congressional rejection of the *Reres* Doctrine had yet to be explored. Soon after, however, CFLCC had become uneasy about the “gray area” inhabited by LOGCAP construction and O&M funding.<sup>207</sup> By December 2004, its successor, the Multi-National Force- Iraq (MNF-I) had decided that there was no LOGCAP exception to buying construction services, especially when there were no services contemplated other than the construction itself.<sup>208</sup> Any other interpretation would allow LOGCAP to swallow MILCON funding rules entirely. The Army could order medical services and receive a hospital, no fiscal strings attached. Looking back at the Fort Lee fiasco, the Army could have had its airfield by simply ordering landing services. In light of Congress’s rejection of the *Reres* Doctrine, some clear lines must be drawn between permissible LOGCAP construction that is merely incidental to the services requested and more troublesome, if not illegal, subterfuge designed to avoid fiscal law altogether.

The Army Field Support Command has recently issued guidance that creates an analytical framework that JAs should use to determine whether LOGCAP can be legitimately used to obtain construction services with O&M funding.<sup>209</sup> Under this analysis, funds maintain their color even though they are paid to LOGCAP contractors.<sup>210</sup> The simplest case involves a statement of work or LOGCAP proposal that explicitly calls for construction.<sup>211</sup> In that case, all fiscal laws applying to military construction apply.<sup>212</sup> MILCON funds must be used, unless the project is small enough to fit under the statutory threshold for O&M funding or the Temporary O&M Authority is used.<sup>213</sup> If the Army requests medical services, and the contractor proposes building a hospital, normal construction funding rules should apply.

A more complex case occurs when, post-award, the command directs the contractor to engage in construction activities.

Here, performance with construction was not reasonably necessary, and the contractor did not propose construction, but after award, someone within the Government directed the contractor to engage in construction activities. This direction by the government to choose construction as a means for continued contract performance, rather than simply the contractor choosing construction as a means of performance, makes the activity a military construction project.<sup>214</sup>

For example, mess services are required, and the contractor proposes to meet the requirement by serving meals in the contractor’s own tents. If it is reasonably foreseeable that construction of more substantial facilities will eventually be necessary, then the command should not accept the proposal just to skirt fiscal constraints. Under those facts, having a complete and usable facility would require construction, not merely services. If the mission’s anticipated duration is short, on the other hand, then the proposal might be acceptable. If the deployment is later extended and the tents no longer satisfactorily meet the mission requirements, then a new proposal to build a dining hall must be funded through normal construction funding channels.

Under this AFSC analysis, the only time O&M funds could be used to pay a LOGCAP contract in excess of the statutory threshold is when the command’s “stated need was only for services, and not construction . . . . The choice by the contractor to engage in construction activities was not foreseeable at the time of award, not necessary for performance, and not unduly influenced by the [command].” In these cases, the command “is not purchasing construction, nor engaged in a military construction project, and the rules relating to construction funding do not apply.”<sup>215</sup> For example, the command could require power, and the contractor could propose to meet the requirement with its own electrical generators. Because of climatic

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<sup>207</sup> Interview with Major Frank March, former Chief of Administrative and Contract Law for CFLCC, at The Judge Advocate General’s Legal Center & School, Charlottesville, Virginia (10 Mar. 2005) [hereinafter Interview with Major Frank March]; see also Center for Law & Military Operations, The Judge Advocate General’s Legal Center & School, U.S. Army, Notes from III Corps Pre-deployment Conference 7 (14 Nov. 2003) (“LOGCAP. Everything they build becomes ours. If they construct something for us, it’s not simply a ‘service’—it will be reported against construction.”).

<sup>208</sup> Interview with Major Frank March, *supra* note 207.

<sup>209</sup> AFSC NEWSLETTER, *supra* note 191, at 1.

<sup>210</sup> “[T]ask orders placed under LOGCAP require the same fiscal law analysis that would be performed if the requirement were placed on any other Army contract.” *Id.*

<sup>211</sup> In response to the command’s requirements documented in the Statement of Work (SOW), the LOGCAP contractor develops and submits a proposed Rough Order of Magnitude (ROM) cost estimate or Technical Execution Plan (TEP) for approval. U.S. ARMY MATERIEL COMMAND, AMC PAM. 700-30, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) 19 (2000). Under this analysis, if the contractor proposes to meet the SOW’s requirements by charging the command for a construction project, then the purpose of those funds is construction, and MILCON funding rules must be followed.

<sup>212</sup> AFSC NEWSLETTER, *supra* note 191, at 1.

<sup>213</sup> FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301(e), 117 Stat. 1209, 1221 (2003).

<sup>214</sup> David Defrieze, Army Field Support Command, LOGCAP Construction (n.d.) (information paper on file with author).

<sup>215</sup> *Id.*

conditions, the contractor later decides to build structures to protect the valuable generators. When the task order is closed out, the overhead costs of the structure might be permitted as allowable costs and paid with O&M funds as an equitable adjustment.<sup>216</sup> The risk to the contractor, however, is that the costs will be disallowed, and that determination will rest upon whether the need for the structure was foreseeable.

### Legislative Solutions

Until Congress provides a responsive military construction process, commanders will continue to chafe at the conflicting responsibilities of completing the mission and complying with fiscal law. Faced with this dilemma, it is small wonder that legal fictions such as the *Reres* Doctrine and the LOGCAP dodge continue to arise. Commanders will continue to test the legal limits of creative scoping, relocatable buildings, and LOGCAP. The 101st Airborne Division's LOGCAP acquisition of relocatable buildings demonstrates that the unresponsiveness of the construction funding process imposes tens of millions of dollars in unnecessary costs. As the Fort Lee fiasco demonstrates, everybody loses whenever military officers compromise their respect for the law for the sake of the mission. The current statutory framework could provide an adequate foundation for authorizing construction necessary for military operations in support of the GWOT, if some improvements were made. By making the following changes, Congress could streamline the process and provide full funding for combat and contingency construction.

First, Congress and the Executive branch should cut down on the confusion by finally agreeing on the appropriate statutory source for contingency construction funding. Either 10 U.S.C. § 2804 Contingency Construction should be fully funded as the primary O&M construction authority (as the FY 2003 Supplemental champions) or Congress should make the Temporary O&M Authority, in fact, permanent. At this stage, the latter course is probably easier because the DOD procedures are now in place.<sup>217</sup> Although the implementing guidelines for the Temporary O&M Authority were slow in developing, a system is now in place that permits truly urgent construction requirements to receive approval in days rather than months.<sup>218</sup> In fact, the streamlined process resulted in total projects quickly reaching the \$200 million cap set by the FY 2005 National Defense Act, so the primary limiting factor now is not time, but money.<sup>219</sup> To address that issue, the Secretary of Defense already has the authority to exceed the \$200 million cap if the project were truly vital to national security.<sup>220</sup>

Second, regardless of the course it takes, Congress should also streamline the authority by adopting shorter waiting periods. Under 10 U.S.C. § 2803, construction can begin seven days after electronic notification, rather than the fourteen days required by 10 U.S.C. § 2804. An extra week can make a huge difference to a commander on the ground. Better still, Congress should dispense with prior notification altogether. A good model would be 10 U.S.C. § 2808 which only requires a follow-on report. Congress still maintains adequate oversight because the appropriation itself is limited and Congress can scrutinize the follow-on report for abuses. To quote Professor Trimble again, "hardly any important executive branch decision is taken without considering the reaction in Congress."<sup>221</sup>

Third, Congress should increase the statutory thresholds that limit O&M construction, and index these costs annually.<sup>222</sup> Though not enacted, early versions of the FY 2005 National Defense Act increased the UMMC thresholds to \$2.5 million normally and to \$4 million to correct a deficiency that threatens life, health, or safety.<sup>223</sup> Such an increase would solve many problems with respect to proposed projects in the UMMC range. To make a real impact, however, Congress would also have to significantly raise the overall UMMC appropriation above the current \$20 million.<sup>224</sup>

<sup>216</sup> FAR, *supra* note 197, subpt. 52.243-4.

<sup>217</sup> Temporary O&M Authority, *supra* note 133.

<sup>218</sup> Discussions by the author with fiscal lawyers from the field at the Contract & Fiscal Law Symposium held at The Judge Advocate General's Legal Center & School (7-10 Dec. 2004) yielded mixed assessments of the Temporary O&M Authority and DOD's procedures. At first, the bureaucratic hurdles seemed insurmountable, but gradually the approval period has been reduced to less than a week for critical missions. Operational lawyers at the lowest echelons generally had a less optimistic viewpoint than those at higher levels.

<sup>219</sup> CMU Construction Project Memo, *supra* note 199.

<sup>220</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(c)(2), 117 Stat. 1391, 1723 (2003).

<sup>221</sup> Trimble, *supra* note 28, at 751.

<sup>222</sup> "Construction costs have increased 41 percent since the existing \$1.5 million threshold for using unspecified minor military construction funds and 7 percent since the existing \$750,000 threshold for using [O&M] funds were last adjusted . . . . As a result, fewer projects that are smaller in scope can now be completed." GAO REP.: DEFENSE INFRASTRUCTURE, *supra* note 161, at 7.

<sup>223</sup> H.R. 4200 EH, 108th Cong., § 2801, at 589 (2004).

<sup>224</sup> If the threshold were increased, thirty fewer projects would require congressional approval through the traditional, multiyear process, but "the number of projects eligible for funding would still be contingent upon the total amount of military construction funds appropriated by Congress . . . regardless of the

Even if Congress did raise the UMMC threshold, the Department of the Army would still have to centrally manage UMMC funds to ensure the overall UMMC appropriation was not exceeded. It would be more helpful to commanders in the field if Congress raised the statutory O&M threshold so that local commanders could meet local needs out of their own budgets. Congress could continue setting the statutory O&M threshold at fifty percent of the upper UMMC threshold.<sup>225</sup> An even more ambitious solution, however, would simultaneously raise the UMMC threshold *and* set the O&M statutory threshold at the same level, transforming the three-tier MILCON funding system into a much simpler two-tier system.<sup>226</sup> Effective oversight could be maintained by requiring Secretary of the Army approval and congressional notification.<sup>227</sup> Fearing another Fort Lee fiasco, Congress may be reluctant to take that course of action. “No system of control, [however,] can eliminate every ill-chosen project. Division and Brigade Commanders will demonstrate-- as they have done time and time again-- the optimal system is one that encourages their initiative and relies on their judgment.”<sup>228</sup>

## Conclusion

The GWOT has greatly stressed the traditional legal framework for military construction funding. The system remains cumbersome, restrictive, and often non-responsive. Commanders in the field, faced with new missions in undeveloped theaters of action, are demanding facilities for operations, force protection, and logistical support. Under its constitutional prerogative, however, Congress has repeatedly expressed its displeasure with the military whenever it has arrogated to itself the power to fund operations in a manner other than that clearly provided for by law. In the midst of this constitutional tension, operational lawyers are delicately positioned, tasked to support commanders in the field while ensuring respect for the law promulgated by civilian authority.

The impasse may tempt JAs to find dubious legal support for O&M funding of military construction by abusing scoping, relocatable buildings, and LOGCAP. Until Congress adopts new legislation, however, fiscal law provides an O&M solution in only two instances: (1) Projects costing under the statutory O&M threshold; and (2) Projects authorized to use of the Temporary O&M Authority recently provided by Congress. Although Congress could certainly do more to streamline these authorities and to make them permanent, the Army must also carry out its responsibility to protect the public fisc. Congress has appropriated over \$165 billion thus far to fight the GWOT.<sup>229</sup> As the theaters of operations mature, Congress will undoubtedly become even more keenly interested in knowing exactly how that treasure is spent. Judge advocates must always remind themselves and their commanders that fiscal laws apply even during combat and contingency operations, and there is no such thing as a “good intentions” defense to a violation of fiscal law.<sup>230</sup>

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threshold being increased.” GAO REP.: DEFENSE INFRASTRUCTURE, *supra* note 161, at 31. Currently, the Army can fund almost seven \$3 million projects. If the UMMC threshold were raised, but the overall appropriation was not, the Army could fund at most five \$4 million projects.

<sup>225</sup> H.R. 4200 EH, 108th Cong., § 2801, at 589.

<sup>226</sup> A commander could then have the flexibility to spend up to \$4 million in O&M funds, but must receive Secretary of the Army approval and notify Congress if the project exceeded \$1.25 million. *See* 10 U.S.C.S. § 2805 (LEXIS 2005).

<sup>227</sup> The House version of the FY 2005 National Defense Act would have (1) raised the O&M threshold to \$1.5 million, but (2) required Secretary of the Army approval and congressional notification if the project were above \$1 million. H.R. REP. NO. 108-491, § 2801, at 411 (2004). Under this simplified proposal, both the O&M and UMMC thresholds would be the same, and both would require DA approval and congressional notification.

<sup>228</sup> Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 19-20.

<sup>229</sup> U.S. GOV’T ACCOUNTABILITY OFF., FISCAL YEAR 2004 COSTS FOR THE GLOBAL WAR ON TERROR WILL EXCEED SUPPLEMENTAL, REQUIRING DOD TO SHIFT FUNDS FROM OTHER USES, GAO-04-915, at 9 (2004). In February 2005, the President requested an additional \$75 billion in supplemental appropriations to fight the Global War on Terror. Jonathan Weisman, *President Requests More War Funding: Money for Iraqi Forces Rises Sharply*, WASH. POST, Feb. 15, 2005, at A4.

<sup>230</sup> Clark, *supra* note 33, at 509.