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**The Two-Tiered Defense
Budget:
The Base Budget and Overseas
Contingency Operations**

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I. INTRODUCTION

Since the start of the Global War on Terror, the Administration and Congress have sought to sustain combat operations, and respond to new threats, in the face of stringent limits on discretionary spending. Facing unanticipated war expenses and base budget shortfalls, the Administration and Congress have increasingly requested defense appropriations in the form of “off-budget” war funding. Although financing military operations with “emergency” war funding is not a new phenomenon, recent debates over the defense budget have shifted toward this practice and what some perceive as its abuse.

Under current budget law, discretionary spending limits only constrain the fundamental, peacetime costs of maintaining the military, or the base budget. The base budget spans six broad categories: military personnel, operation and maintenance, procurement, research and development, military construction and family housing, and revolving funds. By contrast, Overseas Contingency Operations (OCO), or war spending, is effectively exempt from discretionary spending caps. Underlying the OCO bucket is the notion that the nature of war requires ramping up operations on short notice and such unanticipated events cannot be budgeted for in advance. These distinctions between spending buckets—in purposes and constraints—have effectively created a two-tiered national defense budgeting system. Over time, what has qualified as OCO has shifted, often overlapping with base budget programs and activities. Activities historically funded through the base budget have migrated to the OCO budget, and the OCO budget has been used to fund anticipatable expenses of ongoing operations. As opponents of recent war spending practices emphasize, increases in war spending are not required to be offset and are not “paid for,” contravening fiscal discipline. On the other hand, in the face of steady

base budget growth and stringent spending limits, the OCO bucket serves as a safety valve for military operations critical to national security.

This briefing paper examines the two-tiered national defense budget and provides a case study in modern military spending as an illustration of this system in practice. This paper first defines the national defense budget and briefly discusses discretionary spending limits from 1990 to present. This paper then examines the base and OCO budgets and their components before shifting to a case study of modern military spending in the context of the Global War on Terror.¹ This case study tells the story of the dynamics between the base and war budgets over the last fourteen years, highlighting trends in base and war spending and how the Administration and Congress have used the OCO label as a budgeting tool.

II. A TWO-TIERED SYSTEM

1. THE NATIONAL DEFENSE BUDGET

The defense budget can be defined broadly as the National Defense budget function (budget function 050)—one of approximately 20 budget categories organized based on major spending purpose—or narrowly as the Department of Defense (DoD) budget (budget subfunction 051).² In the broad sense, defense spending comprises not only DoD programs but defense-related programs administered by other agencies, such as atomic energy defense programs administered by the Department of Energy, civil defense programs administered by the Federal Emergency Management Agency, and defense-related programs administered by the Coast

¹ This briefing paper does not replicate the analysis of the first Gulf War contained in Brian Callanan & David Weiler, *War Budgeting Strategies: Case Studies of the Gulf War and the Iraq War*, Harvard Law School, 14–15 (May 2008), http://www.law.harvard.edu/faculty/hjackson/WarBudgeting_39.pdf. This briefing paper overlaps with Callanan & Weiler’s analysis of the Global War on Terror (as of 2008) and picks up where Callanan & Weiler’s briefing paper left off.

² MARY T. TYSZKIEWICZ & STEPHEN DAGGETT, CONG. RESEARCH SERV., RL30002, A DEFENSE BUDGET PRIMER 2 (1998).

Guard, the Maritime Administration, and the Federal Bureau of Investigation.³ All of these programs are included in the National Defense budget function, budget function 050.⁴

In the narrow sense—in which this briefing paper is focused—the national defense budget denotes only DoD’s budget.⁵ For the purported purposes of “transparency and efficiency,” DoD’s budget is divided into two buckets: the base budget and the Overseas Contingency Operations budget.⁶ The base budget covers defense programs and activities not associated with war operations and other emergencies. The other part of the defense budget—war operations and other emergencies—is covered by the Overseas Contingency Operations (OCO) budget. As discussed below, only the base budget counts toward discretionary spending limits. For FY2015, the total defense budget is \$560 billion dollars, or 15.22 percent of total spending.⁷ Although historically low as a percentage of total spending, the defense budget still accounts for the largest part of discretionary spending, at 47.65 percent.⁸

DoD receives funding through annual DoD appropriations acts, enacted by the President prior to the end of the preceding fiscal year.⁹ If Congress fails to pass an appropriations bill by the beginning of the fiscal year, DoD “shuts down.”¹⁰ Congress and the President typically avoid

³ *Id.* at 2–3.

⁴ Some argue that the National Defense Budget Function does not include all the programs that should be counted for the purposes of calculating total defense spending, such as veterans’ benefits, international military assistance, and military-related activities funded through NASA. Some argue further that an exhaustive list would include the portion of national debt interest payments attributable to past borrowing for military programs and the unfunded portion of civil service retirement for DoD civilian employees. *Id.* at 4.

⁵ In recent years, DoD funding has accounted for approximately 96 percent of the budget function 050 total. PAT TOWELL & AMY BELASCO, CONG. RESEARCH SERV., R43323, DEFENSE: FY2014 AUTHORIZATION AND APPROPRIATIONS 7 (2014).

⁶ OFFICE OF MANAGEMENT AND BUDGET, THE BUDGET FOR FISCAL YEAR 2013 90 (2013).

⁷ *See* CONG. BUDGET OFFICE, UPDATED BUDGET PROJECTIONS: 2015 TO 2025 2, 10 (Mar. 2015). Total spending includes net interest and was calculated on the assumption that current law will generally remain unchanged. *Id.*

⁸ *Id.* at 2.

⁹ TYSZKIEWICZ & DAGGETT, *supra* note 2, at 41. For the most part, DoD appropriations acts specify a lump sum for all programs within a given appropriation account. However, Congress may appropriate specific amounts for individual programs of particular concern, and committee reports also specify levels of funding at the line item level. *See id.* at 39.

¹⁰ During a shutdown, essential government activities, including national security-related functions, continue, even without funding. *Id.* at 41.

these shutdowns by enacting a continuing resolution, authorizing DoD to continue obligating funds until the President can approve the current fiscal year's appropriations act.¹¹ DoD also receives funding through supplement appropriations acts to cover additional "emergency" expenses during the current fiscal year.¹² In fact, the early War on Terror (Operation Enduring Freedom in Afghanistan and Operation Iraqi Freedom in Iraq) was funded almost entirely through emergency supplemental appropriations, rather than regular appropriations requested through the annual budget process.¹³

2. DISCRETIONARY SPENDING LIMITS

The Budget Enforcement Act of 1990 (BEA) set caps on discretionary spending, reinforced by sequestration.¹⁴ The BEA was extended first in 1993 by the Omnibus Budget Reconciliation Act and again in 1997 by the Budget Enforcement Act.¹⁵ In FY2000 and FY2001, around the start of the Global War on Terror, there was only one overall discretionary spending limit.¹⁶ The BEA expired at the end of FY2002.¹⁷

The Budget Control Act of 2011 (BCA) reintroduced discretionary spending caps for FY2012 through FY2021 and established the Joint Select Committee on Deficit Reduction, tasked with agreeing on a plan to further reduce discretionary spending by \$1.2 trillion.¹⁸ Under the BCA, annual appropriations exceeding the spending caps trigger a largely across-the-board

¹¹ *Id.*

¹² *Id.* at 42.

¹³ See STEPHEN DAGGETT, CONG. RESEARCH SERV., RS22455, MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR IN SUPPLEMENTAL APPROPRIATIONS BILLS 1 (2006).

¹⁴ MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., R41901, STATUTORY BUDGET CONTROLS IN EFFECT BETWEEN 1985 AND 2002 8–9 (2011).

¹⁵ *Id.* at 11–12.

¹⁶ *Id.* at 12.

¹⁷ *Id.*

¹⁸ See CONG. BUDGET OFFICE, LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM 12 (2014). The BCA set caps on the National Defense budget function (budget function 050) and not directly on the DoD budget (a budget subfunction). However, the effect is largely indistinguishable. Since 2001, DoD has received, on average, 95.5 percent of the total funding for the National Defense budget function. See TOWELL & BELASCO, *supra* note 5, at 7.

sequester and a further reduction in annual cap levels.¹⁹ On November 21, 2011, the Joint Select Committee announced that they could not reach an agreement, which triggered a sequester for FY2013 and a reduction of spending caps for FY2014 through FY2021.²⁰ The BCA caps were subsequently revised to impose separate limits on defense and non-defense spending and to further reduce cap levels by \$109 billion for FY2013.²¹

Since 2011, the BCA caps have been raised twice: first by the American Taxpayer Relief Act of 2012 (ATRA) and again by the Bipartisan Budget Act of 2013 (BBA).²² The ATRA reduced reductions to cap levels for FY2013—from \$109 billion to \$85 billion—to be split evenly between defense and nondefense spending.²³ The ATRA and the BBA also raised both caps by \$22 billion each for FY2014 and by another \$9 billion each for FY2015.²⁴ The ATRA and BBA did not modify spending limits for FY2016 through FY2021, however.²⁵

Under the BCA, the discretionary spending caps may be adjusted for certain categories of spending, including appropriations designated by Congress and the President as “Overseas Contingency Operations/Global War on Terrorism” and “emergency requirements.”²⁶ Under § 251(b)(2)(A) of the Budget Control Act:

“If, for any fiscal year, appropriations for discretionary accounts are enacted that— (i) the Congress designates as emergency requirements in statute on an account by account basis and the President subsequently so designates, or (ii) the

¹⁹ See D. ANDREW AUSTIN, CONG. RESEARCH SERV., RL34424, THE BUDGET CONTROL ACT AND TRENDS IN DISCRETIONARY SPENDING 6 (2014).

²⁰ *Id.*

²¹ *Id.*

²² LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18.

²³ AUSTIN, *supra* note 19, at 7. On March 1, 2013, President Obama signed a sequester order that cancelled \$85 billion in budgetary authority. Non-exempt defense discretionary spending was reduced by \$42.6 billion (7.8%). War funding (OCO) was not spared. *Id.* at 10.

²⁴ *Id.* at 13. If Congress had not enacted the BBA, the Administration’s \$552 billion national defense base budget request for FY2014 would have been reduced by \$53.8 billion (about 9.8%), in order to comply with BCA limits. TOWELL & BELASCO, *supra* note 5, at 6.

²⁵ LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18, at 12.

²⁶ Pub. L. No 112–25 § 251(b)(2)(A) (2011).

Congress designates for Overseas Contingency Operations/Global War on Terrorism in statute on an account by account basis and the President subsequently so designates, the adjustment shall be the total of such appropriations in discretionary accounts designated as emergency requirements or for Overseas Contingency Operations/Global War on Terrorism, as applicable.”²⁷

In other words, the BCA effectively exempts appropriations designated as OCO and emergency from the spending caps. Moreover, budget law does not require these increases in OCO spending to be offset by corresponding cuts elsewhere. In theory, OCO spending is exempt in order to allow DoD to respond to unforeseen threats. The nature of war requires ramping up operations on short notice, and requiring DoD to budget for these contingencies in advance, within spending limits, would be impracticable. In practice, the existence of an “off-budget” defense spending bucket has created opportunities for budget arbitrage. For example, some observers argue that OCO spending is being used to fund activities outside the scope of the Global War on Terror and that items historically included in the base budget have migrated to the OCO budget, in order to avoid breaching budget limits and the attendant threat of sequestration.

3. THE BASE BUDGET

The base budget funds the costs of the military excluding war operations and other emergencies—in other words, the peacetime costs of the military.²⁸ The base budget is typically divided into several major categories, based on appropriations titles: Military Personnel; Operation and Maintenance; Procurement; Research, Development, Testing, and Evaluation (RDT&E); Military Construction and Family Housing; and Revolving and Management Funds. In recent years, funding for Military Personnel, Operation and Maintenance, Procurement, and

²⁷ *Id.*

²⁸ See PAT TOWELL, CONG. RESEARCH SERV., R43788, DEFENSE: FY2015 AUTHORIZATION AND APPROPRIATIONS 1 (2015).

RDT&E programs has comprised around 96 percent of the total base budget.²⁹ The other categories—Military Construction and Family Housing and Revolving and Management Funds—have comprised only a small portion of the base budget, though they still finance important activities.³⁰ In FY2015, DoD received \$496.1 billion dollars in the base budget (about 88.5 percent of that year’s total \$560.3 billion defense budget).³¹

A. Military Personnel

Military Personnel appropriations finance the costs of active and reserve forces in the Army, Navy, Marine Corps, and Air Force, and National Guard forces in the Army and Air Force.³² For active duty service members, these costs include “pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and costs of temporary duty travel between permanent duty stations,” as well as accruing retirement and health benefits.³³ For Reserve and National Guard service members on active duty, these appropriations cover “pay, allowances, clothing, subsistence, gratuities, travel, and related expenses.”³⁴

Pay and allowances include basic pay, incentive pay, and basic allowance for housing.³⁵ Pay also includes accruing retirement benefits.³⁶ In 1984, DoD adopted accrual accounting for the military retirement system.³⁷ To account for future liabilities in defined pension benefits for

²⁹ See, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (2014).

³⁰ See, e.g., *id.*

³¹ See DEPARTMENT OF DEFENSE, FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW A-3 (2015).

³² Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 26. Approximately 1.4 million service members are on active duty, and another 1.1 million are in the reserves and National Guard. CONG. BUDGET OFFICE, PUB. NO. 4234, COSTS OF MILITARY PAY AND BENEFITS IN THE DEFENSE BUDGET 1 (2014).

³³ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

³⁴ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

³⁵ COSTS OF MILITARY PAY AND BENEFITS IN THE DEFENSE BUDGET, *supra* note 32, at 6.

³⁶ *Id.* at 7.

³⁷ *Id.* at 39.

current military personnel, DoD makes accrual payments to the Military Retirement Fund.³⁸ Payments to the Military Retirement Fund are assessed as a predefined percentage of basic pay—roughly one-third for active-duty personnel—from Military Personnel appropriations.³⁹

Military Personnel appropriations also cover accruing health benefits.⁴⁰ In 2000, Congress established the TRICARE for Life (TFL) benefit, which reimburses most out-of-pocket health care costs for military personnel (and their family members) eligible for Medicare.⁴¹ In 2003, DoD adopted accrual accounting for TFL.⁴² To account for future liabilities for this program, DoD makes accrual payments to the Medicare Eligible Retiree Health Care Fund.⁴³

In FY2015, DoD received \$134.96 billion in Military Personnel appropriations (about 27 percent of the total base budget).⁴⁴

B. Operation and Maintenance

Operation and Maintenance appropriations finance the cost of operating and maintaining the Armed Forces, including the Reserve and National Guard forces and related DoD support activities.⁴⁵ In other words, these appropriations fund the day-to-day military activities, including supplies; fuel; repair parts; contract services for the maintenance of equipment and facilities; most of the costs of the Defense Health Program; and pay for DoD civilian employees.⁴⁶ These costs are influenced by many factors, including the number of Army Brigades, Marine Corps

³⁸ *Id.* Future costs are determined by the structure of benefits, the recipients of those benefits, and the annual cost-of-living adjustment. *Id.* at 23.

³⁹ *Id.* at 23, 25.

⁴⁰ CONG. BUDGET ORGANIZATION, GROWTH IN DoD'S BUDGET FROM 2000 TO 2014 3 (2014).

⁴¹ *Id.*

⁴² OFFICE OF MANAGEMENT AND BUDGET, DEPARTMENT OF DEFENSE—MILITARY PROGRAMS 270 (2013), available at <https://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/mil.pdf>.

⁴³ GROWTH IN DoD'S BUDGET FROM 2000 TO 2014, *supra* note 40.

⁴⁴ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

⁴⁵ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 257.

⁴⁶ GROWTH IN DoD'S BUDGET FROM 2000 TO 2014, *supra* note 40, at 2.

regiments, and aircraft squadrons; military strength and deployments; and the quantity and complexity of equipment in operation.⁴⁷

These appropriations fund most of the Defense Health Program (DHP).⁴⁸ The DHP, in turn, delivers the military health care benefit, TRICARE, which provides health care to more than 9 million current and retired military personnel and their family members.⁴⁹ All 1.4 million active duty service members are automatically enrolled in TRICARE Prime (a health insurance plan under TRICARE).⁵⁰ In 2011, 2 million of the 2.4 million eligible family members of active duty personnel were enrolled in TRICARE Prime.⁵¹ Additionally, 1.6 million of the 3.5 million retirees and their family members who were not eligible for Medicare were enrolled in TRICARE Prime.⁵²

In FY2015, DoD received \$194.36 billion in Operation and Maintenance funding (about 39 percent of the total base budget).⁵³

C. Procurement

Procurement appropriations finance the costs of “construction, procurement, production, modification, and modernization” of several categories of items, including aircraft, missiles, weapons and tracked combat vehicles, and ammunition.⁵⁴ For example, the Missile Procurement category provides for the procurement of “missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor.”⁵⁵ Procurement appropriations also

⁴⁷ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 257. For example, aircraft, ships, tanks, and missiles.

⁴⁸ *See* GROWTH IN DOD’S BUDGET FROM 2000 TO 2014, *supra* note 40, at 5.

⁴⁹ *See id.*; COSTS OF MILITARY PAY AND BENEFITS IN THE DEFENSE BUDGET, *supra* note 32, at 28.

⁵⁰ COSTS OF MILITARY PAY AND BENEFITS IN THE DEFENSE BUDGET, *supra* note 32, at 28.

⁵¹ *Id.*

⁵² *Id.* The other 2 million retirees and their family members who were eligible for Medicare were covered under the TRICARE for Life benefit, funded by Military Personnel appropriations. *Id.*

⁵³ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

⁵⁴ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

⁵⁵ *Id.*

fund a residual, catch-all category, called Other Procurement, used to procure items ranging from tactical, support, and non-tracked combat vehicles to communications and electronic equipment.⁵⁶

In the 1950s, Congress imposed the full funding policy on DoD, requiring the total procurement cost of an item to be funded in the year the item is procured.⁵⁷ This budgeting rule applies to all weapons and equipment procured using Procurement appropriations.⁵⁸ The rule means that DoD cannot contract for the procurement of an item until Congress approves the entire cost of the item.⁵⁹ The full funding policy, then, prevents the use of incremental funding, under which the procurement cost of an item is divided into multiple annual portions.⁶⁰ Recently, some items—specifically, certain Navy ships—have been procured with funding profiles that contravene the full funding policy.⁶¹

There are two general exceptions to the full funding policy. The first permits the use of advance procurement funding—partial funding for an item that appears in the budget multiple years before its procurement, somewhat like a down payment—for parts of an item that have long manufacturing lead times. The second permits advance procurement funding for “economic order quantity” procurements. Economic order quantity procurements are typically approved as multiyear procurements, a special contracting arrangement that permits DoD to procure multiple of an item over several years.⁶²

⁵⁶ *Id.*

⁵⁷ RONALD O’ROURKE & STEPHEN DAGGETT, CONG. RESEARCH SERV., RL31404, DEFENSE PROCUREMENT: FULL FUNDING POLICY (2007). On one level, the full funding policy is meant to make the total procurement costs of weapons and equipment more visible and thereby easier to understand and track. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Under incremental funding, DoD can contract for the procurement of an item after Congress approves the cost of only the initial portion, and completion of the item is dependent on the subsequent approval of the remaining portions in future years. *Id.*

⁶¹ *Id.* at 4.

⁶² *Id.*

Notably, Article I, Section 8, Clause 12 of the U.S. Constitution provides that “The Congress shall have Power To . . . raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”⁶³ This provision was meant to check the Executive’s power in maintaining a standing Army.⁶⁴ While, textually and structurally, this provision prohibits appropriations beyond two years, current spending practices have defaulted toward pre-committing resources beyond a two-year horizon. For example, the FY2012 National Defense Authorization Act authorized the Army to enter into a multiyear procurement contract for UH-60M/HH-60M Helicopters.⁶⁵ The Army subsequently entered into a five year procurement contract for UH-60M/HH-60M Helicopters with Sikorsky, an American aircraft manufacturer.⁶⁶ These changes in modern spending practices presumably reflect a combination of the Army’s modern character, technological advancements in equipment and weapons, and the modern manufacturing process.

In FY2015, DoD received \$93.58 billion in Procurement funding (about 18 percent of the total base budget).⁶⁷

D. Research, Development, Test, and Evaluation

Research, Development, Test, and Evaluation (RDT&E) appropriations fund “expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment.”⁶⁸ These appropriations help the Armed Forces maintain a technological advantage over potential

⁶³ U.S. Const. art. 1, §8, clause 12.

⁶⁴ Mackubin Owens, *Army Clause*, HERITAGE, <http://www.heritage.org/constitution#!/articles/1/essays/52/army-clause>.

⁶⁵ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81 (2011). Any obligation for out-year contract payments is subject to the availability of appropriations for that purpose in a given fiscal year. *Id.*

⁶⁶ Joakim Kasper Oestergaard Balle, *About the UH-60 Blackhawk* (Mar. 11, 2015), <http://www.bga-aeroweb.com/Defense/UH-60-Black-Hawk.html>.

⁶⁷ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

⁶⁸ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

adversaries and adapt forces for new missions and the changing demands of warfare.⁶⁹ Programs funded under the RDT&E title include the development of weapons systems and supporting systems, such as missile defense.⁷⁰

RDT&E appropriations fund DoD Research and Development organizations (contractors, government laboratories, universities, and nonprofit organizations), such as the Defense Advanced Research Projects Agency (DARPA).⁷¹ These appropriations fund not only the research and development of new military technologies by DoD's R&D organizations but also their normal operation and maintenance costs.⁷² Thus, DoD's R&D organizations do not receive Operation and Maintenance appropriations.⁷³

Research and development programs are funded to cover annual needs, and funds for each fiscal year are available for a two-year period beginning on the first day of that fiscal year.⁷⁴

In FY2015, DoD received \$63.5 billion in RDT&E funding (about 12 percent of the total base budget).

E. Military Construction and Family Housing

Military Construction appropriations fund the “acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property.”⁷⁵ For example, these appropriations pay for the planning, design, construction, and restoration of military facilities as a result of new equipment being inventoried, including aircraft

⁶⁹ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 274.

⁷⁰ *Id.*

⁷¹ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2014 FISCAL LAW DESKBOOK 2–10 (2014), available at http://www.loc.gov/rf/frd/Military_Law/pdf/fiscal-law-deskbook_2014.pdf.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at

⁷⁵ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

and ships.⁷⁶ Family Housing appropriations pay for “expenses of family housing . . . for construction, including acquisition, replacement, addition, expansion, extension, and alteration.”⁷⁷

In FY2015, DoD received \$5.43 billion in Military Construction funding and \$1.12 billion in Family Housing funding.⁷⁸

F. Revolving and Management Funds

Revolving and Management Funds appropriations provide working capital for the operation of industrial, commercial, and logistical activities—such as depot maintenance, supply management, transportation services, finance and accounting services, and information systems—by “selling” goods and services to DoD “customers” and then using those receipts to pay for operating expenses and new purchases.⁷⁹ These appropriations start, increase, or restore a revolving fund,⁸⁰ which, in turn, finances a continuing cycle of operations without fiscal year limitations. These Funds are intended to break even over the long term.⁸¹ The Defense Working Capital Fund (DWCF), for example, receives its initial working capital through an appropriation (or a transfer of existing appropriations) and uses that capital to finance the costs of goods and

⁷⁶ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 39, at 278. These appropriations also pay for the clean up and disposal of property under the base realignment and closure process (consistent with the Base Closure Acts of 1988 and 1990), including environmental assessments of sites designated for closure. LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18, at 41.

⁷⁷ Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29. These appropriations also support the Family Housing Improvement Fund (FHIF), created to provide “alternative means of acquiring and improving military family housing and supporting facilities.” DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 290. The Military Housing Privatization Initiative (MHPI), established in 1996, authorizes DoD to work with the private sector through various financial tools—partnerships, loan guarantees, equity investments, and conveyances or leases—to increase the availability of housing for military personnel. Office of the Undersecretary of Defense Installations and Environment, Military Housing Privatization, <http://www.acq.osd.mil/housing/>. These activities are funded by the FHIF. DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 290.

⁷⁸ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

⁷⁹ DEPARTMENT OF DEFENSE—MILITARY PROGRAMS, *supra* note 42, at 292. An example of a revolving fund is the Defense Working Capital Fund.

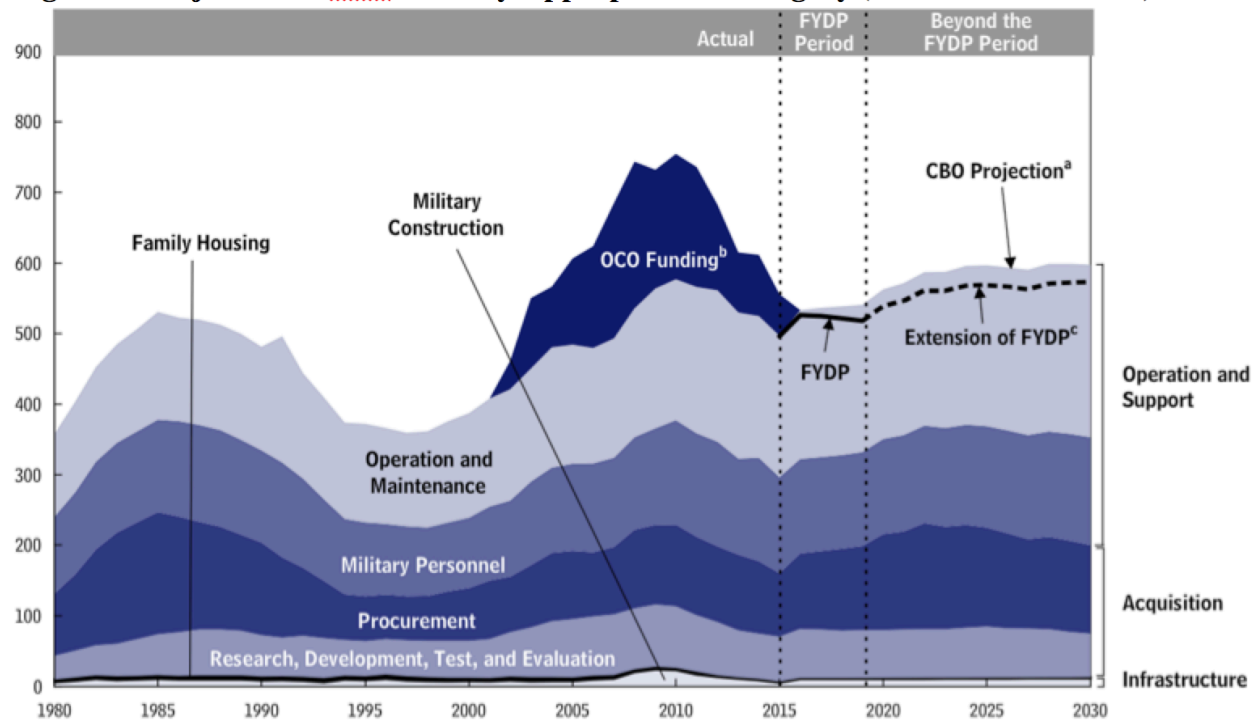
⁸⁰ A revolving fund is a “single combined account to which receipts are credited and from which expenditures are made.” 2014 FISCAL LAW DESKBOOK, *supra* note 71, at 7-1.

⁸¹ *Id.* at 7-3. The revolving fund structure is meant to make decisionmakers more aware of the costs of goods and services by making operating units pay for the support they receive. *Id.* at 7-2.

services.⁸² Customer orders generate the resources to replenish, and permit the continuing operations, of the DWCF.⁸³ The DWCF may incur obligations in advance of appropriations or in anticipation of customer orders.⁸⁴

In FY2015, DoD received \$2.13 billion in Revolving and Management Funds funding.⁸⁵

Figure 1. Projection of DoD Costs by Appropriation Category (in billions of 2015 dollars)



Source: CONG. BUDGET OFFICE, LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM 6 (2014).

Notes: Federal Years Defense Plan (FYDP) is a five-year budget plan prepared by DoD and submitted to Congress.

4. OVERSEAS CONTINGENCY OPERATIONS

By contrast to the base budget, the Overseas Contingency Operations (OCO) budget funds the costs of war and other emergencies.⁸⁶ As mentioned in Subpart 2B, the OCO budget is

⁸² DEPARTMENT OF DEFENSE, DoD 7000.14-R, FINANCIAL MANAGEMENT REGULATION VOLUME 11B: "REIMBURSABLE OPERATIONS POLICY – WORKING CAPITAL FUNDS (WCF)" 1-5 (2013).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

⁸⁶ AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 25 (2014).

effectively exempt from discretionary spending limits. The idea that the Administration and Congress have had an extra defense bucket predates OCO. Before the OCO label was introduced in 2011, Congress funded the incremental costs of military operations through emergency supplemental appropriations and special purpose accounts, which were often exempt from limits on discretionary spending.⁸⁷ For example, 88 percent of the first Gulf War (1990–1991) was funded through the Defense Cooperation Account (DCA), a fund authorized to receive and distribute foreign contributions for the costs of the Gulf War.⁸⁸ The DCA authorized the Secretary of Defense to accept foreign contributions for defense programs related to the Gulf War but required that Congress authorize and appropriate the disbursements, like any other expenditure.⁸⁹ In October, 1990, the Administration and Congress agreed to treat the incremental costs of the Gulf War as “emergency funding requirements,” exempt from the discretionary spending caps under the Budget Enforcement Act of 1990.⁹⁰ At the same time, in a supplemental appropriations act, Congress granted transfer authority for \$2.25 billion for “unforeseen military contingencies.”⁹¹ Six months later, Congress appropriated \$42.6 billion from the DCA to DoD accounts to pay for the \$26 billion already incurred and to prospectively provide DoD with funds for “incremental costs associated with Operation Desert Storm,” as events and wartime needs unfolded.⁹² Additionally, Congress appropriated another \$15 billion to a new Persian Gulf Regional Defense Fund, to fund the incremental costs of the Gulf War to the extent that funds were not available in the DCA for those costs.⁹³

⁸⁷ See DAGGETT, *supra* note 13; see, e.g., Pub. L. No. 101-508 (1990).

⁸⁸ See Callanan & Weiler, *supra* note 1, at 14–15.

⁸⁹ *Id.* at 14.

⁹⁰ *Id.* at 16.

⁹¹ *Id.* at 15.

⁹² *Id.* at 17.

⁹³ *Id.*

Like the DCA, the OCO budget is an emergency spending bucket for a limited purpose. The DCA was established to fund the incremental costs of the first Gulf War, and the OCO label was created specifically for the Global War on Terror. However, whereas the DCA was funded through foreign contributions and resources were primarily appropriated retroactively, OCO funds are appropriated on the front end.

As defined by the BCA, “emergency” means a situation that is “unanticipated.”⁹⁴ The BCA defines “unanticipated” as:

“(A) sudden, which means quickly coming into being or not building up over time; (B) urgent, which means a pressing and compelling need requiring immediate action; (C) unforeseen, which means not predicted or anticipated as an emerging need; and “(D) temporary, which means not of a permanent duration.”⁹⁵

In 2011, the BCA introduced the OCO label, presumably as an alternative to designating war funding as “emergency,” or “unanticipated,” a decade into the Global War on Terror.⁹⁶ Similar to the notion underlying supplemental emergency funding, the OCO budget was implemented to provide flexibility in meeting unanticipated, wartime requirements which could not be budgeted for in advance. OCO and emergency spending allow DoD to respond to wartime demands and unforeseeable situations, as they arise. In practice, the OCO budget has created the opportunity for budget arbitrage. The Administration and Congress have used the OCO designation to fund operational expenses historically provided for in the base budget (as discussed below). In

⁹⁴ Pub. L. No 112–25 § 102(4)(20) (2011).

⁹⁵ Pub. L. No 112–25 § 102(4)(21) (2011).

⁹⁶ OCO and war spending are used interchangeably in this briefing paper.

FY2015, DoD received \$64.3 billion in the OCO budget (about 11.5 percent of the total defense budget).⁹⁷

Each year, DoD submits an OCO budget request, in addition to a base budget request.⁹⁸ OCO funds are subsequently provided in emergency supplemental, omnibus, and normal appropriations bills, by general account.⁹⁹ For example, the FY2015 Consolidated and Further Continuing Appropriations Act provided \$3.25 billion for “Military Personnel, Army,” “*Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism.”¹⁰⁰

OCO funds are also provided through transfer and special purpose accounts, such as the Overseas Contingency Operations Transfer Fund (OCOTF), a transfer account without fiscal year limitations.¹⁰¹ Congress established the OCOTF in 1997 in order to overcome perceived financing difficulties in the normal appropriations process.¹⁰² The OCOTF transfers resources to appropriation accounts as contingency operations unfold.¹⁰³ For example, between FY1997 and FY2001, Congress provided funds in the OCOTF “to finance contingency operations that [were] so variable in their scope, duration, intensity they [could not] be financed via DoD Component appropriations without causing a readiness impact.”¹⁰⁴

OCO funds are ultimately distributed to normal appropriation accounts. To track OCO spending, DoD is required to submit monthly reports on the costs of war to the Government

⁹⁷ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-4.

⁹⁸ That DoD annually submits an OCO budget request indicates the extent to which OCO spending has become institutionalized.

⁹⁹ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at 1; *see also* Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29.

¹⁰⁰ *Id.*; *see also* Appendix 2, 3.

¹⁰¹ DEPARTMENT OF DEFENSE, OVERSEAS CONTINGENCY OPERATIONS TRANSFER FUND, *available at* http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2004/budget_justification/pdfs/01_Operation_and_Maintenance/Overview_Book/17_OCOTF.pdf.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Accountability Office (GAO).¹⁰⁵ In turn, GAO provides quarterly updates to Congress.¹⁰⁶ Under DoD's Financial Management Regulation, DoD components are required to submit data for the cost-of-war reports on a monthly basis to the Defense Finance and Account Service (DFAS), which consolidates the data.¹⁰⁷ These costs are reported in terms of obligations incurred through placing orders, awarding contracts, and receiving services.¹⁰⁸ As of March 2006, DoD components are required to review and validate their reported obligations as accurate.¹⁰⁹ DoD components are also required to perform a monthly "variance" analysis to identify changes in obligation amounts for certain categories and submit written explanations for each month in which reported obligations exceed previously reported obligations.¹¹⁰ In addition, in FY2009, DoD instituted the Contingency Operations Reporting and Analysis Service (CORAS), an automated system and database for reporting OCO spending.¹¹¹

¹⁰⁵ DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL, D-2009-058, DoD COST OF WAR REPORTING OF SUPPLEMENTAL FUNDS 2 (Feb. 2009). DoD has prepared these reports for the Global War on Terror since FY2001. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-68, DOD NEEDS TO TAKE ACTION TO ENCOURAGE FISCAL DISCIPLINE AND OPTIMIZE THE USE OF TOOLS INTENDED TO IMPROVE GWOT COST REPORTING 2 (2007).

¹⁰⁶ DoD COST OF WAR REPORTING, *supra* note 105, at 2.

¹⁰⁷ *Id.* DoD components include Air Force, Army, Defense Health Program, Defense Legal Services Agency, DoD Inspector General, Joint Chiefs of Staff, Marine Corps, Navy, National Security Agency, Office of the Secretary of Defense, Office of the Under Secretary of Defense (Comptroller), and Special Operations Command, among others. *Id.* at 21.

¹⁰⁸ DOD NEEDS TO TAKE ACTION, *supra* note 105, at 2.

¹⁰⁹ *Id.* at 23.

¹¹⁰ *Id.* at 13.

¹¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-562R, OCO COST REPORTING 2 (2010).

Figure 2. DoD Funding since September 11, 2001 (in billions of 2015 dollars)

(\$ in billions)	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Base	287.4	328.2	364.9	376.5	400.1	410.6	431.5	479.0
OCO	22.9	16.9	72.5	90.8	75.6	115.8	166.3	186.9
Other	5.8	--	--	0.3	3.2	8.2	3.1	--
Total	316.2	345.1	437.5	467.6	478.9	534.5	600.9	665.9

(\$ in billions)	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Base	513.2	527.9	528.2	530.4	495.5	496.3	496.1	534.3
OCO	145.7	162.4	158.8	115.1	82.0	84.9	64.2	50.9
Other*	7.4	0.7	--	--	0.1	0.2	0.1	--
Total	666.3	691.0	687.0	645.5	577.6	581.4	560.4	585.3

Source: DEPARTMENT OF DEFENSE, FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW 1-5 (2015).

Notes: Other* non-war supplemental funding.

A. What Counts as War Spending?

Definitions of war funding have changed over time. From the 1990s to 2006, DoD financial management regulations defined war funding as funds necessary to cover incremental costs “that would not have been incurred had the contingency operation not been supported.”¹¹² In other words, only costs incurred but for deploying troops for war counted as war funding. Under this definition, war funding included items such as pay for imminent danger and activating reserves to active duty; transporting personnel and equipment to theater and providing short-term healthcare related to combat operations; replacing weapons systems; developing effective methods for combatting threats, such as roadside bombs; building facilities; expanding inventories; and special war-related programs and activities, such as the Afghan Security Forces Fund and the Iraq Security Forces Fund.¹¹³

In 2006, DoD expanded the definition of war funding to include any expenses reflecting “the longer war on terror,” without defining what types of expenses could be covered.¹¹⁴ As a result, DoD expanded the types of programs and activities considered to be war-related and was

¹¹² BELASCO, *supra* note 86, at 25.

¹¹³ *Id.* at 25–26.

¹¹⁴ *Id.* at 27.

able to receive funding for long-term needs.¹¹⁵ For example, under this expanded definition, DoD received funding for the acceleration of planned equipment upgrades and the modernization of the Army's M-1 tanks and truck and vehicle fleet—all historically part of the base budget.¹¹⁶ Between FY2006 and FY2009, war-related Procurement spending more than tripled from \$22 billion to \$65.9 billion, presumably reflecting this policy change.¹¹⁷

In 2009, the Office of Management and Budget (OMB) issued revised guidelines that largely restored the earlier limits on war funding.¹¹⁸ OMB's revised guidelines break down war funding at the item level and define the extent to which each item may be considered war funding.¹¹⁹ OMB's criteria largely resembles DoD's earlier regulations, confining war-related Procurement to "war losses excluding items currently scheduled for replacement, upgrades directly supporting war operations, and put on contract within 12 months," and also confining war-related Operation requirements to "transport to, from, and within the theater of operations and incremental costs to directly support operations."¹²⁰ Moreover, OMB's criteria explicitly excludes certain items, including recruiting and retention bonuses and expenses, training equipment, programs to maintain or expand industrial base capacity, and base realignment and closure projects.¹²¹

OMB's criteria, however, still allow for significant discretion in labeling funds as OCO. For example, OMB adopted a broad geographic area for war funding, including "Iraq and Afghanistan," "geographic areas in which combat or direct combat support operations for Iraq

¹¹⁵ *Id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-68, DOD NEEDS TO TAKE ACTION TO ENCOURAGE FISCAL DISCIPLINE AND OPTIMIZE THE USE OF TOOLS INTENDED TO IMPROVE GWOT COST REPORTING 20 (2007).

¹¹⁶ BELASCO, *supra* note 86, at 27.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 28.

¹¹⁹ *See Criteria for War/Overseas Contingency Operations Funding Requests*, OFFICE OF MANAGEMENT AND BUDGET (Sep. 9, 2010), <http://asafm.army.mil/Documents/OfficeDocuments/Budget/Guidances/omb-gd.pdf>.

¹²⁰ BELASCO, *supra* note 86, at 29.

¹²¹ *Id.*

and Afghanistan occur,” and “other countries on a case-by-case basis.”¹²² Moreover, some of the items in OMB’s criteria allow for expenses to be considered on a case-by-case basis.¹²³ For example, indirect war costs incurred outside the theater of operations are evaluated on a case-by-case basis. Congress can attempt to constrain “misuse” of the OCO budget by, for example, instituting a point of order (requiring 60 votes to overturn) against exempting a certain amount of OCO spending from the discretionary spending limits, as was recently attempted in the Senate’s budget resolution.¹²⁴ Currently, the only actual check on war spending is the requirement that the President and Congress agree.

B. The Recent Debate

Opponents of the OCO budget argue that funding wars separately from the base budget reduces transparency and accountability and enables waste.¹²⁵ Opponents argue that the OCO budget typically receives less scrutiny than the base budget and that OCO spending is difficult to track.¹²⁶ For example, despite DoD’s progress in monitoring and reporting OCO spending, a 2007 GAO study found continued problems with transparency and inaccuracies in reported obligations.¹²⁷ GAO found that, in some cases, required written explanations for changes in OCO spending were not disclosed due to inadequate management oversight.¹²⁸ Moreover, in some cases, DoD components did not attest to the accuracy of reported obligations, nor did they

¹²² *Id.* at 28.

¹²³ See *Criteria for War/Overseas Contingency Operations Funding Requests*, *supra* note 119.

¹²⁴ *Senate’s Budget Matches House in Defense Dollars but Adds Procedural Hurdle*, DEFENSE COMMUNITIES (Mar. 29, 2015), <http://www.defensecommunities.org/headlines/senates-budget-matches-house-in-defense-dollars-but-adds-procedural-hurdle/#>.

¹²⁵ Kathleen Hicks, *The Challenges and Benefits of OCO*, Center for Strategic & International Studies 2 (Feb. 3, 2015), http://csis.org/files/publication/150203_FY16_Budget_Analysis.pdf.

¹²⁶ *Id.*; Mick Mulvaney, *The Republic Budget is a Deficit Bust*, THE WALL STREET JOURNAL (Mar. 29, 2015), <http://www.wsj.com/articles/mick-mulvaney-the-republican-budget-is-a-deficit-bust-1427662664>.

¹²⁷ DOD NEEDS TO TAKE ACTION, *supra* note 105, at 3.

¹²⁸ *Id.* at 22.

disclose the outcomes of their variance analyses.¹²⁹ A 2010 GAO study found further transparency problems, including DoD not reporting all OCO costs.¹³⁰ Despite the implementation of the Contingency Operations Reporting and Analysis Service, GAO concluded that the process for reviewing and reporting OCO data lacked adequate internal controls.¹³¹

Opponents further argue that funding military operations through the BCA-exempt OCO budget misrepresents the total costs of defense spending. Under current policy, the Administration and Congress request known and likely projected costs of ongoing operations through the OCO budget rather than the base budget.¹³² Moreover, some programs and activities historically funded in the base budget have been shifted to the OCO budget. Rather than using OCO funds strictly for overseas military operations, the OCO budget has been used to finance longer-term, maintenance costs of the military. For example, in the FY2014 omnibus appropriations bill, Congress moved \$8.5 billion in Operation and Maintenance funds from the base to the OCO budget, presumably to backfill base budget cuts.¹³³ Moreover, the Committee for a Responsible Federal Budget noted that for FY2015, Congress provided an extra \$3 billion for Operation and Maintenance spending in the OCO budget, effectively funding non-war Operation and Maintenance costs as budget-exempt war spending.¹³⁴ This blending of the base and OCO budgets has made it difficult to distinguish between the incremental costs of supporting ongoing operations and the longer-term, maintenance costs of the military. More importantly, because current budget law exempts OCO spending from the budget caps and does not require

¹²⁹ *Id.* at 22–23.

¹³⁰ OCO COST REPORTING, *supra* note 111, at 6.

¹³¹ *Id.*

¹³² DOD NEEDS TO TAKE ACTION, *supra* note 105, at 6.

¹³³ *War Spending in the Omnibus Bill*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Jan. 15, 2014), <http://crfb.org/blogs/war-spending-omnibus-bill>; *Congress Passes FY2014 Omnibus Appropriations Bill* (Jan. 17, 2014), <http://www.asmcnline.org/2014/01/congress-passes-fy2014-omnibus-appropriations-bill/>.

¹³⁴ *Budget Gimmicks In The Cromnibus Bill*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Dec. 10, 2014), <http://crfb.org/blogs/budget-gimmicks-cromnibus-bill>.

OCO spending to be offset by cuts elsewhere, additional military spending through the OCO budget goes “unpaid for.” Thus, opponents have criticized the OCO budget as a “slush fund” for circumventing spending limits by designating appropriations only indirectly related to war as OCO.¹³⁵ Opponents argue that establishing a cap on OCO spending would better enforce budget discipline and encourage more careful defense spending.

Both Democratic and Republican Congress members have raised concerns about the current practice of “misusing” the OCO budget to increase military spending, while avoiding spending caps, calling it a “gimmick.”¹³⁶ In a recent House Budget Committee hearing, Democrat Congressman Chris Van Hollen called attention to the tendency for “creeping allocations from the base budget into the OCO budget,” stating that “this is not just on the side of the administration . . . Congress has actually been a greater offender in this area.”¹³⁷ Additionally, in a recent opinion piece, Republican Congressman Mick Mulvaney stated that “OCO is perhaps the worst way to fund the military . . . There is no honest way to justify not paying for spending, no matter how often my fellow Republicans try.”¹³⁸ Mulvaney went on to say, “What House and Senate budgets tell people is this: ‘Defense is important, but let's borrow the money and let our children pay for it.’ That isn't courage, but the opposite.”¹³⁹

The other side of the debate emphasizes the OCO budget’s intended purpose: to allow DoD to finance unanticipated, overseas military operations essential to national security and the security of our partners. Funding military operations within discretionary spending limits, in advance, would be impracticable. The OCO budget provides DoD flexibility in meeting these

¹³⁵ See BELASCO, *supra* note 86, at 20.

¹³⁶ See, e.g., *Mulvaney Amendment Would Limit OCO Gimmick*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (May 21, 2014), <http://crfb.org/blogs/mulvaney-amendment-would-limit-oco-gimmick>.

¹³⁷ BELASCO, *supra* note 86, at 22.

¹³⁸ Mulvaney, *supra* note 126.

¹³⁹ *Id.*

unanticipated operations. As DoD Deputy Secretary Robert Work stated, “as sequester has impacted the department, it has really squeezed our ability to absorb within the department unanticipated operations.”¹⁴⁰ The OCO budget prevents statutory spending caps from hamstringing military readiness.

Proponents further argue that the OCO budget serves as a “safety valve” for preserving base budget requirements.¹⁴¹ DoD currently projects total defense spending growing by 20 percent over the next decade and a half, exceeding spending caps by as early as next fiscal year.¹⁴² In addition, DoD projects that congressional reluctance to accept proposed military compensation reforms and weapons system cancellations will create an additional funding gap of \$70 billion over the next five years—defense budgeting seems to be an area that Congress is not willing to cut or, at least, to offset against the Administration’s tendency to increase spending.¹⁴³ Proponents argue that DoD needs relief from sequestration, in order to modernize and rebuild its capabilities. The OCO budget, then, helps avoid painful cuts in base budget requirements that support military modernization, reinvestment, and readiness.

The debate over the OCO budget raises the question of whether funding the incremental costs of war through a separate budget, subject to different constraints, is the best way to finance military operations. Other countries fund military operations using different budgetary practices. For example, Chile’s military is financed primarily through a fix percentage of revenues from a government-owned copper mining company. A comparative analysis of military budgeting might reveal best practices, although any recommended adjustments to US military budgeting would have to account for the structure of the US political system.

¹⁴⁰ *Id.* at 22.

¹⁴¹ BELASCO, *supra* note 86, at 20.

¹⁴² *See* LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18, at 1–2.

¹⁴³ BELASCO, *supra* note 86, at 21.

III. CASE STUDY: THE GLOBAL WAR ON TERROR

Since September 11, 2001, the national defense budget has swelled, as basic expenses per capita have steadily risen and U.S. troops have been deployed overseas. Only recently has war spending begun to decline, reflecting a drawdown in overseas operations. The enactment of discretionary spending caps has placed constraints on the growing defense budget, forcing cutbacks and adjustments in spending. This Part will discuss the steady growth in the base budget and oscillations in war spending in the context of the Global War on Terror. Subparts 1 and 2 briefly discuss Operation Enduring Freedom in Afghanistan and the Iraq war for context. Subpart 3 examines the steady growth in the base budget since the start of operations in 2001. Subpart 4 then discusses war spending for the Global War on Terror, highlighting how funds have drifted between the base and OCO budgets.

1. OPERATION ENDURING FREEDOM

On September 11, 2001, the World Trade Center towers and the Pentagon were attacked. Within hours, President Bush directed his Joint Chiefs of Staff to plan for invading Afghanistan.¹⁴⁴ Just seven days after the attacks, President Bush signed the Authorization for Use of Military Force (AUMF), authorizing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁴⁵ On October 7, U.S. military forces deployed to Afghanistan, marking the start of Operation Enduring Freedom (OEF).¹⁴⁶

¹⁴⁴ *The Iraq War Part I*, THE NATIONAL SECURITY ARCHIVE (Sept. 22, 2010), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB326/>. At that meeting, Bush also directed his team to prepare contingency plans for invading Iraq. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; Pub. L. No. 107-40 (2001).

2. THE WAR IN IRAQ (OPERATION IRAQI FREEDOM AND OPERATION NEW DAWN)¹⁴⁷

By contrast to the events leading up to OEF, the war in Iraq was preceded by a buildup of U.S. military strength in Kuwait and bombing raids on Iraq.¹⁴⁸ On November 21, 2001, President Bush instructed Secretary of Defense Donald Rumsfeld to develop operational plans for invading Iraq.¹⁴⁹ General Tommy Franks was concerned that invading Iraq would detract from the war in Afghanistan, but on February 7, 2002, General Franks presented to President Bush a formal operational plan.¹⁵⁰ Shortly thereafter, bombing raids on Iraq intensified and construction projects in Kuwait to facilitate more troops broke ground.¹⁵¹ By July 2002, four Army brigades were positioned and ready in Kuwait.¹⁵²

On October 16, 2002, President Bush signed the Authorization for the use of Military Force Against Iraq Resolution of 2002, authorizing the President to use military force to “defend the national security of the United States against the continuing threat posed by Iraq.”¹⁵³ Operation Iraqi Freedom was officially launched on March 19, 2003 with an aerial attack on a location where Saddam Hussein and his top officials were believed to be meeting. U.S. forces entered Iraq on March 20, and while they encountered some resistance, all major population centers were controlled by April 14.¹⁵⁴ Only a few weeks later, on May 1, 2003, President Bush

¹⁴⁷ Operation Iraqi Freedom refers to the war in Iraq until September 1, 2010, when U.S. forces transitioned from combat operations to training Iraqi forces. After September 1, 2010, the mission was renamed Operation New Dawn, which ended on December 31, 2011, when all U.S. forces left Iraq. BELASCO, *supra* note 79, at 15.

¹⁴⁸ See Callanan & Weiler, *supra* note 1, at 26 (May 2008).

¹⁴⁹ *THE IRAQ WAR PART I*, *supra* note 105.

¹⁵⁰ JAMES PFIFFNER, DECISION MAKING, INTELLIGENCE, AND THE IRAQ WAR 322 (2008), *available at* http://pfiffner.gmu.edu/files/pdfs/Book_Chapters/Iraq%20Intel,%20DM%20&%20Intel%202008.pdf.

¹⁵¹ See Callanan & Weiler, *supra* note 1.

¹⁵² *Id.*

¹⁵³ RAYMOND W. COPSON, CONG. RESEARCH SERV., RL31715, IRAQ WAR: BACKGROUND AND ISSUES OVERVIEW 8 (2003).

¹⁵⁴ *Id.*

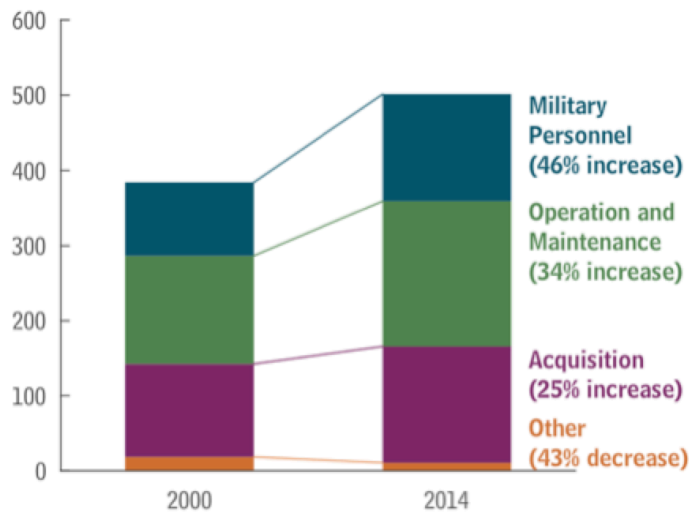
declared that “major military combat actions in Iraq have ended.”¹⁵⁵ U.S. troops remained in Iraq for almost seven more years, however.¹⁵⁶

3. GROWTH IN THE BASE BUDGET

Since FY2000, just before the beginning of the Global War on Terror, DoD’s base budget has grown from \$384 billion to \$496 billion (in real terms).¹⁵⁷ That growth was mainly driven by rising costs for Military Personnel, Operation and Maintenance, and Procurement and RDT&E.

Between FY2000 and FY2015, Military Personnel funding increased by 46 percent and increased the base budget by \$45 billion (in real terms), despite there being fewer deployed personnel at the end of that period.¹⁵⁸ As the Congressional Research

Figure 4. Base Budget Growth Between FY2000–2014 (in billions of 2014 dollars)



Source: CONG. BUDGET ORGANIZATION, GROWTH IN DoD’S BUDGET FROM 2000 TO 2014 2 (2014).

Service reported, real Military Personnel funding per active-duty service member (excluding most of the cost of medical care) has increased by nearly 27 percent since FY2000.¹⁵⁹ Rising basic pay for active-duty personnel and basic allowance for housing, as well as the enactment of TRICARE for Life, has contributed most to growing Military Personnel costs.¹⁶⁰ For example,

¹⁵⁵ BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL21405, U.S. PERIODS OF WAR AND DATES OF RECENT CONFLICTS 8 (2015).

¹⁵⁶ *Id.*

¹⁵⁷ See GROWTH IN DoD’S BUDGET FROM 2000 TO 2014, *supra* note 40, at 1.

¹⁵⁸ *Id.* at 2.

¹⁵⁹ See TOWELL, *supra* note 28, at 16.

¹⁶⁰ See GROWTH IN DoD’S BUDGET FROM 2000 TO 2014, *supra* note 40, at 2.

between FY2000 and FY2014, real funding for basic pay for active-duty personnel rose by 19 percent—at an average annual rate of 1.6 percent—due to legislatively-set pay raises that exceeded inflation in nearly every year.¹⁶¹ To make matters worse, growth in basic pay also drives growth for costs indexed to basic pay, such as the Military Retirement Fund.¹⁶²

Operation and Maintenance funding comprises the largest portion of the base budget. Between FY2000 and FY2014, Operation and Maintenance funding increased by 34 percent, at an average annual rate of 2.1 percent (in real terms).¹⁶³ The Defense Health Program, fuel, and base operating support drove most of that growth.¹⁶⁴ Notably, Congress expanded TRICARE benefits and maintained low out-of-pocket costs for health care services.¹⁶⁵ As a result, Defense Health Program spending nearly doubled (in real terms) between FY2000 and FY2014.¹⁶⁶

Procurement and RDT&E funding grew by a combined 25 percent over that period.¹⁶⁷ Between FY2000 and FY2014, Procurement and RDT&E funding per capita increased by 1.6 percent.¹⁶⁸ This spending has increased as weaponry has become increasingly complex and combat operations in Afghanistan and Iraq have demanded innovative technologies to address new threats, like roadside bombs.¹⁶⁹

This secular rise in the base budget can be framed as a percentage of (1) GDP, (2) total budget spending, and (3) total discretionary spending. Between FY2001 and FY2014, base budget spending as a percentage of GDP rose by 0.17 percent, from 2.71 percent to 2.88

¹⁶¹ *See id.* at 3.

¹⁶² *Id.*

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 6.

¹⁶⁸ *Id.* at 7.

¹⁶⁹ *Id.*

percent.¹⁷⁰ However, over the same period, base budget spending as a percentage of total budget spending fell by 1.27 percent, from 15.43 percent to 14.16 percent.¹⁷¹ Similarly, base budget spending as a percentage of discretionary spending fell by 2.17 percent, from 44.28 percent to 42.11 percent.¹⁷² While base budget spending as a percentage of discretionary spending has fallen since FY2001, the institution of discretionary spending caps in FY2012 has threatened DoD's ability to maintain current, base budget operations. If real per capita costs of Military Personnel, Operation and Maintenance, and Procurement and RDT&E continue to increase, DoD will be forced to cutback on force size, readiness, and modernization plans.

Figure 4. Base Budget Data

Fiscal Year	2001	2005	2007	2008	2009	2011	2012	2013	2014
Base Budget/GDP	2.71%	3.06%	2.99%	3.25%	3.56%	3.40%	3.28%	2.97%	2.88%
Base Budget/Total Spending	15.43%	16.19%	15.81%	16.06%	14.59%	14.66%	15.00%	14.34%	14.16%
Base Budget/Discretionary Spending	44.28%	41.31%	41.43%	42.21%	41.47%	39.21%	41.24%	41.22%	42.11%

Sources: See CONG. BUDGET OFFICE, HISTORICAL BUDGET DATA (Jan. 2015), <https://www.cbo.gov/publication/45249>; *World Bank Data*, The World Bank, <http://databank.worldbank.org/data/views/reports/tableview.aspx?isshared=true>; FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW 1–5 (2015).

4. TRENDS IN WAR SPENDING

Between FY2001 and FY2008, total funding for the Global War on Terror rose from \$36 billion to a peak of \$195 billion, primarily because of the war in Iraq.¹⁷³ In FY2009, war spending fell to \$157 billion, reflecting the beginning of a drawdown in Iraq.¹⁷⁴ This decline in war funding was partly offset, however, by the simultaneous surge in troops deployed in

¹⁷⁰ See CONG. BUDGET OFFICE, UPDATED BUDGET PROJECTIONS: 2015 TO 2025 (Mar. 2015); CONG. BUDGET OFFICE, HISTORICAL BUDGET DATA (2015), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/49892-breakout-AppendixG.pdf>; *World Bank Data*, THE WORLD BANK, <http://databank.worldbank.org/data/views/reports/tableview.aspx?isshared=true>.

¹⁷¹ See sources cited *supra* note 154.

¹⁷² *Id.*

¹⁷³ BELASCO, *supra* note 86, at 14.

¹⁷⁴ *Id.*

Afghanistan.¹⁷⁵ In the past few years, war funding has continued to decline as troops have been withdrawn from, or transitioned to an “advise and assist” role in, Afghanistan.¹⁷⁶ For example, DoD received only \$65 billion in war funding in FY2015.¹⁷⁷ However, this trend may be reversing—under the current budget resolution, Congress may provide up to \$96 billion for FY2016.¹⁷⁸

Most war spending for OEF and OIF was provided in supplemental (often designated as emergency) appropriations and in bridge funds included in regular DoD appropriations acts.¹⁷⁹ Following the September 11 attacks, Congress gave DoD flexibility in responding to wartime needs by appropriating lump sums to short-term, flexible accounts.¹⁸⁰ For example, Congress initially provided DoD with \$17 billion in emergency supplemental appropriations to respond to and recover from the attacks.¹⁸¹ Of those emergency supplemental funds, DoD received \$15 billion in the Defense Emergency Response Fund (DERF) to support vague requirements, like “increased situational awareness” and “increased worldwide posture.”¹⁸² In 2003, Congress provided an additional \$77.4 billion in government-wide emergency supplemental appropriations.¹⁸³ Of those emergency supplemental funds, \$15.6 billion was provided in a new Iraq Freedom Fund (IFF), another short-term, flexible account.¹⁸⁴

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Budget Process in the FY 2016 Congressional Budget Resolution*, Committee for a Responsible Federal Budget (May 6, 2015), <http://crfb.org/blogs/budget-process-fy-2016-congressional-budget-resolution>.

¹⁷⁹ AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 5 (2011).

¹⁸⁰ *Id.* at 38.

¹⁸¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-346, TRACKING OF EMERGENCY RESPONSE FUNDS FOR THE WAR ON TERRORISM I (2003).

¹⁸² *See Id.*; BELASCO, *supra* note 179, at 38. In 2002, Congress provided an additional \$13.4 billion in war funding, \$11.9 billion of which was appropriated to the Defense Emergency Response Fund. *Id.* at 18.

¹⁸³ BELASCO, *supra* note 179, at 38.

¹⁸⁴ *Id.*

Since 2004, Congress has included war funding in Title IX of DoD's normal appropriation acts as a bridge for ongoing war costs, but these funds are still designated as emergency and thus are exempt from budget limits.¹⁸⁵ Congress has also provided war funding in special purposes accounts, such as the Afghan Security Forces Fund (ASFF), which was established to provide "equipment, supplies, services, training, facility and infrastructure repair, renovation and construction, and funding."¹⁸⁶ These special purpose accounts give DoD wide discretion in allocating resources as wartime needs change.¹⁸⁷ According to the Congressional Research Service, funding levels in these accounts generally do not reflect troop levels or operational needs, and between FY2004 and FY2008, these funds grew by \$10 billion, partially explaining the \$107 billion increase in war spending during this period.¹⁸⁸

5. WAR SPENDING BEFORE THE BUDGET CONTROL ACT OF 2011

A. Fluctuations in Troop Levels: Afghanistan

Since the beginning of operations in 2001, fluctuations in total war expenses have been correlated with simultaneous fluctuations in troop levels in Afghanistan and Iraq.¹⁸⁹ Between 2002 and 2005, the number of U.S. troops in Afghanistan doubled to 20,000. By 2008, troop levels had doubled again to 40,000 and war costs for Afghanistan had doubled to \$39 billion.¹⁹⁰ In FY2009, the new Administration ordered the deployment of an additional 50,000 troops, bringing the total to 98,000 and war costs for Afghanistan to \$94 billion by late 2010.¹⁹¹ On July 22, 2011, President Obama ordered troops to be withdrawn and announced that the drawdown

¹⁸⁵ BELASCO, *supra* note 86, at 23 n. 55.

¹⁸⁶ BELASCO, *supra* note 179, at 39; *Afghanistan Security Forces Fund (ASFF)*, DEFENSE SECURITY COOPERATION AGENCY, <http://www.dsca.mil/programs/afghanistan-security-forces-fund-asff>.

¹⁸⁷ BELASCO, *supra* note 179, at 39.

¹⁸⁸ *Id.*

¹⁸⁹ BELASCO, *supra* note 86, at 9.

¹⁹⁰ *Id.* at 9, 14.

¹⁹¹ *Id.* at 9–10, 14.

would be complete by 2014.¹⁹² Troop levels rapidly declined to 65,000 in September 2012.¹⁹³ On May 27, 2014, President Obama announced that 9,800 troops would remain in Afghanistan for another year to train Afghan security forces and conduct counter-terror operations before finally falling to “an embassy presence” by January 2017.¹⁹⁴ As troops were withdrawn, expenses fell to \$86 billion in FY2013 and \$77 billion in FY2014.¹⁹⁵

B. Fluctuations in Troop Levels: Iraq

By September 2003, six months after the initial invasion, the number of U.S. troops in Iraq had reached 149,000.¹⁹⁶ Three months later, troop levels were down to 124,000, where they remained for the following three years.¹⁹⁷ War cost for Iraq continued escalating, however—from \$51 billion in FY2003 to \$79 billion in FY2005—as the United States established bases to support lower troop levels.¹⁹⁸ In January 2007, President Bush initiated the “Iraqi surge,” bringing the number of troops in Iraq to by 165,000 by November.¹⁹⁹ The surge raised expenses to \$131 billion in FY2007, peaking at \$144 billion in FY2008.²⁰⁰ Troop levels eventually started declining, falling to 147,000 by July 2008.²⁰¹ President Obama further reduced troop levels to 50,000 by September 2010, and under a bilateral security agreement, most U.S. troops were withdrawn by December 31, 2011.²⁰² As U.S. forces transitioned to an “advise and assist” role, expenses fell to \$47 billion in FY2011 and \$20 billion in FY2012.²⁰³

¹⁹² *Id.* at 10.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 10.

¹⁹⁵ *Id.* at 14.

¹⁹⁶ *Id.* at 10.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 10, 14.

¹⁹⁹ *Id.* at 10.

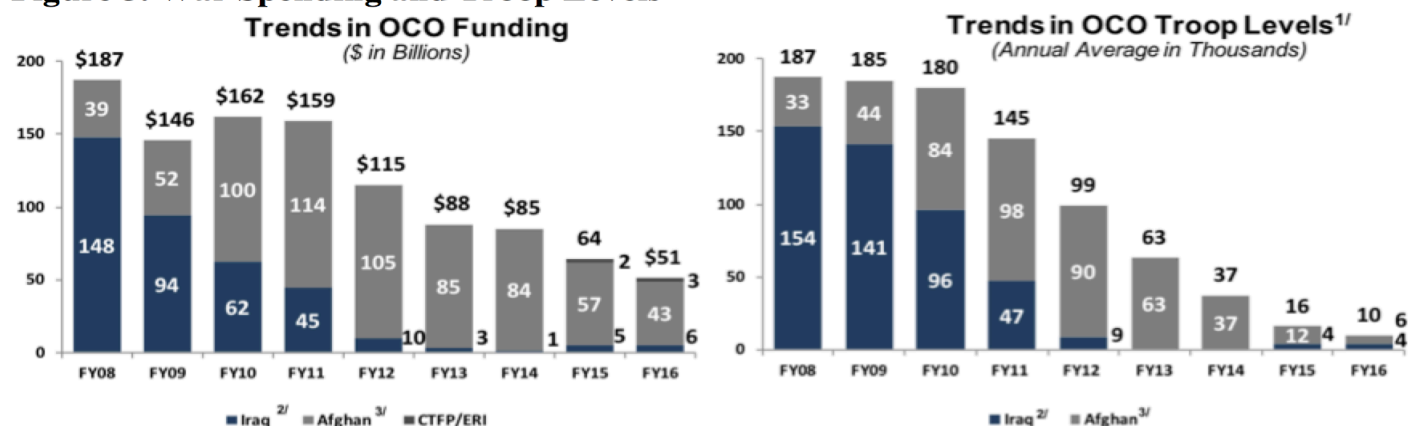
²⁰⁰ *Id.* at 14.

²⁰¹ *Id.* at 10.

²⁰² *Id.*

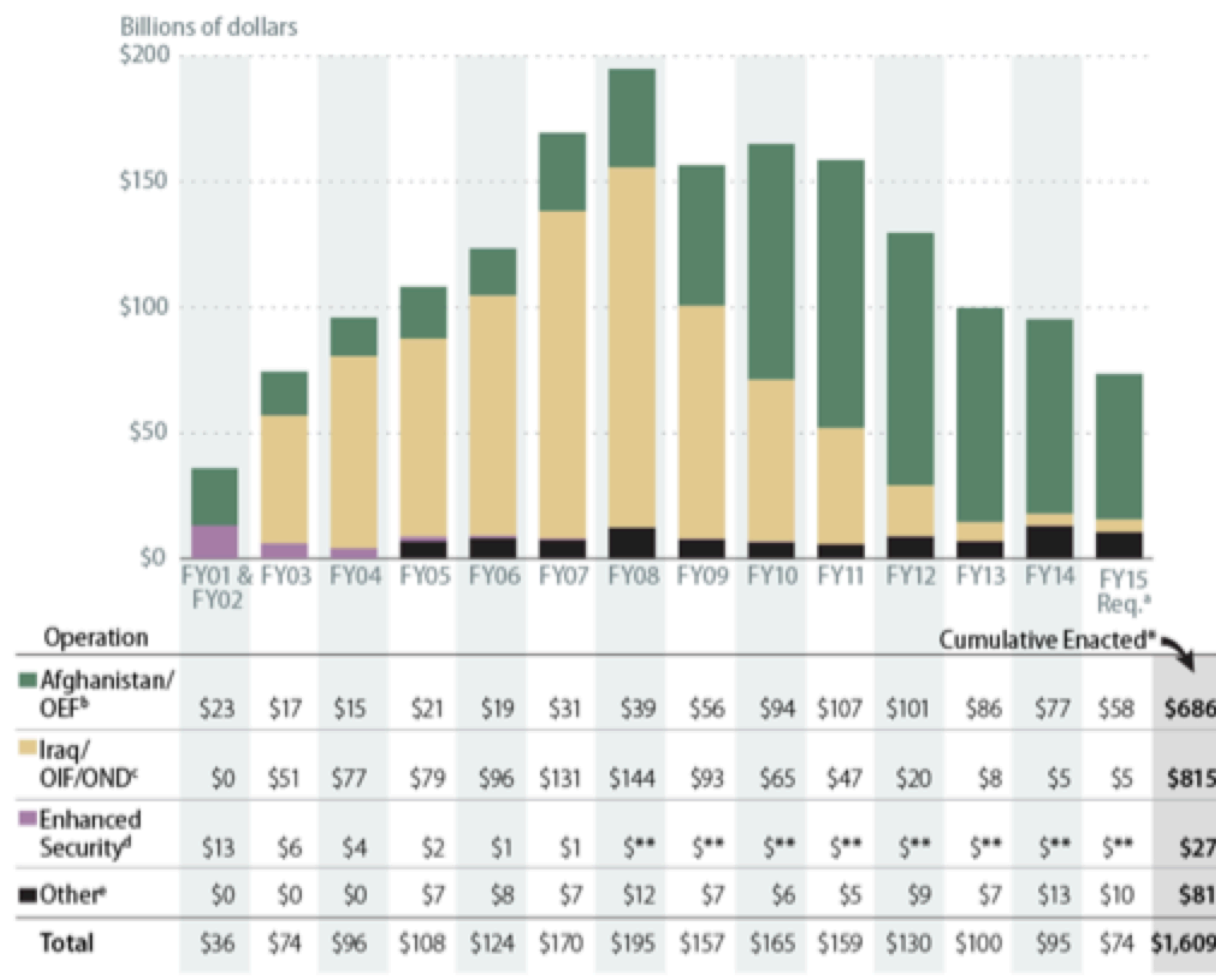
²⁰³ *Id.* at 14.

Figure 5. War Spending and Troop Levels



Source: DEPARTMENT OF DEFENSE, FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW 7-5 (2015).

Figure 6. War Spending Authority by Operation (in billions of 2014 dollars)



Source: BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 15-16 (2014).

Notes: Afghanistan/OEF: ~~Operation~~ Enduring Freedom in Afghanistan and in-theater support in neighboring countries and other related counter-terror operations.

Iraq/OIF/OND: Operation Iraqi Freedom and Operation New Dawn in Iraq.

Enhanced Security: Operation Noble Eagle (the costs of 9/11 attacks to DoD and New York City)

Other: "Emergency or war spending not tracked as a war cost, such as congressional adds childcare centers and barracks improvements; unanticipated increases in basic pay, housing allowances, fuel costs, modularity; and congressional transfers of base budget expenses to Title IX war funding.

C. Other Contributing Factors

Between FY2004 and FY2008, war funding swelled more rapidly than would be expected based on troop levels and intensity of operations alone.²⁰⁴ During that period—the peak funding years during the Iraqi surge—only a fraction of the \$107 billion (150 percent) growth in total war spending was related to troop levels in the Gulf Region.²⁰⁵ Between FY2004 and FY2008, war-related military personnel costs changed by only \$1 billion.²⁰⁶ Instead, growth in war-related Operation and Maintenance, Procurement, and special purpose programs (such as the Afghan security forces) drove the growth in war spending during that period.

War-related Operation and Maintenance funding nearly doubled—from \$42.0 billion to \$79.1 billion—between FY2004 and FY2008.²⁰⁷ These costs would be expected to reflect the number of troops deployed, the intensity of operations, and the costs of transporting equipment.²⁰⁸ During that period, however, war-related Operation and Maintenance costs grew by over three times as much as the number of troops deployed.²⁰⁹ The Congressional Research Service (CRS) suggests that if Operation and Maintenance costs had grown proportionately, Operation and Maintenance funding in FY2008 would have been \$52.5 billion rather than \$79.1 billion.²¹⁰ CRS further suggests that the \$26.6 billion difference reflects other factors, including DoD policy decisions to designate as war expenses the Army's conversion to a modular

²⁰⁴ BELASCO, *supra* note 179, at 32.

²⁰⁵ *Id.*

²⁰⁶ *Id.* During this period, troop levels rose by 8%, whereas military personnel costs rose by only 2%, or \$300 million. Military personnel costs include the additional cost of activating reservists; that is, paying reservists full-time salaries instead of part-time salaries. The fact that military personnel costs grew less than troop strength may reflect that DoD reduced its reliance on reservists, who cost more than active duty personnel. In FY2008, reservists accounted for around one-third of troop strength, compared to around one-half in FY2004. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 32–33.

²⁰⁹ *Id.* at 33.

²¹⁰ *Id.*

structure²¹¹ (a modernization change) and costs associated with growth in the size of the Army and Marine Corps, which was originally planned as temporary, and thus carried as a war cost, but later adopted as permanent.²¹²

A seven-fold increase in war-related Procurement funding, from \$7.2 billion in FY2004 to \$61.5 billion in FY2008, accounted for nearly half of the total growth in war funding in that period.²¹³ RDT&E and Military Construction funding also contributed to that total growth, although only by about \$2 billion.²¹⁴ Those \$2 billion are still significant in the sense that war funding typically does not include RDT&E or Military Construction—both activities take time and therefore would not seem to meet the criteria for emergency funding.²¹⁵

The growth in war-related investment is largely attributable to DoD policy decisions to fund as war expenses equipment for newly configured Army and Marine Corps units (a process known as restructuring); the costs of rebuilding or replacing damaged, or “stressed,” equipment (a process known as reset); and most importantly, the adoption of an expansive definition of war funding in 2006 that included programs and activities necessary to prepare for a “long war on terror.”²¹⁶ For example, a CBO study found that more than 40 percent of spending for reset—repairing and replacing stressed equipment—for the Army was actually spent upgrading systems, buying equipment to eliminate shortfalls in inventory, and converting newly configured units

²¹¹ Modularity refers to converting the Army from a structure based on divisions totaling 10,000 to 18,000 soldiers to one based on brigades totaling 3,900, at most. William M. Donnelly, *Transforming an Army at War: Designing the Modular Force 1991–2005*, CENTER OF MILITARY HISTORY (2007), http://www.history.army.mil/html/books/transforming_an_army/CMH_70-108-1.pdf.

²¹² BELASCO, *supra* note 148, at 35. The \$26.6 billion gap may also reflect the building of infrastructure to support troops and equipment and increases in command, communications, computers, and intelligence support. *Id.*

²¹³ *Id.* In terms of total DoD war appropriations, war-related Procurement grew from 10 percent in FY2004 to 34 percent in FY2008. *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 36.

²¹⁶ *Id.*

(restructuring).²¹⁷ These war-related investment funds—for restructuring, reset, and other upgrades—overlapped with baseline budget requirements, which anticipate continually purchasing new equipment.²¹⁸ Designating these funds as war expenses allowed DoD to finance modernization sooner than anticipated.²¹⁹

However, this trend may have been reversed with the adoption of stricter criteria for war funding in 2009.²²⁰ For example, OMB’s guidelines restored the previous definition of reset, which limited procurement to war losses and limited upgrades to those directly supporting war operations.²²¹ Since FY2009, war-related Procurement funding has dropped from \$32.0 billion to \$27.5 billion in FY2010 and \$21.4 billion in FY2011.²²² But this decline in Procurement funding also reflects the concurrent drawdown in troops.

6. MILITARY SPENDING AFTER THE BUDGET CONTROL ACT OF 2011

A. Fiscal Year 2012

FY2012 was the first year affected by the BCA.²²³ For FY2012, the BCA established security and non-security discretionary spending caps.²²⁴ That year, \$22.5 billion was cut from DoD’s base budget (a 3.8% reduction), in order to comply with the BCA caps.²²⁵ Of those cuts, \$6.0 billion was shifted to OCO, including \$1.4 billion for Predator and Reaper unmanned aerial vehicles used for reconnaissance and ground attack.²²⁶ This shift was largely offset by several

²¹⁷ CONG. BUDGET ORGANIZATION, PUB. NO. 2809, REPLACING AND REPAIRING EQUIPMENT USED IN IRAQ AND AFGHANISTAN: THE ARMY’S RESET PROGRAM ix (2007).

²¹⁸ BELASCO, *supra* note 179, at 36.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ BILL HENIFF ET. AL., CONG. RESEARCH SERV., R41965, THE BUDGET CONTROL ACT OF 2001 3 (2011).

²²⁴ *Id.* at 2. Security discretionary spending was defined to include the DoD base budget, the Departments of Veterans Affairs and Homeland Security, the Energy Department’s National Nuclear Security Agency, and other international activities funded by federal agencies. *See* AUSTIN, *supra* note 19, at 33.

²²⁵ PAT TOWELL, CONG. RESEARCH SERV., R41861, DEFENSE: FY2012 BUDGET REQUEST, AUTHORIZATION AND APPROPRIATIONS 7 (2012).

²²⁶ *Id.* at 70.

reductions in OCO, including \$4.0 billion to reflect the drawdown in Afghanistan and \$419.3 million from the \$1.6 billion requested to support the Afghan Army and National Police.²²⁷ Since FY2012, OCO funding has steadily declined.

B. Fiscal Year 2013

In FY2013, the BCA triggered a sequester, cutting \$32.0 billion from the DoD base budget and \$5.3 billion from OCO.²²⁸ Moreover, the initial BCA caps were replaced with lower spending caps split between the National Defense budget function (budget function 050) and non-defense spending.²²⁹ Under these new caps, DoD spending was to be constrained to \$496 billion in FY2013, FY2014, and FY2015.²³⁰ In FY2013, DoD received \$88.48 billion for total OCO—a decrease of \$26.49 billion from FY2012, reflecting the cessation of combat operations in Iraq and the drawdown in Afghanistan.²³¹

C. Fiscal Year 2014

The Bipartisan Budget Act of 2013 (BBA) amended then-current budget law, raising BCA spending caps for FY2014.²³² If the BBA had not been signed into law, the Administration's \$552 billion National Defense (budget function 050) budget request for FY2014 (excluding OCO funding) would have been reduced by \$53.8 billion (or 9.8%) to a total of \$498.1 billion.²³³ DoD appropriations in particular would have been reduced by \$20 billion (or 3.8 percent) in order to comply with the BCA limits.²³⁴

²²⁷ *Id.* at 70–71.

²²⁸ PAT TOWELL & AMY BELASCO, CONG. RESEARCH SERV., RL 43323, DEFENSE: FY2014 AUTHORIZATION AND APPROPRIATIONS 12 (2014).

²²⁹ AUSTIN, *supra* note 19, at 6.

²³⁰ BELASCO, *supra* note 86, at 20.

²³¹ *Department of Defense Appropriations Bill*, HOUSE OF REPRESENTATIVES COMMITTEE ON THE BUDGET (Jul. 18, 2012), <http://budget.house.gov/news/documentsingle.aspx?DocumentID=303535>.

²³² TOWELL & BELASCO, *supra* note 228, at 1.

²³³ *Id.* at 6.

²³⁴ *Id.* at 2. This estimate reflects the amount by which the FY2014 Continuing Resolution exceeded the estimated \$476 billion cap set by the BCA. *Id.*

The FY2014 omnibus appropriations bill provided \$85.2 billion for OCO, \$5.7 billion higher than requested.²³⁵ That increase is attributable to an \$8.5 billion transfer in base budget Operation and Maintenance accounts, offset by a \$3 billion cut to the request for the Afghanistan Security Forces Fund.²³⁶ At the same time, the appropriations bill cut base budget Operations and Maintenance funding by more than \$15 billion (or almost 9 percent).²³⁷ As the Committee for a Responsible Federal Budget suggests, it is probable that some of the increase in OCO funding was used to backfill base budget cuts.²³⁸

D. Fiscal Year 2015

In FY2015, Congress appropriated \$496.1 billion to DoD's base budget, a roughly 26% increase (in real terms) from the FY2000 base budget.²³⁹ As noted in Part 3, this growth is the consequence of the steady rise in the annual cost-per-active-duty-troop within major categories of the base budget (in real terms).²⁴⁰ DoD will have to make sharp cuts in its budget if current statutory limits on DoD spending remain flat and real per capita costs in the base budget continue climbing (see the graph below, showing projections for the costs of DoD's plans).²⁴¹

In FY2015, DoD requested additional OCO funding on three separate occasions.²⁴² On June 27, 2014, DoD released an amended OCO request, including \$4.0 billion for a new Counterterrorism Partnerships Fund (CTPF) to support the counter-terrorism efforts of partner states.²⁴³ Of these funds, \$1 billion was requested specifically to support Syria's neighbor

²³⁵ *War Spending in the Omnibus Bill*, *supra* note 133.

²³⁶ *Id.*; *See Congress Passes FY2014 Omnibus Appropriations Bill*, *supra* note 133.

²³⁷ *War Spending in the Omnibus Bill*, *supra* note 133.

²³⁸ *Id.*

²³⁹ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at A-3.

²⁴⁰ *See* TOWELL, *supra* note 28, at 16.

²⁴¹ *See* LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18, at 6.

²⁴² TOWELL, *supra* note 28, at 5.

²⁴³ *See* DEPARTMENT OF DEFENSE, FISCAL YEAR 2015 BUDGET AMENDMENT OVERVIEW: OVERSEAS CONTINGENCY OPERATIONS 7–10 (2014).

states—Iraq, Lebanon, Jordan, and Turkey—against the growing threat posed by ISIS.²⁴⁴ Moreover, of the total CTPF request, DoD included a preliminary allocation of \$500 million for “Crisis Response,” in order to facilitate flexibility in responding to unforeseen contingencies.²⁴⁵ In addition to the \$4 billion for CTPF, DoD requested \$925 million for a new European Reassurance Initiative (ERI), intended to support the security of NATO allies and European partner states who “feel most threatened by Russia’s actions against Ukraine.”²⁴⁶ These funds would be used for activities including increasing U.S. military presence in Europe and building infrastructure at key locations to support increased military operations.²⁴⁷

On November 5, 2014, the President requested \$6.18 billion in emergency appropriations in response to the Ebola outbreak in Africa.²⁴⁸ That package included \$112 million in funding for the Defense Advanced Research Projects Agency for developing medical technology used to develop vaccines for infectious disease.²⁴⁹ Finally, on November 10, 2014, the President requested an additional \$5 billion to cover the cost of Operation Inherent Resolve, the operations against the Islamic State.²⁵⁰ Of these funds, 141.3 million was requested to replenish munitions, and \$673.6 was requested for classified procurement purposes.²⁵¹ Congress ultimately appropriated \$65.17 billion for OCO.²⁵² In that bill, Congress offset additions in the base budget by shifting funds for activities requested in the base budget to OCO, including \$2.9 billion in Operation and Maintenance funds.²⁵³ OCO also included \$1 billion “for the purposes of

²⁴⁴ *See id.* at 7–8.

²⁴⁵ *Id.* at 10.

²⁴⁶ *Id.* at 10–11.

²⁴⁷ *Id.*

²⁴⁸ TOWELL, *supra* note 28, at 6. OMB categorized these emergency appropriations as part of DoD’s OCO. *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 7.

²⁵² *Id.* at 61.

²⁵³ *Id.*

improving military readiness,” “in addition to amounts appropriated in Title II” of the base budget, and \$1.2 billion for equipment for the reserve and National Guard components.²⁵⁴

E. Fiscal Year 2016

For FY2016, spending limits for DoD will increase to \$499 billion.²⁵⁵ The Administration has requested \$534.3 billion for the base budget (an increase of \$38.2 billion from FY2015) and \$58 billion for the OCO budget (a decrease of \$6 billion from FY2015).²⁵⁶ The FY2016 budget request reflects continued growth in major base budget categories and declining OCO costs as operations in Afghanistan die down. This downward trend is partially offset by counter-terrorism operations in Iraq and Syria and support for European allies against Russian aggression. In fact, many of the controversial programs inaugurated in the FY2015 OCO budget have been requested again for FY2016, including the European Reassurance Initiative (\$798 million), the Counterterrorism Partnerships Fund (\$2.1 billion), and funding for Operation Inherent Resolve (\$5.3 billion, plus an additional \$300 million for post-Operation New Dawn activities).²⁵⁷ The bulk of the FY2016 OCO request (\$42.5 billion) supports Operation Freedom’s Sentinel in Afghanistan and “related missions.”²⁵⁸ Of these funds, \$7.9 billion was requested specifically for the “the replenishment, replacement, and repair of equipment and munitions expended, destroyed, damaged, or worn out due to prolonged use in combat operations.”²⁵⁹

In March, both the House and Senate moved to increase OCO spending by \$34 billion and \$38 billion above the President’s \$58 billion request in their respective budget resolutions.²⁶⁰

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 13.

²⁵⁶ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at 1-1–1-2.

²⁵⁷ Hicks, *supra* note 125.

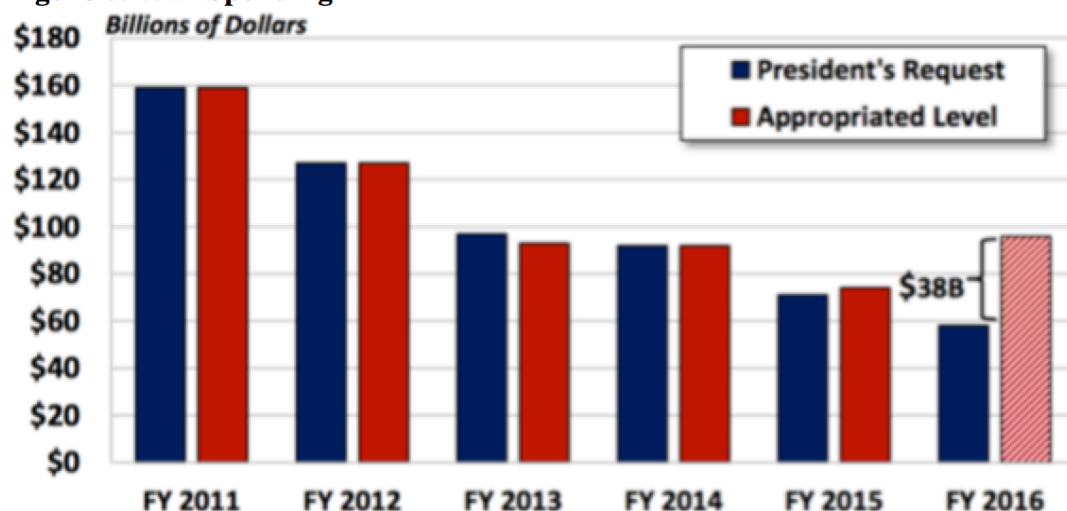
²⁵⁸ FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW, *supra* note 31, at 7–1.

²⁵⁹ *Id.* at 7–5.

²⁶⁰ *Budget Rules! Process in the House and Senate Budgets*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Mar. 31, 2015), <http://crfb.org/blogs/budget-rules-process-house-and-senate-budgets>; *Two Budgets Enter, One*

The Senate created a point of order (requiring 60 votes to overturn) holding the amount of war spending exempt from the spending caps at \$58 billion (the amount requested by the President).²⁶¹ However, the budget conference report dropped the Senate budget's provision creating the 60-vote point of order, allowing Congress to exempt the full \$96 billion of OCO spending.²⁶² Had the provision creating the 60-vote point of order not been dropped (and subsequently not bypassed), Congress would not have been able to provide the additional \$38 billion without either breaching or raising the statutory spending caps. Dropping the provision allows Congress to provide an extra \$38 billion in military programs and activities, both directly and indirectly related to war.

Figure 7. War Spending



Source: OMB, House and Senate FY16 Budgets

Note: FY16 Appropriated Level is House and Senate Budget Levels

Source: *Appropriators Jump the Gun and Start the FY 2016 Funding Race*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Apr. 24, 2015), <http://crfb.org/category/blog-issue-areas/fy-2016-budget>.

Budget Will Leave, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Mar. 24, 2015), <http://crfb.org/blogs/two-budgets-enter-one-budget-will-leave>.

²⁶¹ *Senate Amendment Would Take Further Step Back on War Spending*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Mar. 26, 2015), <http://crfb.org/blogs/senate-amendment-would-take-further-step-back-war-spending>.

²⁶² *Budget Process in the FY 2016 Congressional Budget Resolution*, *supra* note 178.

IV. CONCLUSION

Under current projections, the costs of DoD's plans will exceed the BCA spending caps by as early as next fiscal year.²⁶³ To avoid sequestration, DoD will have to make further cuts to personnel levels and compensation, reduce the intensity of its operations, and curtail the development and purchases of weapons and equipment. Despite the cessation of operations in Iraq and the drawdown in Afghanistan, it is unlikely that the Administration and Congress will ease off using the OCO budget. Recent attention to the perceived "inappropriate" use of the OCO budget may lead to further checks on war spending. In that case, lawmakers will have to decide how to balance providing DoD flexibility in financing unanticipated military operations and maintaining fiscal discipline.

²⁶³ See LONG-TERM IMPLICATIONS OF THE 2015 FUTURE YEARS DEFENSE PROGRAM, *supra* note 18, at 6.

APPENDIX 1: OMB GUIDELINES FOR OCO FUNDING REQUESTS²⁶⁴

Criteria for War/Overseas Contingency Operations Funding Requests

Item	Definition of Criteria
Geographic area covered/ "Theater of operations" (for non-classified war/overseas contingency operations funding)	Geographic areas in which combat or direct combat support operations occur: Iraq , Afghanistan, Pakistan, Kazakhstan, Tajikistan, Kyrgyzstan, the Horn of Africa, Persian Gulf and Gulf nations, Arabian Sea, the Indian Ocean, the Philippines, and other countries on a case-by-case basis. Note: OCO budget items must also meet the criteria below.
Inclusions	
Major equipment (General)	Replacement of losses that have occurred but only for items not already programmed for replacement in the Future Years Defense Plan (FYDP) -- no accelerations. Accelerations can be made in the base budget. Replacement or repair to original capability (to upgraded capability if that is currently available) of equipment returning from theater. The replacement may be a similar end item if the original item is no longer in production. Incremental cost of non-war related upgrades, if made, should be included in the base. Purchase of specialized, theater-specific equipment. Funding must be obligated within 12 months.
Ground equipment Replacement	Combat losses and washouts (returning equipment that is not economical to repair); replacement of equipment given to coalition partners, if consistent with approved policy; in-theater stocks above customary equipping levels on a case-by-case basis.
Equipment modifications (enhancements)	Operationally-required modifications to equipment used in theater or in direct support of combat operations, for which funding can be obligated in 12 months, and that is not already programmed in FYDP.
Munitions	Replenishment of munitions expended in combat operations in theater. Training ammunition for theater-unique training events is allowed. Forecasted expenditures are not allowed. Case-by-case assessment for munitions where existing stocks are insufficient to sustain theater combat operations.
Aircraft Replacement	Combat losses, defined as losses by accident or by enemy action that occur in the theater of operations.
Military Construction	Facilities and infrastructure in the theater of operations in direct support of combat operations. The level of construction should be the minimum to meet operational requirements. At non-enduring locations, facilities and infrastructure for temporary use are covered. At enduring locations, construction requirements must be tied to surge operations or major changes in operational requirements and will be considered on a case-by-case basis.
Research and Development	Projects required for combat operations in these specific theaters that can be delivered in 12 months.

²⁶⁴ *Criteria for War/Overseas Contingency Operations Funding Requests*, OFFICE OF MANAGEMENT AND BUDGET (Sep. 9, 2010), <http://asafm.army.mil/Documents/OfficeDocuments/Budget/Guidances/omb-gd.pdf>.

Item	Definition of Criteria
Operations	<p>Direct War costs:</p> <ul style="list-style-type: none"> • transport of personnel, equipment, and supplies to, from and within the theater of operations; • deployment-specific training and preparation for units and personnel (military and civilian) to assume their directed missions as defined in the orders for deployment into the theater of operations; <p>Within the theater, the incremental costs above the funding programmed in the base budget to:</p> <ul style="list-style-type: none"> • support commanders in the conduct of their directed missions (to include Emergency Response Programs); • build and maintain temporary facilities; • provide food, fuel, supplies, contracted services and other support; and, • cover the operational costs of coalition partners supporting US military missions, as mutually agreed. <p>Indirect War Costs: Indirect war costs incurred outside the theater of operations will be evaluated on a case-by-case basis.</p>
Health	Short-term care directly related to combat. Infrastructure that is only to be used during the current conflict.
Personnel (Incremental Pay)	Incremental special pays and allowances for Service members and civilians deployed to a combat zone; incremental pay, special pays and allowances for Reserve Component personnel mobilized to support war missions.
Special Operations Command	Operations and equipment that meet the criteria in this guidance.
Prepositioned Supplies and Equipment	Resetting in-theater stocks of supplies and equipment to pre-war levels – Excludes costs for reconfiguring prepositioned sets or for maintaining them.
Security Force Funding	Training, equipping, and sustaining Iraqi and Afghan military and police forces.
Fuel	War fuel costs, and funding to ensure that logistical support to combat operations is not degraded due to cash losses in DoD's baseline fuel program. Would fund enough of any base fuel shortfall attributable to fuel price increases to maintain sufficient on-hand cash for the Defense Working Capital Funds to cover seven days disbursements. (This would enable the Fund to partially cover losses attributable to fuel cost increases.)
<i>EXCLUSIONS from war/overseas contingency funding – Appropriately funded in the base budget</i>	
Training equipment	Training vehicles, aircraft, ammunition, and simulators. Exception: training base stocks of specialized, theater-specific equipment that is required to support combat operations in the theater of operations, and support to deployment-specific training described above.
Equipment Service Life Extension Programs (SLEPs)	Acceleration of SLEPs already in the FYDP.
Base Realignment and Closure (BRAC)	BRAC projects.
Family Support Initiatives	Family support initiatives to include the construction of childcare facilities; funding private-public partnerships to expand military families' access to childcare; and support for service members' spouses professional development.
Industrial Base Capacity	Programs to maintain industrial base capacity (e.g. "war-stoppers").
Personnel	Recruiting and retention bonuses to maintain end-strength. Basic Pay and the Basic allowances for Housing and Subsistence for permanently authorized end strength. Individual augmentees will be decided on a case-by-case basis.
Office of Security Cooperation	Support for the personnel, operations, or the construction or maintenance of facilities, at U.S. Offices of Security Cooperation in theater
<i>Special Situations</i>	
Reprogrammings and paybacks	Items proposed for increases in reprogrammings or as payback for prior reprogrammings must meet the criteria above.

1 **DIVISION C—DEPARTMENT OF DEFENSE**

2 **APPROPRIATIONS ACT, 2015**

3 **TITLE I**

4 **MILITARY PERSONNEL**

5 **MILITARY PERSONNEL, ARMY**

6 For pay, allowances, individual clothing, subsistence,
7 interest on deposits, gratuities, permanent change of sta-
8 tion travel (including all expenses thereof for organiza-
9 tional movements), and expenses of temporary duty travel
10 between permanent duty stations, for members of the
11 Army on active duty (except members of reserve compo-
12 nents provided for elsewhere), cadets, and aviation cadets;
13 for members of the Reserve Officers' Training Corps; and
14 for payments pursuant to section 156 of Public Law 97–
15 377, as amended (42 U.S.C. 402 note), and to the Depart-
16 ment of Defense Military Retirement Fund,
17 \$41,116,129,000.

²⁶⁵ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (2014).

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TITLE II

OPERATION AND MAINTENANCE

OPERATION AND MAINTENANCE, ARMY

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law, \$31,961,920,000: *Provided*, That not to exceed \$12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes.

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TITLE III
PROCUREMENT

AIRCRAFT PROCUREMENT, ARMY

For construction, procurement, production, modifica-
tion, and modernization of aircraft, equipment, including
ordnance, ground handling equipment, spare parts, and
accessories therefor; specialized equipment and training
devices; expansion of public and private plants, including
the land necessary therefor, for the foregoing purposes,
and such lands and interests therein, may be acquired,
and construction prosecuted thereon prior to approval of
title; and procurement and installation of equipment, ap-
pliances, and machine tools in public and private plants;
reserve plant and Government and contractor-owned
equipment layaway; and other expenses necessary for the
foregoing purposes, \$5,216,225,000, to remain available
for obligation until September 30, 2017.

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MISSILE PROCUREMENT, ARMY

7 For construction, procurement, production, modifica-
8 tion, and modernization of missiles, equipment, including
9 ordnance, ground handling equipment, spare parts, and
10 accessories therefor; specialized equipment and training
11 devices; expansion of public and private plants, including
12 the land necessary therefor, for the foregoing purposes,
13 and such lands and interests therein, may be acquired,
14 and construction prosecuted thereon prior to approval of
15 title; and procurement and installation of equipment, ap-
16 pliances, and machine tools in public and private plants;
17 reserve plant and Government and contractor-owned
18 equipment layaway; and other expenses necessary for the
19 foregoing purposes, \$1,208,692,000, to remain available
20 for obligation until September 30, 2017.

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TITLE IX

2

OVERSEAS CONTINGENCY OPERATIONS

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MILITARY PERSONNEL

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MILITARY PERSONNEL, ARMY

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For an additional amount for “Military Personnel,

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Army”, \$3,259,970,000: *Provided*, That such amount is

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designated by the Congress for Overseas Contingency Op-

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erations/Global War on Terrorism pursuant to section

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251(b)(2)(A)(ii) of the Balanced Budget and Emergency

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Deficit Control Act of 1985.

²⁶⁶ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235 (2014).

1 OPERATION AND MAINTENANCE

2 OPERATION AND MAINTENANCE, ARMY

3 For an additional amount for “Operation and Main-
4 tenance, Army”, \$18,108,656,000: *Provided*, That such
5 amount is designated by the Congress for Overseas Con-
6 tingency Operations/Global War on Terrorism pursuant to
7 section 251(b)(2)(A)(ii) of the Balanced Budget and
8 Emergency Deficit Control Act of 1985.

3 COUNTERTERRORISM PARTNERSHIPS FUND

4 (INCLUDING TRANSFER OF FUNDS)

5 For the “Counterterrorism Partnerships Fund”,
6 \$1,300,000,000, to remain available until September 30,
7 2016: *Provided*, That such funds shall be available to pro-
8 vide support and assistance to foreign security forces or
9 other groups or individuals to conduct, support, or facili-
10 tate counterterrorism and crisis response activities pursu-
11 ant to section 1534 of the National Defense Authorization
12 Act for Fiscal Year 2015: *Provided further*, That the Sec-
13 retary of Defense shall transfer the funds provided herein
14 to other appropriations provided for in this Act to be
15 merged with and to be available for the same purposes
16 and subject to the same authorities and for the same time
17 period as the appropriation to which transferred: *Provided*
18 *further*, That the transfer authority under this heading is
19 in addition to any other transfer authority provided else-
20 where in this Act: *Provided further*, That the funds avail-
21 able under this heading are available for transfer only to

22 the extent that the Secretary of Defense submits a prior
23 approval reprogramming request to the congressional de-
24 fense committees: *Provided further*, That the Secretary of
25 Defense shall comply with the appropriate vetting stand-
1 ards and procedures established elsewhere in this Act for
2 any recipient of training, equipment, or other assistance:
3 *Provided further*, That the amount provided under this
4 heading is designated by the Congress for Overseas Con-
5 tingency Operations/Global War on Terrorism pursuant to
6 section 251(b)(2)(A)(ii) of the Balanced Budget and
7 Emergency Deficit Control Act of 1985.

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PROCUREMENT

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AIRCRAFT PROCUREMENT, ARMY

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For an additional amount for “Aircraft Procurement,
22 Army”, \$196,200,000, to remain available until Sep-
23 tember 30, 2017: *Provided*, That such amount is des-
24 ignated by the Congress for Overseas Contingency Oper-
25 ations/Global War on Terrorism pursuant to section
1 251(b)(2)(A)(ii) of the Balanced Budget and Emergency
2 Deficit Control Act of 1985.

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MISSILE PROCUREMENT, ARMY

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For an additional amount for “Missile Procurement,
5 Army”, \$32,136,000, to remain available until September
6 30, 2017: *Provided*, That such amount is designated by
7 the Congress for Overseas Contingency Operations/Global
8 War on Terrorism pursuant to section 251(b)(2)(A)(ii) of
9 the Balanced Budget and Emergency Deficit Control Act
10 of 1985.

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