

CRS Report for Congress

How Long Can the Defense Department Finance FY2008 Operations in Advance of Supplemental Appropriations?

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Amy Belasco, Stephen Daggett, and Pat Towell
Specialists in Defense Policy and Budgets
Foreign Affairs, Defense, and Trade Division



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Summary

The Department of Defense is currently financing both day-to-day peacetime activities and overseas military operations in Iraq and elsewhere with funds appropriated in the regular FY2008 Defense Appropriations Act, P.L. 110-116, which provides \$460 billion for the Defense Department to cover the costs of baseline, non-war-related programs in FY2008. The Administration has also requested \$189.3 billion in FY2008 supplemental appropriations for the Department of Defense to cover war-related costs. Congress has approved \$16.8 billion of that amount, all for Mine Resistant Ambush Protected (MRAP) vehicles. The remainder has been held up pending debate over Iraq policy, though Congress may provide some additional temporary funding.

In the absence of supplemental appropriations, the Defense Department has said that money for Army operations will run out the end of February and for the Marine Corps in March, even after a transfer of \$4.1 billion from other accounts to sustain Army operations. On November 15, Secretary of Defense Gates announced plans to "cease operations at all Army bases by mid-February next year." This would result, he said, in furloughs of 100,000 civilian and another 100,000 contractor personnel.

On December 17, the House approved an omnibus appropriations bill, H.R. 2764, that would provide \$31 billion for Operation Enduring Freedom, which encompasses activities in Afghanistan and other areas but not in Iraq. If enacted, the additional funding for Army OEF operations in the bill would allow money from other sources to sustain operations in Iraq for several more weeks, perhaps as long as the first week of April, 2008. On December 18, the Senate approved a substitute by Senator McConnell to provide \$70 billion for all overseas military operations. The additional funding it provides for the Army would extend operations until about the end of July.

With or without such additional funding, the Defense Department could extend operations further by transferring limited additional amounts to the Army and Marine Corps and by slowing down spending through measures such as those the Army began to implement last April. Such measures would reduce remaining financial flexibility and might disrupt day-to-day operations. The Defense Department may be able to sustain operations longer by invoking the Feed and Forage Act or by using novel, unprecedented measures, such as assigning the Navy and Air Force to pay costs of Army support operations abroad. Such measures may weaken congressional war powers and erode congressional controls on the use of funds. This report will be updated as events warrant.

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How Long Can the Defense Department Finance FY2008 Operations in Advance of Supplemental Appropriations?

Most Recent Developments

On December 17, the House approved an FY2008 omnibus appropriations bill, H.R. 2764, that would provide \$485 billion in regular FY2008 appropriations for most agencies of the government. Division L of the bill would provide an additional \$31 billion in emergency supplemental funding for the Department of Defense for Operation Enduring Freedom (OEF), which encompasses military activities in Afghanistan and elsewhere around the globe, but not operations in Iraq. Section 104 of Division L prohibits any of the \$31 billion to be used for Operation Iraqi Freedom, except for \$1.6 billion for force protection equipment. The bill appropriates \$17.8 billion for Army operation and maintenance and \$2.0 billion for Marine Corps operation and maintenance for Operation Enduring Freedom.

The Senate took up the House-passed bill on December 18, and, by a vote of 70-25, approved a substitute by Senator McConnell that would provide \$70 billion in supplemental defense appropriations for all overseas operations. The substitute includes \$35.2 billion for Army operation and maintenance and \$4.0 billion for Marine Corps operation and maintenance. Now the bill will go back to the House for further consideration.

Earlier, on November 14, the House approved a bill, H.R. 4156, that would have provided \$50 billion in supplemental appropriations for FY2008, including \$27.5 billion for the Army operation and maintenance and \$2.4 billion for Marine Corps operation and maintenance. On November 16, by a vote of 53-45, with 60 votes required, the Senate refused to close debate on a motion to proceed to consideration of H.R. 4156 as passed by the House. The Senate also rejected, by a vote of 45-53, a motion to proceed to consideration of H.R. 2340, Senator McConnell's initial proposal to provide \$70 billion without requiring withdrawal from Iraq.

How Long Funding for Operation Enduring Freedom in FY2008 Omnibus Appropriations Would Extend the Availability of Funding for Iraq

The House version of the FY2008 omnibus appropriations bill, H.R. 2764, would provide \$17.8 billion for Army O&M and \$2.0 billion for Marine Corps O&M. Except for \$1.6 billion for force protection, the supplemental funding in the House bill is not available either for Iraq or for day-to-day peacetime military activities. The money is, however, to some extent, "fungible," and it would indirectly extend the amount of time for which available funds would finance

operations in Iraq. The money appropriated for OEF would substitute for money that would otherwise have to come from amounts in the regular FY2008 Defense Appropriations Act (P.L. 110-116) or from transfers of funds from other accounts. To the extent the additional OEF money in the omnibus frees up other money, the other amounts can be used to finance day-to-day peacetime operations and also operations in Iraq.

Impact of Providing \$31 Billion for Operation Enduring Freedom on Operations in Iraq

CRS has used two methods to make rough estimates of how long the OEF money in the House-passed omnibus appropriations bill would allow the Defense Department to extend day-to-day peacetime operations and operations in Iraq. Either method leads to an estimate that the Defense Department can extend operations until the end of March or early April.

Method 1: Currently, the Army projects that it will obligate about \$1.5 billion per week to cover operation and maintenance (O&M) costs of day-to-day peacetime activities plus war-related operations in Iraq, Afghanistan and elsewhere.¹ The House-passed \$31 billion omnibus appropriations bill would provide \$17.8 billion for Army operation and maintenance to cover the full year costs of Army operations in Afghanistan, or about \$342 million per week ($\$17.8 \text{ billion} \div 52 \text{ weeks} = \$342 \text{ million per week}$). One can calculate that this would reduce requirements for funding from other sources to \$1.158 billion per week to finance peacetime activities and Iraq operations ($\$1.5 \text{ billion} - \$342 \text{ million} = \$1.158 \text{ billion per week}$).

In all, the Army expects to have available \$31.5 billion in operation and maintenance funds that can be used for peacetime activities and for Iraq. The FY2008 Defense Appropriations Act provides \$27.4 billion for Army operation and maintenance (O&M). In addition, the Defense Department plans, subject to approval by the four congressional defense committees, to transfer \$4.1 billion of other FY2008 appropriated funds to the Army. At a weekly obligation rate of \$1.5 billion, that amount will last for 21 weeks of the fiscal year, or until February 23. But at a weekly rate of \$1.158 billion, the available funds would sustain operations for more than 27 weeks or until about April 8, 2008 (see **Appendix A**).²

Method 2: The House-passed omnibus appropriations bill provides \$17.8 billion for Army O&M, of which \$14.8 billions is specifically for military operations (the remainder includes \$1.6 billion for force protection equipment, \$902 million for

¹ This is based on Army calculations. The Army has available \$27.4 billion in regular FY2008 appropriations for operation and maintenance and plans on an additional \$4.1 billion in transfers, for a total of \$31.5 billion. The Army estimates that this amount will last until February 23, which is at the of 21 weeks of FY2008. This assumes \$1.5 billion per week in obligations ($\$31.5 \text{ billion} \div 21 \text{ weeks} = \$1.5 \text{ billion per week}$).

² This is a rough calculation, however. One possible problem with it is that the Army may not be able to obligate funds for Afghanistan fast enough to lower the average obligation rate for other operations to \$1.158 billion a month. If so, the amount of time the OEF money would extend Army operations elsewhere would be somewhat less than six weeks.

health care and family support, and \$500 million for reconstruction assistance in Afghanistan). Based on last year's obligation rates, however, not all of this money appears likely to be used immediately. Last year, the Army obligated \$450 million a month for operations in Afghanistan. Assuming a similar rate of obligations this year, the Army will obligate about \$2.7 billion over the first six months of FY2008. This will free up an equivalent amount of regular FY2008 appropriations for use in Iraq. In addition, up to \$1.6 billion for force protection could be used in Iraq, for a total of \$4.3 billion. Assuming obligations of funds in Iraq are running at about \$3.8 billion per month, an additional \$4.3 billion could extend operations for about five weeks, or until the end of March.³

Impact of Providing a \$70 Defense “Bridge Fund” for Operations in Iraq, Afghanistan, and Elsewhere

On December 18, the Senate approved an amendment by Senator McConnell to the FY2008 omnibus appropriations bill, H.R. 2764, to provide \$70 billion for overseas military operations without limits on where funds may be used. The amendment includes \$35.2 billion for Army operation and maintenance and \$4.0 billion for Marine Corps operation and maintenance. If this version is approved by the House and signed into law, it would increase FY2008 Army O&M funding from \$27.4 billion in the regular FY2008 Defense Appropriations Act to \$62.5 billion. At a monthly obligation rate of slightly under \$6.5 billion, which is what the Army now assumes, this would provide funding for 9.7 months of FY2008, or until the middle of June, 2008 (see **Table A3** in the Appendix).

Background

The Department of Defense is currently financing both the day-to-day peacetime operation of U.S. military forces and overseas military operations in Iraq and elsewhere with funds appropriated in the regular FY2008 Defense Appropriations Act, P.L. 110-116. That measure provides \$460 billion for the Defense Department to cover the costs of baseline, non-war-related programs in FY2008. The Administration has also requested \$189.3 billion in FY2008 supplemental appropriations for the Department of Defense to cover war-related costs. Congress has approved \$16.8 billion of that amount, all for Mine Resistant Ambush Protected (MRAP) vehicles. The remainder has been held up pending debate over Iraq policy.

Until the week of December 10, action on supplemental funding appeared to be at an impasse. On November 14, the House approved a bill, H.R. 4156, to provide \$50 billion in supplemental appropriations as a temporary “bridge fund” to cover war costs for part of the year, with a requirement that the President begin withdrawing troops from Iraq. The Senate rejected cloture on a motion to bring the bill up for debate, however, and the White House has threatened a veto. There has been no action in Congress to date on a full-year supplemental.

³ For a further discussion of this approach, see CRS Report RL33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11*, updated December 18, 2007, by Amy Belasco.

Now, in place of the \$50 billion bridge fund, the House is considering provide \$31 billion in emergency FY2008 supplemental appropriations for Operation Enduring Freedom as part of FY2008 omnibus appropriations, H.R. 2764. The Senate may later consider a substitute to provide \$70 billion without conditions for all overseas operations.

How Long Regular FY2008 Defense Appropriations Will Last

With enactment of supplemental appropriations in doubt, the immediate issue has become how soon the Defense Department will have to rein in operations before it runs out of money. At a press conference on November 15, Secretary of Defense Gates warned that the Army would run out of money by the beginning of February, and the Marine Corps some time in March, and he announced measures to limit spending beginning almost immediately. “The least undesirable” option, he said, would be to “cease operations at all Army bases by mid-February next year.” This would result, he said, in furloughs of 100,000 civilian and another 100,000 contractor personnel. Because some layoffs require 60 days advance notice, he said, the Pentagon would have to begin sending notifications to personnel in December.⁴

In the same press conference, Secretary Gates said that the Defense Department would take steps to extend Army and Marine Corps funding by “reprogramming” or “transferring” funds.⁵ On November 20, the Defense Department announced that it was requesting approval from the congressional defense committees to transfer \$4.5 billion of funds from other accounts to the Army and to the Joint IED Defeat Organization. The transfers, officials said, would extend Army operations for two or three weeks.⁶ Subsequently, the Army circulated estimates that funding from the

⁴ Department of Defense, "DoD News Briefing with Secretary of Defense Gates and Chairman of the Joint Chiefs of Staff Adm. Mullen from the Pentagon Briefing Room, Arlington, Va.," November 15, 2007 at [<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4089>].

⁵ In general a “transfer” of funds is a shift of money from one appropriations account to another. Because appropriations laws provide specific amounts for each account, a shift of funds is permissible only to the extent Congress allows a transfer in statutory language. As part of each appropriations bill, Congress usually specifies that a limited amount may be transferred, subject to certain conditions. Section 8005 of the FY2008 Defense Appropriations Act permits DOD to transfer up to \$3.7 billion between accounts. This is referred to as “General Transfer Authority” or “GTA.” In most agencies the term “reprogramming” refers to shifts of funds within accounts, rather than a “transfer” between accounts. The Defense Department, however, uses the term “reprogramming” to refer to all shifts of funds, including those that involve a transfer between accounts. All transfers, along with reprogramming actions over certain threshold amounts, also require advance approval by the four congressional defense committees.

⁶ Department of Defense, “Reprogramming Action – Prior Approval,” Serial No. FY 08-02 PA, November 20, 2007. The proposal decreases Navy and Air Force personnel accounts by \$1.85 billion each, for a total of \$3.7 billion, decreases cash balances in the Army Working Capital Fund by \$800 million, increases Army Operation and Maintenance funding by \$4,055.6 million, and increases the Joint Improvised Explosive Device Defeat Fund by \$444.4 million.

regular Defense Appropriations Act plus planned transfers would run out on February 23.

CRS calculations of the length of time the Army and Marine Corps can continue to operate without additional funding are in line with Defense Department estimates. At issue is how long money in Army and Marine Corps Operation and Maintenance (O&M) accounts will last at projected obligation rates. The O&M accounts finance a broad range of activities, including recruitment, training, transportation, clothing, subsistence, fuel, facility operation and repair, and equipment maintenance. Funding for Army and Marine Corps O&M supports both peacetime activities and war-related operations.

For the first few months of the fiscal year, the Army appears to be planning obligations of about \$6.4-\$6.6 billion per month and the Marine Corps of about \$800 million per month. The FY2008 Defense Appropriations Act, P.L. 110-116, provides \$27.4 billion in O&M for the Army and \$4.8 billion for the Marine Corps. At planned monthly obligation rates, therefore, the Army can operate with baseline appropriations for about four months of the fiscal year (which began on in October 1, 2007) or until the beginning of February, and the Marine Corps can operate for about six months, or until the end of March, consistent with Defense Department estimates.

Alternatives for Extending Operations Longer

In the absence of a bridge fund, the Defense Department may be able to extend Army and Marine Corps operations beyond either February or March, without the \$31 billion Afghanistan supplemental, or beyond April 8 for the Army with the Afghanistan funds, either by adding money from other sources to O&M accounts or by slowing the pace at which the services are obligating funds. Barring extensive use of the Feed and Forage Act or an unprecedented use of provisions of standing law that may allow other services to pay for Army and Marine Corps operations (see below for a discussion) options appear limited, and the services may be able to extend operations for an additional month or two.

Alternatives for extending Army and Marine Corps operations include –

- Transfer limited additional amounts that may be available from cash balances in working capital funds;
- Slow the pace of Army and Marine Corps obligations of funds, in part by using means the Army considered in April 2007 and in part by delaying depot maintenance funding;
- Invoke the Feed and Forage Act, which permits obligations of funds in advance of appropriations, and for which there are extensive precedents in the past 40 years; and finally,
- Consider using standing authorities for which there do not appear to be precedents to limit Army and Marine Corps costs, such as the authority in 10 USC 165 to assign support operations to other services.

Each of these alternatives may extend operations for some time, but each has limits and disadvantages as well.

In the Army's official view, moreover, all of these kinds of budget maneuvers are detrimental. In a presentation at the Brookings Institution on December 4, Army Chief of Staff George Casey complained about any kind of budgetary gamesmanship:

In general, as Chief of Staff of the Army, not having predictable, timely funding makes it harder for me to do my job: to organize, train and equip the Army. Every time you put something off or delay it or take some measures to get another week's worth of funding for the operations and maintenance account, it has second and third order effects that ricochet all through the organization, that you don't find the results for two or three months, and it just makes it harder.

The second thing is I think what's going on right now sends a terrible signal to soldiers and families. We have nine brigades that are redeploying from Iraq and Afghanistan right now after being gone for 15 months. They started in September. They'll come in through January. The notion that people are even discussing closing down or warm-basing their installations just minimum essential tasks at a time when they're coming home from being gone for 15 months is very difficult for them.⁷

Transfer Additional Funds to the Army and Marine Corps

The Defense Department may be able to transfer a limited amount of additional money to extend Army and Marine Corps operations. DOD already plans, subject to approval by the congressional defense committees, to transfer \$3.7 billion of funds from Air Force and Navy personnel accounts to the Army and to JIEDDO and to shift \$800 million of cash balances from working capital funds to the Army. The \$3.7 billion transfer from the Air Force and the Navy exhausts the total amount of General Transfer Authority provided by Section 8005 of the FY2008 Defense Appropriations Act. Additional funds may be available for transfer, however, in cash balances of working capital funds.

⁷ General George William Casey, Jr., Chief of Staff of the Army, "Maintaining Quality in the Force: a Briefing by General George W. Casey, Jr.," Brookings Institution Transcript, December 4, 2007, p. 33, at [http://www.brookings.edu/~media/Files/events/2007/1204_casey/20071204casey.pdf]. The military services have consistently been wary of budget maneuvers, including Administration steps to use money from later in the year to finance operations at the start of the year – a practice known as “cash flowing.” Disputes over the use of cash flowing for the Iraq war began as early as January, 2004. The Administration decided not to request FY2005 supplemental appropriations until after the start of calendar year 2005. When senior service leaders expressed concern about that decision in congressional hearings, DOD Comptroller Dov Zakheim called a press conference to defend the practice. See Department of Defense, "Defense Department Special Briefing: Purpose Of Budget Supplementals," February 11, 2004, at [<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2062>]. Subsequently Congress initiated the practice of providing part-of-the year bridge funding when it added \$25 billion in unrequested funds for war related expenses to the FY2005 Defense Appropriations Act. Later, Congress provided an unrequested bridge fund of \$50 billion in FY2006. The Administration only began to request appropriations for a bridge fund in the FY2007 budget.

The transfer of excess cash balances in working capital funds is permitted by Section 8008 of the FY2008 Defense Appropriations Act.⁸ Working capital funds are business-like activities of the Defense Department that are funded primarily through revenues from sales to the military services. Some working capital fund activities maintain inventories of products that they sell to the services. Others provide industrial services, such as depot maintenance of equipment. The military services use appropriated funds, mostly in the operation and maintenance accounts, to make the purchases. Section 8008 allows the funds to maintain sufficient cash balances to meet projected requirements for disbursements. Excess cash balances may then be available for transfer to other accounts, including service operation and maintenance accounts.

The amount of excess cash balances varies from fund to fund and from year to year. So far, the Defense Department has tapped FY2008 excess cash balances twice. The FY2008 Defense Appropriations Act used \$628 million to offset Army, Navy, Air Force, and Defense-Wide operation and maintenance accounts. And now the Defense Department is using \$800 million for the Army. So about \$1.4 billion has been used.

Pros and Cons. The Government Accountability Office (GAO) has reported to congressional defense committees that DOD had as much as \$3.5 billion in excess cash balances in the working capital funds at the start of FY2008.⁹ With \$1.4 billion having been used, another \$2.1 billion or so may be available. To tap all of the remaining funds to finance Army and Marine Corps O&M accounts would extend operations for a week or two. It would also, however, further reduce DOD's remaining financial flexibility to respond to future developments, at least temporarily. DOD has asked Congress to restore the \$3.7 billion in transfers it requested on November 20, and Congress has, in the past, agreed to forgive amounts transferred because of delays in making supplemental appropriations.¹⁰

Slow the Pace of Army and Marine Corps Operations

To the extent that Army obligations of O&M funds can be reduced below about \$6.6 billion per month, and Marine Corps obligations below \$790 million, the services can operate longer with available funds. Last April, the Army planned a series of increasingly restrictive limits on activities to be implemented if FY2007 supplemental appropriations were further delayed.¹¹ The Army projected that these

⁸ Like Section 8005, Section 8008 is a recurring provision in annual defense appropriations acts.

⁹ CRS calculation based on DOD data provided by GAO analyst by e-mail, November 30, 2007.

¹⁰ The Defense Department also opposed House and Senate use of excess cash balances in the FY2008 defense appropriations bills – see Department of Defense, “Budget Appeal, FY2008 Defense Appropriations Bill,” #RF-2, October 15, 2007. The appropriations conference agreement rejected the appeal.

¹¹ Army Memorandum, “Operation and Maintenance, Army Spending Restrictions Plan for (continued...) ”

measures could reduce obligations by as much as \$3.6 billion over three months out of FY2007 obligations of about \$6 billion per month.¹² The Army and Marine Corps may also be able to defer some other funding by, for example, delaying orders for depot maintenance of equipment, for which the Army plans average obligations of about \$400 million per month in FY2008 – i.e., about \$1.6 billion over the first four months of the year.

Pros and Cons. If implemented over the next four months, these steps might reduce obligations by as much as \$5 billion (\$3.6 billion from measures like those identified last April, plus \$1.6 billion from deferring depot maintenance), though less if they were pursued selectively. This is enough for an additional three weeks or so of operations. Some of these measures may be less disruptive to the day-to-day operations of the force than others, particularly if undertaken on only a temporary basis. The Army reportedly has a depot maintenance backlog of about 7 ½ months, so there may be some room to defer new orders without disrupting depot work flows.¹³ It is uncertain how reduced obligations of funds would affect military readiness or how disruptive cuts would be to facilities management, civilian and contractor employment, materiel inventories, equipment orders to industry, DOD travel, or depot maintenance workloads. Congress may wish to consider these matters more fully through hearings and other means.

Defense Department officials have said that cuts such as those planned last spring are not sufficient in the present circumstances because of greater uncertainty about supplemental funding. In his November 20 press briefing, DOD spokesman Geoff Morrell insisted that the issue was not simply how to free up money to extend operations, but, rather, what steps the Defense Department would have to take to shut down operations almost completely in the absence of funding. “All that will happen on the [military] bases,” he said, “is that the most basic security and safety personnel – fire, police, and so forth – will be operating. Day care centers, libraries, all of the additional benefits that are there for families living on the base will cease to operate, because we will not have the funds to keep them going.” The steps taken last spring, he explained, were designed to extend operations on the assumption that

¹¹ (...continued)

FY07,” April 14, 2007. The text of the Memorandum is available at [<http://www.comw.org/warreport/fulltext/0704armyspending.pdf>]. See also, Army Press Release “Funding Needs Prompt Army Spending Constraints,” April 16, 2007, at [<http://www.army.mil/-newsreleases/2007/04/16/2698-funding-needs-prompt-army-spending-constraints/>]. The Army Memorandum is also discussed in CRS Report RL33900, *FY2007 Supplemental Appropriations for Defense, Foreign Affairs, and Other Purposes*, by Stephen Daggett, Amy Belasco, Pat Towell, Susan B. Epstein, Connie Veillette, Curt Tarnoff, Rhoda Margesson, and Bart Elias, updated July 2, 2007 – see subsection entitled “Financing Army Operations Until Passage of the Supplemental.”

¹² Army Budget Office, PowerPoint Slides entitled “Operation and Maintenance, Army Spending Restrictions Will Extend Fund Availability” and “OMA FY07 Execution,” April 2007.

¹³ E-mail communication from GAO analyst, November 30, 2007.

Congress would provide additional appropriations quite soon. Now, however, defense officials are not coping with a delay in funding, but with a shut off of funds.¹⁴

Invoke the Feed and Forage Act

The Feed and Forage Act, 41 USC 11,¹⁵ is a long-standing law, with antecedents from well before the Civil War,¹⁶ that gives the Defense Department authority to finance some costs of military operations in advance of congressional appropriations. In the past 40 years, the act has been used periodically to pay for unplanned military contingencies and to sustain military operations when supplemental appropriations have been delayed.

The Feed and Forage Act permits the Department of Defense to obligate funds in advance of appropriations for “clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies.” Obligations may not, however, “exceed the necessities of the current year.” These categories are broad enough to encompass most activities financed in operation and maintenance accounts. The “transportation” category, for example, has been interpreted to allow operation of weapons engaged in combat, including aircraft carrying out bombing missions in Southeast Asia, and funding of repairs of equipment, including purchases of spare parts.¹⁷ The law does not, however, permit pay of uniformed personnel or purchases of munitions or other weapons.

When queried about the use of the Feed and Forage Act, Pentagon spokesperson Geoff Morrell all but dismissed its potential use except in extraordinary circumstances –

we have extraordinary measures that can be taken in the eventuality that we find ourselves in a situation where we have no money – and no ability to move funds and we find ourselves with our men and women in uniform in the theater potentially unfunded. But all that we would be able to do in those circumstances is provide – is basically provide for their survival. It’s a “Feed and Forage” provision. It dates back before the Civil War. And it will allow us, really, just

¹⁴ Department of Defense, "DoD News Briefing with Press Secretary Geoff Morrell from the Pentagon," November 20, 2007 at – [<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4091>].

¹⁵ It is also frequently cited as Revised Statute 3732. The “Feed and Forage Act” as codified in 41 USC 11 is an express exception to the “Adequacy of Appropriations Act,” which states that “No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment.”

¹⁶ Louis Fisher, *Presidential Spending Power* (Princeton: Princeton University Press, 1985), pp. 238-247. The author cites one precedent as early as 1799 – see p. 240.

¹⁷ CRS has prepared an extensive compilation of background material, much of it provided, by the Department of Defense Comptroller, on uses of the Feed and Forage Act since 1960, on its history, and on associated issues, including war powers. Congressional staff and Members of Congress should contact Stephen Daggett at CRS for a copy.

to provide for their feed and that's it. So it's an extraordinarily desperate situation. We are not there yet. We are not talking about invoking that yet.¹⁸

The Feed and Forage Act has been used in the past in circumstances quite similar to those today. It has been used, for instance, to sustain major military operations, including combat operations in Southeast Asia in the 1960s and transportation of personnel to the Persian Gulf during Operation Desert Shield/Desert Storm, when appropriated funds were not sufficient. **Table 1** summarizes uses of the Feed and Forage Act since 1960. As the table shows, when amounts are adjusted to today's prices, the Feed and Forage Act has been invoked to finance quite substantial obligations of funds – in FY1968, for example, during the Vietnam War, when, in FY2008 prices, \$7.4 billion was used and in FY1991, for Operation Desert Shield/Desert Storm, when \$2.6 billion was used.

Table 1. Uses of the Feed and Forage Act Since FY1960
(amounts in millions of current year and constant FY2008 dollars)

Fiscal Year		Current Year Dollars	Constant FY2008 Dollars
1962	Berlin Airlift	53	441
1966	Southeast Asia	277	1,943
1968	Southeast Asia: Late enactment of supplemental appropriations	1,136	7,427
1969	Southeast Asia: Late enactment of supplemental appropriations	4	23
1972	Southeast Asia	137	700
1978	Escalating foreign currency rates: Late enactment of supplemental appropriations	80	252
1980	Middle East oil crisis	664	1,719
1991	Gulf War	1,642	2,562
1994	Haiti	126	185
1996	Saudi Arabia Khobar Towers*	–	–
2001	Terrorist Attacks of 9/11/01*	–	–

Source: Current year dollars figures from Department of Defense Comptroller, constant dollar totals calculated by CRS using deflators from Department of Defense Comptroller.

* The act was invoked in 1996 following the Khobar Towers bombing in Saudi Arabia and in 2001 just after the attacks of 9/11, but no funds were used.

Pros and Cons. The Feed and Forage Act gives the Department of Defense considerable flexibility to mobilize funding for military operations in the event of unexpected developments. The potential use of substantial amounts to carry on combat operations, particularly if Congress has denied or refused to act on funding

¹⁸ Department of Defense, “DoD News Briefing with Press Secretary Geoff Morrell from the Pentagon,” November 20, 2007 at [http://www.defenselink.mil/transcripts/transcript]. aspx?transcriptid=4091.

for a war, may be of concern to Congress because of its implications for congressional war powers, including the power of the purse. During the Vietnam war, use of the Feed and Forage Act ignited a vigorous debate over war powers issues. In 1973 Senators Mathias and Church sponsored hearings on the law, and in 1974 and 1975, Senator Abourezk proposed repealing the act because, he argued, it eroded congressional authority.¹⁹ Use of the Feed and Forage Act under current circumstances may warrant similar concerns. Unless Congress were to enact language restricting funding for Iraq “in this or any other act,” use of funding under the Feed and Forage Act would not appear to be subject to any limitations.

The act has other has limitations as well. Significantly, while the act permits the Defense Department to obligate funds (i.e., sign contracts or hire civilian personnel), in DOD’s interpretation, it does not permit actual expenditures (i.e., outlays) of funds without congressional appropriations.²⁰ This would require contractors to agree, likely with some compensation, to contracts that might delay actual payments. In effect, the law allows the Defense Department to obligate Congress to provide what are known as “deficiency appropriations,” which were quite frequently enacted up until the 1950s, but have not been used often since then. The enactment of deficiency appropriations may, however, be delayed.

Use Unprecedented Title 10 Authorities to Assign Support Operations to Other Services

While the use of the Feed and Forage Act has an extensive history, there are some other authorities in standing law that might be used to extend Army and Marine Corps operations, but for which CRS is not aware of any precedents. One such provision is 10 USC 165. Title 10 U.S. Code is the standing law that establishes the Department of Defense and includes most of the statutory language that governs its organization and operations. Section 165 (c) specifically permits the Secretary of Defense to assign responsibility for administration and support of forces assigned to combatant commands (including the Central Command responsible for operations in Iraq and Afghanistan), to other components of the Defense Department. The term “components” includes the active duty element of each military service, as well as each of the reserve elements, as well as defense agencies. The full text of the provision reads –

(c) Assignment of Responsibility to Other Components of DOD.— After consultation with the Secretaries of the military departments, the Secretary of

¹⁹ John P. MacKenzie, “Pentagon Use of 1861 Law Scored,” *Washington Post*, September 30, 1973, p. 4. Remarks of Senator Abourezk, *Congressional Record*, June 5, 1975, pp. S17367-17369. Remarks of Senator Abourezk, *Congressional Record*, June 3, 1974, pp. S9417-S9422. Congressional concern about the act was piqued particularly when then-Secretary of Defense Melvin Laird asserted in congressional testimony that the Defense Department could use authority of the “deficiency authorization legislation,” meaning the Feed and Forage Act, to continue military operations in Southeast Asia in the absence of appropriations for the war – see MacKenzie article.

²⁰ See, Department of Defense Comptroller, “Budget Execution Flexibility, FY2007,” at [http://www.defenselink.mil/comptroller/execution/Final_Budget_Execution.pdf], p. 19.

Defense may assign the responsibility (or any part of the responsibility) for the administration and support of forces assigned to the combatant commands to other components of the Department of Defense (including Defense Agencies and combatant commands). A component assigned such a responsibility shall discharge that responsibility subject to the authority, direction, and control of the Secretary of Defense and subject to the authority of commanders of the combatant commands under section 164 (c) of this title.

Pros and Cons. On its face, 10 USC 165 (c) would appear to allow the Defense Department considerable latitude to assign management and budget responsibility to the Air Force and Navy for such support activities as food and housing services handled by civilian contractors under what are known as LOGCAP contracts, for which \$6.2 billion is requested in FY2008; contracts for linguists, for which \$1.1 billion is requested; subsistence for DOD civilians and contractors, for which \$675 million is requested; or other war support activities. The Secretary also has authority to detail civilian personnel from one service to another as part of his general responsibility for managing the Department, so Army personnel currently managing these contracts could be detailed to another service to ensure continuity.²¹

Since Air Force and Navy O&M budgets are less limited than Army and Marine Corps budgets, this would further extend the amount of time the Army and Marine Corps could operate without FY2008 supplemental funding. The FY2008 Defense Appropriations Act provides \$32.2 billion for Air Force O&M and \$33.1 billion for Navy O&M. If the Air Force and Navy were each assigned responsibility for \$5 billion of activities currently handled by the Army, it would extend Army operations by a month-and-a-half, while funding for Air Force and Navy operations would be reduced by about two months.

Since the use of this provision is unprecedented, it is not known whether a shift of responsibilities could quickly and efficiently be implemented. Use of this authority might also be a matter of considerable concern to Congress, since it would appear to undermine congressional limitations on the use of funds. If the Navy can support Army operations with large amounts of money, then the integrity of the account structure into which Congress appropriates money is clearly at issue.

Summary of Measures to Extend Operations

The Defense Department has warned that money available to sustain Army and Marine Corps operations will run out in February or March, and CRS calculations are consistent with this projection. The Defense Department may be able to extend military operations further by transferring limited additional amounts to the Army and Marine Corps and by slowing down operations, but each alternative has some disadvantages.

- Excess cash balances remaining in working capital funds might be as high as \$2.1 billion. Tapping these funds would, however, reduce DOD's remaining flexibility to respond to unexpected developments.

²¹ See Title 5, Section 3341 and Title 10, Sec. 113 (d).

- The Army projected that measures it planned to slow down operations last April might, at the upper limit, avoid \$3.6 billion or so of obligations over three months. Some of these measures, however, may disrupt day-to-day Army operations.
- Deferring new orders for depot maintenance might reduce planned obligations by \$400 million or so per month, or about \$1.6 billion over four months or \$2.0 billion over five months. CRS cannot, however, assess how this would affect depot work planning.

Taken together, all of these measures might temporarily reduce or offset Army and Marine Corps funding requirements by as much as \$2.1 billion (use remaining excess cash balances in working capital funds) + \$3.6 billion (slow operations) + \$1.6 billion (defer new depot maintenance orders) = \$7.3 billion, or about one month's worth of funding at current obligation rates, which would allow the Army to extend operations until about the end of March, 2008 (see **Table 2**).

A potentially more significant source of funds may be to invoke the Feed and Forage Act. In the past, it has been used to finance as much as \$7.4 billion of war-related operations in today's prices. That amount would finance Army and Marine Corps operations for about another month. Operations might be sustained longer if larger amounts were used. There may be some problems negotiating contracts, however. And use of the Feed and Forage Act raises significant war powers issues. For Congress to recommend use of the Feed and Forage Act appears particularly ironic – it is, in a sense, to write the script for the Executive Branch to evade legislative restrictions on the use of funds to carry on the war in Iraq.

The potential for DOD to use unprecedented measures, such as the flexibility given to the Secretary of Defense to reassign responsibility for support activities to other services, is particularly hard to assess. It might be difficult to administer, or it might involve only paper changes that could be implemented quickly. It would appear, however, to undermine congressional controls on the use of funds.

Table 2: Possible Options for Extending Army Operations in Advance of FY2008 Supplemental Appropriations*

Options	Potential Additional Funds/Reduction in Obligation of Funds	Potential Number of Weeks or Days Financed at Obligation Rate Assumed by Army	Date Funding Might Run Out if Options Are Cumulative and Fully Implemented	Precedents/Notes	Potential Consequences
DOD Plan: Use all funds in regular FY2008 Defense Appropriations Act and transfer \$3.3 billion from Navy and Air Force under General Transfer Authority and \$800 million of working capital fund cash balances (\$4.1 billion total) to Army operation & maintenance	\$27.4 billion for Army O&M in FY2008 Defense Appropriations Act; + \$4.1 billion transfer; = \$31.5 billion	21 weeks according to Army calculations (assumes \$1.5 billion obligations per week)	February 23, 2008 (current official Army estimate)	“Cash flowing” – i.e., moving funds from the end of the year to the beginning has been common in recent years. General Transfer Authority used in FY2007 was later restored by Congress. Requires approval of congressional defense committees.	Services have long complained that “cash flowing” of large amounts is disruptive. Would exhaust all \$3.7 billion in General Transfer Authority (transfer of \$0.4 billion remainder is requested for JIEDDO), unless and until Congress were to restore it.
Use \$17.8 billion for Army O&M in FY2008 Omnibus Appropriations bill, H.R. 2764, only for Afghanistan. This reduces funding drawn from FY2008 Defense Appropriations Act and other sources for Afghanistan by that amount and frees it up for Iraq and peacetime operations	\$17.8 billion; ÷ 52 weeks = \$ 0.342 billion per week saved	Reduces funding required for peacetime + Iraq operations to \$1.158 billion per week	NA	NA	NA
Use \$31.5 billion for Army O&M from FY2008 Defense Appropriations Act and transfers for Iraq + peacetime operations	\$31.5 billion; ÷ \$1.158 billion per week;	=27.2 weeks at \$1.158 billion per week; =191 days	April 8, 2008	NA	NA
Use \$444 million for JIEDDO for Army instead	\$ 0.444 billion; ÷ \$1.158 billion per week;	3 days	April 11, 2008	H.R. 2764 provides full amount in amended request for JIEDDO, \$4.3 billion	NA

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Options	Potential Additional Funds/Reduction in Obligation of Funds	Potential Number of Weeks or Days Financed at Obligation Rate Assumed by Army	Date Funding Might Run Out if Options Are Cumulative and Fully Implemented	Precedents/Notes	Potential Consequences
Use all remaining excess cash balances in working capital funds	\$2.1 billion; ÷ \$1.158 billion per week;	12 days	April 23, 2008	Cash balances a common source of funding for O&M accounts.	Would reduce remaining DOD financial flexibility unless and until Congress were to restore transferred funds.
Slow obligations of funds through progressively more restrictive limits over three months, as the Army planned and began to implement in April 2007	\$3.6 billion over three months (Army estimate of April 2007) ÷ \$1.158 billion per week;	22 days	May 15, 2008	In April, DOD achieved savings from delaying contracts and other belt tightening measures. Monthly obligations often fluctuate.	Proposed measures appeared likely to become increasingly disruptive to Army operations over time. CRS did not assess their impact or alternatives. DOD says slowing funding not adequate because the requirement is to shut down operations with no funding available.
Defer depot maintenance of \$400 million per month	\$1.6 billion over 4 months, \$2.0 billion over 5 months ÷ \$1.158 billion per week;	10-12 days	May 25-27, 2008	Reducing current 7 and 1/2 month backlog of depot orders may not delay repair deliveries.	Depots need some backlog for planning purposes.

Source: CRS calculations based on Army estimate of end date of February 23, 2008 and estimates of funding amounts from sources cited above.

* Use of the Feed and Forage Act of other authorities might extend funding further, but potential amounts could vary. Please refer to the full text of this report for a full review of potential sources of funds and limitations on their use.

Appendix: Alternatives with \$31 Billion in Supplemental Funding for Operation Enduring Freedom or \$70 billion Unrestricted Bridge Fund

If Congress were to approve and the President were to sign into law the \$31.0 billion in emergency funding for Operation Enduring Freedom (OEF) in the House-passed omnibus appropriations bill, H.R. 2764, money provided elsewhere for Army O&M would not be needed for Afghanistan or other global counter-terrorism operations. As a result, money in the regular FY2008 Defense Appropriations Act and any additional amounts transferred to the Army would sustain Army peacetime and Iraq operations longer than estimated in **Table 2** above.

A starting point for estimating the impact is to calculate how the money in the omnibus appropriations bill would affect weekly Army O&M obligations. Currently, the Army is assuming obligations of almost exactly \$1.5 billion per week. The House-passed omnibus appropriations bill provides \$17.8 billion for Army operation and maintenance for Operation Enduring Freedom. On average, this amounts to weekly obligations of $\$17.8 \text{ billion} \div 52 \text{ weeks} = \$342 \text{ million per week}$. This would allow other Army O&M money to be used to finance peacetime operations and operations in Iraq at a rate of \$1.158 billion per week.

Table A1 shows how this change would affect options for funding Army O&M. CRS calculates that \$31.5 billion available to the Army in the regular FY2008 Defense Appropriations Act (\$27.4 billion) plus planned transfers (\$4.1 billion) would last until about April 8 at a weekly obligation rate of \$1.158 billion for Iraq and for peacetime operations. In addition, since the omnibus appropriations bill provides full requested funding for the Joint IED Defeat Organization, the \$444 million that the Defense Department has proposed transferring to JIEDDO could be redirected to the Army. An additional \$7.3 billion of funds or of reduced obligations, as discussed in this CRS report, would extend funding for almost 6 and 1/2 weeks. As the table shows, these steps could extend Army funding until through the end of May 2008, thought at the price of reduced funding flexibility and possible disruptions to day-to-day activities.

For purposes of comparison, **Table A2** shows how long Army and Marine Corps funding might last at planned obligation rates in the absence of additional supplemental appropriations or transfers of funds beyond the \$4.1 billion initially planned.

Table A3 shows how long Army and Marine Corps funding might be expected to last at planned obligation rates with the additional amounts included in the Senate-passed version of the FY2008 omnibus appropriations bill, which includes the McConnell \$70 billion defense bridge fund.

**Table A1. Possible Options for Extending Army Operations with
\$31 Billion in Supplemental Appropriations for Operation Enduring Freedom***

Options	Potential Additional Funds/Reduction in Obligation of Funds	Potential Number of Weeks or Days Financed at Obligation Rate Assumed by Army	Date Funding Might Run Out if Options Are Cumulative and Fully Implemented	Precedents/Notes	Potential Consequences
DOD Plan: Use all funds in regular FY2008 Defense Appropriations Act and transfer \$3.3 billion from Navy and Air Force under General Transfer Authority and \$800 million of working capital fund cash balances (\$4.1 billion total) to Army operation & maintenance	\$27.4 billion for Army O&M in FY2008 Defense Appropriations Act; + \$4.1 billion transfer; = \$31.5 billion	21 weeks according to Army calculations (assumes \$1.5 billion obligations per week)	February 23, 2008 (current official Army estimate)	“Cash flowing” – i.e., moving funds from the end of the year to the beginning has been common in recent years. General Transfer Authority used in FY2007 was later restored by Congress. Requires approval of congressional defense committees.	Services have long complained that “cash flowing” of large amounts is disruptive. Would exhaust all \$3.7 billion in General Transfer Authority (transfer of \$0.4 billion remainder is requested for JIEDDO), unless and until Congress were to restore it.
\$17.8 billion for Army O&M in FY2008 Omnibus Appropriations bill, H.R. 2764, for Afghanistan and other areas reduces funding drawn from FY2008 Defense Appropriations Act and other sources for Afghanistan by that amount and frees it up for Iraq and peacetime operations.	\$17.8 billion; ÷ 52 weeks = \$ 0.342 billion per week in obligations	Reduces funding required for peacetime + Iraq operations to \$1.158 billion per week	NA	NA	NA
Use \$31.5 billion for Army O&M from FY2008 Defense Appropriations Act and transfers for Iraq + peacetime operations	\$31.5 billion; ÷ \$1.158 billion per week;	=27.2 weeks at \$1.1158 billion per week; =191 days	April 8, 2008	NA	NA
Use \$444 million for JIEDDO for Army instead	\$ 0.444 billion; ÷ \$1.158 billion per week;	3 days	April 11, 2008	H.R. 2764 provides full amount in amended request for JIEDDO, \$4.3 billion	NA

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Options	Potential Additional Funds/Reduction in Obligation of Funds	Potential Number of Weeks or Days Financed at Obligation Rate Assumed by Army	Date Funding Might Run Out if Options Are Cumulative and Fully Implemented	Precedents/Notes	Potential Consequences
Use all remaining excess cash balances in working capital funds	\$2.1 billion; ÷ \$1.158 billion per week;	12 days	April 23, 2008	Cash balances a common source of funding for O&M accounts.	Would reduce remaining DOD financial flexibility unless and until Congress were to restore transferred funds.
Slow obligations of funds through progressively more restrictive limits over three months, as the Army planned and began to implement in April 2007	\$3.6 billion over three months (Army estimate of April 2007) ÷ \$1.158 billion per week;	22 days	May 15, 2008	In April, DOD achieved savings from delaying contracts and other belt tightening measures. Monthly obligations often fluctuate.	Proposed measures appeared likely to become increasingly disruptive to Army operations over time. CRS did not assess their impact or alternatives. DOD says slowing funding not adequate because the requirement is to shut down operations with no funding available.
Defer depot maintenance of \$400 million per month	\$1.6 billion over 4 months, \$2.0 billion over 5 months ÷ \$1.158 billion per week;	10-12 days	May 25-27, 2008	Reducing current 7 and 1/2 month backlog of depot orders may not delay repair deliveries.	Depots need some backlog for planning purposes.

Source: CRS calculations based on Army estimate of end date of February 23, 2008 and estimates of funding amounts from sources cited above.

* Use of the Feed and Forage Act of other authorities might extend funding further, but potential amounts could vary. Please refer to the full text of this report for a full review of potential sources of funds and limitations on their use.

Table A2. Army and Marine Corps O&M Funding with Baseline FY2008 Defense Appropriations and Proposed Transfers of Funds
(amounts in millions of dollars)

	(1) FY2008 Base Budget Defense Appropriations	(2) Transfers	(3) FY2008 Available Funding (1) + (2)	(4) Average Funding Per Month	(5) Months of Funding Available (3) ÷ (4)	(6) Month Available Funding Would Run Out
Army Operation & Maintenance	\$ 27,362	\$ 4,056	\$ 31,418	\$ 6,473	4.9	End-February
Marine Corps Operation & Maintenance	\$ 4,792	\$ -	\$ 4,792	\$ 748	6.4	Mid-April

Table A3. Army and Marine Corps O&M Funding with Baseline FY2008 Defense Appropriations and FY2008 Omnibus Appropriations with \$70 Billion McConnell Substitute
(amounts in millions of dollars)

	(1) FY2008 Base Budget Defense Appropriations	(2) FY2008 Omnibus Appropriations	(3) FY2008 Available Appropriations (1) + (2)	(4) Average Funding Per Month	(5) Months of Funding Available (3) ÷ (4)	(6) Month Available Funding Would Run Out
Army Operation & Maintenance	\$ 27,362	\$ 35,152	\$ 62,514	\$ 6,473	9.7	End-July
Marine Corps Operation & Maintenance	\$ 4,792	\$ 3,966	\$ 8,758	\$ 748	11.7	End of FY2008