

FUNDING SURROGATE FORCES IN THE FIGHT AGAINST TERRORISM

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I. Introduction

An hour or so into your new job as a Special Forces Battalion Judge Advocate, the phone rings. It is the new Group Judge Advocate (GJA). You miss his name, if he gave it, as you are scrambling for and forcing open your new, very crisp green book and pulling a pen out of your sleeve. Once you are actually ready to listen, you realize he is already on a roll:

. . . need the status of that African counter-terrorism operation your unit is working through surrogate forces—approval at Bragg was complete weeks ago, so why haven't operations begun? I only worked domestic fiscal law and don't have a strong operational funding background, so explain to me how we're paying this group to fight for us. What's this "P-11 funding" the boss mentioned in my in-brief? There are some notes here from my predecessor—why on earth is a pallet of ammo for this operation stuck in Armenia and why was a pallet of weapons sent to some place in Kentucky? And another thing, I saw a news article before coming here that these guys had summarily executed a half dozen terrorists they had captured. Weren't they vetted? What if they do it again with our guys on-site?

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Once he hangs up, you realize your plans for the morning need to change significantly, so you finish setting up the cappuccino machine, but forgo getting the rest of your office in place.

After a few internet searches yield meager results,¹ you decide to drop by some staff peers' offices to finish your coffee. In the course of your informal research, you realize the GJA was talking about 10 U.S.C. Section 127e, a fiscal authority allowing the United States Special Operations Command (USSOCOM) to spend up to \$100 million annually to provide support to foreign forces, irregular forces, groups, or individuals (hereinafter "surrogate forces")² to support U.S. special operations forces (SOF) in the fight against terrorist enemies.³

Though combatants have spilled a fair amount of blood over the years in Section 127e operations, military attorneys have not yet spilt any ink analyzing the various legal challenges and fiscal requirements inherent in utilizing this authority. The dearth of legal literature on Section 127e and the special operations community's Major Force Program (MFP)-11 budgetary classification has made gaining a basic understanding of this fiscal authority unnecessarily time-consuming and difficult. Thus, this article will enable judge advocates to understand and analyze the full spectrum of fiscal law issues inherent in Section 127e operations while equipping them to identify and respond to the common intertwined budgetary concerns and national security law issues they will simultaneously encounter.

The article divides into two substantive sections. The first focuses on black letter law and theory, and the second considers the actual implementation of Section 127e. The following section discusses as threshold matters the basic foundational authorities of fiscal law such as

¹ References to Section 127e operations rarely appear in the news. However, Section 127e operations in countries including Somalia, Kenya, Tunisia, Niger, Cameroon, Mali, Mauritania, and Libya combating elements of al-Qaeda, al-Shabab, Boko Haram, and the Islamic State in Syria have been unofficially acknowledged by various sources. See Wesley Morgan, *Behind the secret U.S. war in Africa*, POLITICO (July 2, 2018), <https://www.politico.com/story/2018/07/02/secret-war-africa-pentagon-664005>. See also Kyle Rempher, *Special operations launches 'secret surrogate' missions in new counter-terrorism strategy*, MILITARY TIMES (Feb. 8, 2019), <https://www.militarytimes.com/news/your-army/2019/02/08/fighting-terrorism-may-rely-on-secret-surrogate-forces-going-forward>.

² See Gregory R. Bart, *Special Operations Forces and Responsibility for Surrogates' War Crimes*, 5 HARV. NAT'L SECURITY J. 513, 514 (2014).

³ 10 U.S.C.A. § 127e (West 2019).

the Constitution and several relevant statutes to chronicle why and how Section 127e developed, while also providing an introduction to the MFP-2 and MFP-11 budgetary classifications. The second section then offers an in-depth consideration of the various requirements for planning, staffing, and funding Section 127e operations before concluding with a series of discussions on some of the practical problems posed by Section 127e operations, such as getting supplies into the area of operations and liability for war crimes.

II. The Foundations of Section 127e Operations

As distinct from other areas in which judge advocates frequently practice, fiscal law is inherently restrictive. In other practice areas, judge advocates may fairly ask, “Where does it say the commander cannot do that?” However, the basic principles of fiscal law contained within the Constitution and related statutes frame the question as, “Where does it say that our commander can do this?” Knowing why this latter approach must be the paradigm for fiscal analysis will enable the reader to make the fine distinctions Section 127e operations necessitate regarding proper funding beneficiaries, amounts, and budgetary classifications.

A. The History and Evolution of 10 U.S.C. Section 127e

A proper understanding of 10 U.S.C. Section 127e begins with consideration of its predecessor, the temporary “1208” authority established in 2005. Like many other aspects of the fight against terrorism, Section 1208 traces its origins back to September 11, 2001, when al-Qaeda’s attacks on the Pentagon and the World Trade Center marked the beginning of an era in U.S. military operations where armed non-state actors—often operating from within sovereign nations unwilling and/or unable to prevent their continued existence—would be the primary adversary for the U.S. military.⁴

The first days of operations in Afghanistan in response to the 9/11 attacks revealed a significant gap in SOF capabilities to fulfill their assigned missions without fiscal support from outside the Department of

⁴ See BOB WOODWARD, STATE OF DENIAL 77-83 (2006).

Defense (DoD).⁵ Special operations forces arrived in October 2001 before their conventional counterparts and began to train, assist, and fight with the Northern Alliance rebel group against the Taliban.⁶ However, SOF lacked any fiscal authority to make payments to benefit the Northern Alliance since these Afghans were not U.S. personnel.⁷ Another executive agency, the Central Intelligence Agency (CIA), had to pay the Northern Alliance on behalf of the DoD using its own fiscal authorities.⁸

In response to these developments and to address the evolving nature of U.S. military operations, Congress enacted Section 1208 of the Fiscal Year (FY) 2005 National Defense Authorization Act (NDAA) providing for \$25 million annually through FY 2007 to “provide support to foreign forces, irregular forces, groups or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism.”⁹ Over the next twelve years, Congress routinely increased and/or extended this appropriation¹⁰ before codifying it as a permanent annual appropriation of \$100 million in 2016.¹¹ This fiscal authority has generated political consensus through the years and appears to be a tool on which USSOCOM can expect to rely indefinitely as the United States continues to expand its options for fighting terrorism.¹²

⁵ Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE, 565 (Geoffrey S. Corn, Rachel E. VanLandingham & Shane R. Reeves, eds. 2015).

⁶ *Id.*

⁷ *Id.* at 566.

⁸ *Id.*

⁹ Ronald W. Reagan NDAA for FY 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004).

¹⁰ NDAA for FY 2008, Pub. L. No. 110-181, § 1202, 122 Stat. 3 (2008) (extension through FY 2010); Duncan Hunter NDAA for FY 2009, Pub. L. No. 110-417, § 1208, 122 Stat. 4356 (2008) (\$35 million through FY 2013); NDAA for FY 2010, Pub. L. No. 111-84, § 1202, 123 Stat. 2190 (2009) (\$40 million); Ike Skelton NDAA for FY 2011, Pub. L. No. 111-383, § 1201, 124 Stat. 4137 (2011) (\$45 million); NDAA for FY 2012, Pub. L. No. 112-81, § 1203, 125 Stat. 1298 (2011) (\$50 million through FY 2015); Carl Levin and Howard P. “Buck” McKeon NDAA for FY 2015, Pub. L. No. 113-291, § 1208, 128 Stat. 3292 (2014) (\$75 million through FY 2017).

¹¹ NDAA for FY 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016); 10 U.S.C.A. § 127e (West 2019).

¹² The passage of the original Section 1208 authority and its series of extensions through to the final codification of Section 127e spanned two presidential administrations and control of Congress by each party. *See generally* WOODWARD, *supra* note 4; BOB WOODWARD, *OBAMA’S WARS* (2010). The Trump administration’s first National Security Strategy (NSS) and National Defense Strategy (NDS) signaled an intention to continue this overall trend toward flexibility in combatting terrorism. The NSS stated

B. The Constitutional Foundation of Fiscal Law

Fiscal law exemplifies the system of checks and balances that undergird the Constitution. Article I gives Congress the authority to spend money on the necessary functions of government, to include “provid[ing] for the common Defence and general Welfare of the United States”¹³ but later qualifies this power stating that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹⁴ These provisions give Congress a firm hold on the government’s purse strings, requiring its assent for any and all spending on behalf of the government.

Equally, the Constitution in Article II provides that the President is the commander-in-chief of the armed forces¹⁵ and therefore responsible for the overall operations of the military, which includes the execution and oversight of the spending necessary to maintain the armed forces. Thus the Constitution separates the power of the purse and the power of the sword: any and all spending by an Article II executive agency such as the DoD must rest upon a statutory basis provided by Congress.

C. Statutes and Policy Affecting Section 127e Operations

The law and policy affecting Section 127e operations are of two types: fiscal law statutes of general applicability to all U.S. government spending as well as specific statutes and policies governing the unique considerations posed by special military operations.

that the United States remained at war with non-state actors espousing extremist Islamic ideologies, expressed our intention to combat jihad at its source, and stated a desire to share responsibility for combatting terrorist enemies with our allies. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (December 2017). The NDS then expanded on these notions to indicate that the U.S. military would work with local partners in the Middle East and elsewhere to combat terrorism. U.S. DEP’T OF DEF., SUMMARY OF THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018). Section 127e, codified just a year earlier, serves as an operational tool for USSOCOM to achieve each of these strategic ends.

¹³ U.S. CONST. art. I, § 8, cl. 1.

¹⁴ U.S. CONST. art. I, § 9, cl. 7. The Supreme Court has made clear that these texts mean exactly what they say: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317 (1976) (plurality opinion) (citing *Reeside v. Walker*, 52 U.S. 272 (1851)).

¹⁵ U.S. CONST. art. II, § 2, cl. 1.

1. Generally Applicable Fiscal Law Statutes

Congress limited Article II executive agencies' discretion in public spending in a series of statutes governing the purpose, time, and amount of each expenditure.¹⁶ We will consider each of these statutes in turn.

The first limiting statute is the Purpose Statute, requiring that every expenditure be made according to the express purpose of the authorization in question.¹⁷ By contrast, in areas where Congress has provided only general language to govern agency appropriations, agencies have discretion to make those acquisitions "necessary" for their statutory missions.¹⁸

The second restrictive statute is the Time Statute limiting the agencies' ability to obligate appropriated funds—that is, to create a legal obligation for the United States to pay for something—to the time period that Congress set for each fund's availability.¹⁹ As a bulwark against the immediate spending of all monies made available, the "Bona Fide Needs Rule" limits agency spending to only those needs actually arising during a fund's period of availability.²⁰

The third statutory constraint, which governs the amount of agency spending, is the Anti-Deficiency Act (ADA).²¹ The ADA prevents agencies from, *inter alia*, obligating funds in advance of an appropriation's effective date, in excess of an appropriation's amount, or in excess of budgetary apportionments and/or formal subdivisions.²²

¹⁶ See 31 U.S.C.A. §§ 1301 (Purpose), 1502 (Time), & 1341-42, 1511-19 (Anti-Deficiency Act) (West 2019).

¹⁷ 31 U.S.C.A. § 1301(a) (West 2019).

¹⁸ For these acquisitions, the Government Accountability Office's "Necessary Expense Doctrine" requires that an expense be logically related to the appropriation or directly contribute to carrying out the function Congress authorized; that the expense cannot be otherwise prohibited by law; and, that the expense cannot be otherwise provided for in a more specific appropriation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-797SP, PRINCIPLES OF FED. APPROPRIATIONS LAW, at 3-14 through 3-17 (4th ed., rev. 2017).

¹⁹ 31 U.S.C.A. § 1502 (West 2019).

²⁰ See Lieutenant Colonel (Retired) Michael J. Davidson, *Putting the Genie Back in the (Muddy) Bottle: Curing the Potential ADA Violation*, 78 A.F. L. REV. 27, 60 n.197 (2018).

²¹ 31 U.S.C.A. §§ 1341-42, 1511-19 (West 2019).

²² See Davidson, *supra* note 20 at 68.

2. *Statutes with Special Relevance to Section 127e Operations*

United States Special Operations Command, though itself a combatant command, from a fiscal perspective is best understood as a hybrid organization containing aspects of both a geographic combatant command (GCC) and a military service.²³ The Goldwater-Nichols Act of 1986 created an organizational principle by which the individual military services train and equip forces for operational duties as part of a GCC.²⁴ The Future Years Defense Program (FYDP), a DoD-wide budgetary planning process, categorizes the requisite service funding here as MFP-2, General Purposes Forces.²⁵

In 1987, the year following Goldwater-Nichols, the Nunn-Cohen Amendment²⁶ created the ability for USSOCOM to budget for the development and acquisition of “special operations-peculiar” equipment and material, supplies, or services “peculiar to special operations activities.”²⁷ The FYDP categorizes all such “special operations-peculiar” funding as MFP-11.²⁸

The hybrid nature of USSOCOM manifests itself in the interplay between these two streams of funding: the services themselves fund all “service-common” requirements for SOF units through MFP-2 funds,²⁹ whereas USSOCOM’s budget consists solely of MFP-11 funds for expenditure on its special operations-peculiar needs.³⁰ Of particular note here is that MFP-11 is a budgetary classification applicable to all

²³ See Jim Cunningham, USSOCOM Resources: Understanding Major Force Program – 11 Funding, at slide 3 (Oct. 23, 2018) (unpublished PowerPoint presentation) (on file with author) [hereinafter “USSOCOM PowerPoint”].

²⁴ Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986); JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES AT II-11 through II-13 (Mar. 25, 2013) (C1, July 12, 2017) [hereinafter JOINT PUB. 1].

²⁵ ELVIRA N. LOREDO ET AL., RAND, OPTIONS AND AUTHORITIES FOR FUNDING USSOCOM OPERATIONS 46 (2014).

²⁶ National Defense Authorization Act (NDAA) for Fiscal Years (FY) 1988 and 1989, Pub. L. No. 100-180, § 1211, 101 Stat. 1019 (1987).

²⁷ 10 U.S.C.A. § 167(g) (West 2019).

²⁸ See LOREDO ET AL., *supra* note 25, at 46-47.

²⁹ UNITED STATES SPECIAL OPERATIONS COMMAND, WHITE PAPER MAJOR FORCE PROGRAM-11 FUNDING 2 (Sept. 25, 2015) [hereinafter “WHITE PAPER”].

³⁰ Telephone Interview with Mr. Jim Cunningham, Chief, Policy and Funds Control, Special Operations Financial Management, USSOCOM (Jan. 8, 2019) [hereinafter “Mr. Cunningham Interview”].

USSOCOM appropriations,³¹ whether spent for ordinary Operations and Maintenance (O&M), Procurement, or Overseas Contingency Operations (OCO) O&M purposes.

3. Distinguishing Between MFP-2 and MFP-11 Funding

A key task in supporting SOF units is the ability to distinguish between what special operations-peculiar requirements USSOCOM properly funds with MFP-11 funds and what common military requirements the services themselves fund with MFP-2 funds. Delineating between special operations-peculiar and non-special operations-peculiar (otherwise known as “service-common,” but better-labeled as “service-funded”³²) requirements is no easy feat.³³ Service-funded should be the default concept with special operations-peculiar as the exception.³⁴ Service-funded requirements include all standard military items, base operational support (BOS), and supplies/services provided by a service to sustain its own forces—both conventional and SOF.³⁵ Special operations-peculiar requirements are those items and services initially designed by or used by SOF (until adopted by a service), modifications to service-funded items, and items and services specially approved by the USSOCOM commander (CDRUSSOCOM) as critically urgent for immediate accomplishment of a SOF mission.³⁶

³¹ See LOREDO ET AL., *supra* note 25, at 44 (Figure B.1). See also email from Major Allan S. Jackman, Division Chief, Special Mission Activities, Special Operations Financial Management, USSOCOM, to author (Jan. 8, 2019, 16:37 EST) (on file with author).

³² Mr. Cunningham Interview, *supra* note 30. Mr. Cunningham notes thinking of Major Force Program (MFP)-2 and MFP-11 as opposites is improper because they do not always refer to sources of funding for wholly different requirements. Focusing on which entity actually pays the bill is preferable because certain requirements can shift from special operations-peculiar to service-funded over time and because memoranda of understanding between USSOCOM and the services can also alter the general distinction between the types of funding. *Id.*; see also WHITE PAPER, *supra* note 29, at 3.

³³ See generally LOREDO ET AL., *supra* note 25; WHITE PAPER, *supra* note 29.

³⁴ See WHITE PAPER, *supra* note 29, at 2-3; Mr. Cunningham Interview, *supra* note 30.

³⁵ WHITE PAPER, *supra* note 29, at 3. Other examples include initial military training, pay, and housing allowances. USSOCOM PowerPoint, *supra* note 23, at slide 8.

³⁶ WHITE PAPER, *supra* note 29, at 4. See also USSOCOM PowerPoint, *supra* note 23, at slides 7-9. United States Special Operations Command (USSOCOM)’s structure as a joint command can complicate the application of these definitions for two primary reasons. First, the services do not have a uniform definition of “service common” or “service-funded.” LOREDO ET AL., *supra* note 25, at 19. Second, the existence USSOCOM’s separate budget for special operations-peculiar items often incentivizes the respective services to view the general service-funded concept in a limited rather than

D. Analysis of Section 127e

With the legal foundations and history of Section 127e in mind, we are ready to analyze the statute itself. In terms of purpose, a careful reading of Section 127e shows that its purpose for spending appropriated funds is not primarily for the benefit of U.S. armed forces but rather for the benefit of the surrogate—and, by definition, foreign—force.³⁷ This express language regarding foreign beneficiaries is significant because ordinarily the Department of State serves as the government's lead agent for foreign assistance.³⁸ This language abrogates the general rule and makes such DoD spending for foreign benefit consistent with the Purpose Statute.

With regard to time and amount, the permanent codification of 10 U.S.C. Section 127e eliminated the uncertainty inherent in the sporadic reauthorizations of the FY 2005 NDAA's temporary Section 1208.³⁹ Now the express codified purpose of supporting surrogates against terrorism leaves only the perennial fiscal law concerns of keeping spending under the annual cap each fiscal year.⁴⁰

Distinguishing between MFP-2 and MFP-11 funding becomes important when considering the annual limit. Only those costs in Section 127e operations benefitting the surrogate force are MFP-11 special

expansive manner in an effort to steward their own limited resources. WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. Disputes regarding the classification of various requirements are resolved through established processes within the Office of the Secretary of Defense (OSD). WHITE PAPER, *supra* note 29, at 4-5.

³⁷ 10 U.S.C.A. § 127e(a) (West 2019).

³⁸ See 22 U.S.C.A. § 2151(b) (West 2019).

³⁹ NDAA for FY 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016). Each prior iteration of Section 1208 contained a date past which USSOCOM would lose its ability to support foreign entities fighting terrorism and potentially have to discontinue lines of effort in ongoing fights since each iteration was a temporary funding authority. Many subsequent reauthorizations of Section 1208 also increased the annual funding limit, obviating apparent recurring concerns over the annual funding limit. Ronald W. Reagan NDAA for FY 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004) (originally \$25 million through FY 2007); NDAA for FY 2008, Pub. L. No. 110-181, § 1202, 122 Stat. 3 (2008) (extension through FY 2010); Duncan Hunter NDAA for FY 2009, Pub. L. No. 110-417, § 1208, 122 Stat. 4356 (2008) (\$35 million through FY 2013); NDAA for FY 2010, Pub. L. No. 111-84, § 1202, 123 Stat. 2190 (2009) (\$40 million); Ike Skelton NDAA for FY 2011, Pub. L. No. 111-383, § 1201, 124 Stat. 4137 (2011) (\$45 million); NDAA for FY 2012, Pub. L. No. 112-81, § 1203, 125 Stat. 1298 (2011) (\$50 million through FY 2015); Carl Levin and Howard P. "Buck" McKeon NDAA for FY 2015, Pub. L. No. 113-291, § 1208, 128 Stat. 3292 (2014) (\$75 million through FY 2017).

⁴⁰ 10 U.S.C.A. § 127e(a)-(b) (West 2019).

operations-peculiar costs and count against the statutory limit.⁴¹ Costs for the SOF executing unit (EU) working alongside the surrogate force are generally MFP-2 service-funded but never count against the Section 127e limit.⁴²

One area where Section 127e differs from other, similar fiscal authorities allowing the flow of appropriated funds to foreign entities is that the provision of support to surrogate forces under Section 127e is not contingent upon an adequate assessment of the forces' human rights records.⁴³ This process is often referred to as "Leahy Vetting."⁴⁴ The exemption from the Leahy Vetting requirement allows for faster execution of planned Section 127e operations and greater flexibility for commanders in determining which surrogate group(s) to support.

Not to be lost among the fiscal concerns posed by Section 127e are the statute's practical concerns that reveal the need for careful advance planning and constant monitoring of Section 127e operations. The Secretary of Defense, with the concurrence of the local Chief of Mission (COM) (generally the ambassador), is the approval authority and cannot delegate that authority.⁴⁵ The DoD must notify Congress fifteen days before utilizing Section 127e authority.⁴⁶ Finally, the DoD must also submit biannual reports regarding its utilization of Section 127e authority.⁴⁷

Having considered the history and basic legal parameters of 10 U.S.C. Section 127e, we will now assess the many legal implications of executing Section 127e operations.

⁴¹ Mr. Cunningham Interview, *supra* note 30.

⁴² *Id.* The funded-unfunded cost analysis of military construction projects may be a helpful analogue. See U.S. DEP'T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION, Glossary, sec II (Mar. 18, 2010).

⁴³ UNITED STATES SPECIAL OPERATIONS COMMAND, DIR. 525-19, 1208 AUTHORITY – SUPPORT OF SPECIAL OPERATIONS TO COMBAT TERRORISM 4 (Oct. 13, 2016) [hereinafter "USSOCOM DIRECTIVE"].

⁴⁴ 10 U.S.C.A. § 362 (West 2019); See CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK (2018) at page 10-61 [hereinafter "FISCAL LAW DESKBOOK"].

⁴⁵ 10 U.S.C.A. § 127e(a) & (e) (West 2019).

⁴⁶ 10 U.S.C.A. § 127e(d)(1) (West 2019). In exceptional circumstances affecting national security, the Department of Defense (DoD) may wait as much as forty-eight hours after having commenced the Section 127e operation before notifying Congress. *Id.*

⁴⁷ 10 U.S.C.A. § 127e(h) (West 2019).

III. Utilization of Section 127e and the Judge Advocate's Role

In this section we will consider the prerequisite fiscal law analysis for a Section 127e operation, the staffing and approval process for an operation, the proper source of funding for the SOF and surrogate elements in a Section 127e operation, and some practical problems that an operation may pose.

A. Prerequisites for a Section 127e Operation

The basic fiscal requirements that must be met to conduct a military operation are mission authority, funding authority, and proper funds.⁴⁸

1. *Mission Authority and Funding Authority: Distinct Concepts*

Though Section 127e provides the statutory authority to fund surrogate forces, Section 127e by itself does not authorize military operations.⁴⁹ Stated another way, a unit granted funding authority to expend funds pursuant to Section 127e by the Secretary of Defense (SECDEF) must also have an independent mission authority flowing down from the appropriate level of command in order to get “boots on the ground” alongside the surrogate force.⁵⁰

The notion of “mission authority,” assumed by the statutory text,⁵¹ has not been formally defined within military doctrine.⁵² A proposed definition is that “[m]ission authority is the directive or right—provided

⁴⁸ See Major Anthony Lenze, *Are We Allowed to be There? Understanding Mission Authority in the Context of the Fatal Niger Ambush*, ARMY LAW., Iss. 3, 2019, at 37, 39.

⁴⁹ USSOCOM DIRECTIVE, *supra* note 43, at 4.

⁵⁰ See Lenze, *supra* note 48, at 38.

⁵¹ 10 U.S.C.A. § 127e(a) (West 2019) (“The Secretary of Defense may, with the concurrence of the relevant Chief of Mission, expend up to \$100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating *ongoing military operations by United States special operations forces to combat terrorism*.” Emphasis added.) The reference to “ongoing military operations” presupposes an independent order authorizing such activity. The extension of such order to cover operations including authorized spending under Section 127e represents mission authority in this context.

⁵² Lenze, *supra* note 48, at 38.

through a [combatant commander]—to execute a particular task.”⁵³ This definition would serve as a means to ensure that the proper military authorities from SECDEF down the chain of command have authorized SOF to perform the particular task of funding specified surrogate forces to fight specified terrorist enemies consistent with the general grant of authority to fund surrogate forces against terrorist enemies contained in Section 127e.⁵⁴

Thus the first stage in analyzing a proposed Section 127e operation is to ensure that the EU has authority to perform tasks funded by Section 127e in the area of operations from its GCC. The orders produced by the staffing process for the Section 127e operation should reflect this fact, but judge advocates must always review the orders to make sure mission authority is present.⁵⁵ A failure to secure mission authority prior to executing a mission represents operational risk for a commander, as opposed to fiscal law risk.

2. Funding Authority and Proper Funds

As referenced briefly in the preceding section, funding authority is present once SECDEF approves a proposed Section 127e operation.⁵⁶ The final remaining prerequisite will be to ensure that proper funds are available for the Section 127e operation.⁵⁷ The staffing and approval process, discussed below, functionally links the requirements of obtaining funding authority and ensuring proper funds are available⁵⁸ because SECDEF is the sole approval authority for Section 127e operations.⁵⁹

⁵³ *Id.* “This definition is asserted solely by [Major Lenze] as neither law nor doctrine defines ‘mission authority.’ This definition is consistent with the basic understanding that military orders provide the authority to conduct a mission. Major Michael J. O’Connor, *A Judge Advocate’s Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5, 27.” *Id.* at n.27.

⁵⁴ *See id.* at 38. Such a definition also operates as yet another mechanism to ensure compliance with the Purpose Statute because it forces an analysis of what the precise legal bases and contours of a proposed operation are. *Id.*

⁵⁵ *Id.* at 41 n.50.

⁵⁶ *See* 10 U.S.C.A. § 127e(a) (West 2019); Lenze, *supra* note 48, at 38.

⁵⁷ Lenze, *supra* note 48, at 39.

⁵⁸ *See* USSOCOM DIRECTIVE, *supra* note 43, at 7 and 20-21, respectively. USSOCOM tracks annual spending pursuant to Section 127e and provides a recommendation to OSD for all proposed Section 127e operations. Thus no request to use the Section 127e funding authority should ever leave USSOCOM without the availability of funds having been validated.

⁵⁹ 10 U.S.C.A. § 127e(a), (e) (West 2019).

Such high-level review also significantly mitigates the fiscal law risks of the Purpose Statute and potential ADA violations as operations begin.

B. Staffing and Approval of Section 127e Operations

The backdrop against which staffing and approval of Section 127e operations plays out is the Unified Command Plan whereby both the relevant GCC and USSOCOM maintain certain responsibilities toward deployed SOF units.⁶⁰ Though the EU for a Section 127e operation reports to the theater special operations command (TSOC) and through the TSOC to USSOCOM, the relevant GCC has operational control over the EU.⁶¹ Thus, both the GCC and USSOCOM process requests for Section 127e funds in parallel.⁶² This fact and SECDEF's non-delegable authority to approve funding pursuant to Section 127e⁶³ can make the staffing and approval process both time-consuming and complex.

The EU will propose to conduct operations pursuant to Section 127e when it wants to utilize operational capabilities and/or individual characteristics that are inorganic to the unit itself.⁶⁴ The EU conducts the initial mission planning to include cost estimates, develops the initial concept of operations (CONOPS),⁶⁵ and begins the initial coordination with the local COM, USSOCOM, and GCC via its TSOC.⁶⁶

The GCC must determine whether the CONOPS falls within the existing scope of its mission authority,⁶⁷ and include a request for

⁶⁰ See JOINT PUB. 1, *supra* note 24 at II-11; Major Ian W. Baldwin, *Advising Special Forces*, ARMY LAW., May 2016, at 8, 9-10.

⁶¹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-05, SPECIAL OPERATIONS at xii-xv (July 26, 2014) [hereinafter JOINT PUB. 3-05]; Baldwin, *supra* note 60 at 9-10.

⁶² USSOCOM DIRECTIVE, *supra* note 43, at 6.

⁶³ 10 U.S.C.A. § 127e(a), (e) (West 2019).

⁶⁴ See USSOCOM DIRECTIVE, *supra* note 43, at 5.

⁶⁵ A verbal or graphic statement that clearly and concisely expresses what the joint force commander intends to accomplish and how it will be done using available resources. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP'T OF DEF. DICTIONARY OF MIL. AND ASSOCIATED TERMS 45 (Nov. 8, 2010) (as amended Feb. 15, 2016) [hereinafter JOINT PUB. 1-02].

⁶⁶ *Id.* at 6.

⁶⁷ United States Special Operations Command Directive 525-19 uses "operational authority" for this concept. I use the term "mission authority" in keeping with the earlier discussion in Part III.A.1 because the Directive's use of operational authority is synonymous with my use of mission authority for the purposes of this primer. See USSOCOM DIRECTIVE, *supra* note 43, at 6-7, 16-18.

necessary additional authority, before forwarding the CONOPS with a recommendation to the Joint Staff and the Office of the Secretary of Defense (OSD). Simultaneously, the CONOPS will flow through USSOCOM to OSD with a recommendation as to the availability and advisability of funding the proposed operation. Once the parallel processes converge at OSD, the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD-SO/LIC) leads the final approval process, to include the required congressional notifications and any necessary coordination with external executive agencies.⁶⁸ Once the J-3⁶⁹ has prepared the proposed order in conjunction with the ASD-SO/LIC, it enters the Secretary of Defense Orders Book and its accompanying process for final approval by SECDEF.⁷⁰

Upon final approval⁷¹ and completion of the ordinary fifteen-day waiting period, the Joint Staff will signal final approval to execute the mission. The Special Operations Command will then release funding and may begin any necessary acquisition activities.⁷²

C. Funding Section 127e Operations

We begin our consideration of the fiscal and budgetary implications of funding Section 127e operations by distinguishing between the funding of the surrogate force and SOF. Understanding the funding for the surrogate forces lays the foundation for the more complex analysis of funding SOF, so our analysis begins there.

1. Funding the Surrogate Force

Section 127e allows for funding of a broad array of surrogate force activities. These activities range from traditional military activities such

⁶⁸ *Id.* at 6-7.

⁶⁹ The operations directorate of the Joint Staff. JOINT PUB. 1-02, *supra* note 65, at A-91.

⁷⁰ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-35, DEPLOYMENT AND REDEPLOYMENT OPERATIONS at II-3 (Jan. 10, 2018); JOINT CHIEFS OF STAFF, CHAIRMAN OF THE JOINT CHIEFS OF STAFF GUIDE 3130, ADAPTIVE PLANNING AND EXECUTION OVERVIEW AND POLICY FRAMEWORK at A-7 (May 29, 2015).

⁷¹ It is important to note at this point that only funds actually approved for expenditure by SECDEF can, if and when spent, count against the \$100 million annual threshold for purposes of the Time Statute and the Anti-Deficiency Act (ADA). Mr. Cunningham Interview, *supra* note 30.

⁷² USSOCOM DIRECTIVE, *supra* note 43, at 7.

acquisition, logistics, and sustainment for irregular and paramilitary forces to salaries, equipment, and incidental costs for recruiting and leveraging informants⁷³—espionage-like purposes for which only the CIA previously had authorization.⁷⁴

The basic fiscal concerns remain important in assessing the funding of surrogate force operations. With regard to purpose, judge advocates should ensure that only those funds spent pursuant to Section 127e benefit the surrogate force.⁷⁵ All funds benefitting the surrogate force are USSOCOM's MFP-11 funds,⁷⁶ a fact that aids the intertwined time and amount considerations. Because SECDEF approves a maximum amount of spending on a particular Section 127e operation during its planning and approval phase,⁷⁷ a significant amount of oversight regarding the annual funding limit exists. The Financial Management section of USSOCOM monitors total spending pursuant to Section 127e throughout the fiscal year.⁷⁸ Each EU is responsible for staying at or below its approved operational funding threshold,⁷⁹ with the implied task of properly accounting for spending that benefits the surrogate force and that spending required by the SOF unit. One fact that simplifies the Purpose Statute analysis and accounting here is that all Section 127e spending is through OCO⁸⁰ O&M funds,⁸¹ eliminating the need to distinguish between OCO O&M and Procurement funds for large purchases.⁸²

⁷³ *Id.* at 8-10.

⁷⁴ Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. OF NAT'L SECURITY L. & POL'Y 373, 377 (2012).

⁷⁵ Mr. Cunningham Interview, *supra* note 30.

⁷⁶ *Id.*

⁷⁷ USSOCOM DIRECTIVE, *supra* note 43, at 7.

⁷⁸ *Id.* at 8.

⁷⁹ *See id.* at 14-15.

⁸⁰ *See* USSOCOM PowerPoint, *supra* note 23, at slide 5.

⁸¹ 10 U.S.C.A. § 127e(b) (West 2019).

⁸² Congress allows the DoD discretion regarding the use of Operations and Maintenance (O&M) or Procurement funds for purchases of investment items not exceeding \$250,000. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. 115-245, § 9010, 132 Stat. 2981 (2018). However, DoD policy ordinarily requires use of Operations and Maintenance funds for such purchases. U.S. DEP'T OF DEF., DoD 7000.14-R, DEP'T OF DEF. FINANCIAL MANAGEMENT REGULATION, vol. 2A, ¶ 010201 (Oct. 2008). This concept is frequently referred to as the "Expense-Investment Threshold." FISCAL LAW DESKBOOK, *supra* note 44, paras. 8-15, 2-7, and 2-8.

2. Funding SOF Operations

To understand the funding of SOF activities during the execution of Section 127e operations, one must remember that the purpose of Section 127e spending is to benefit the surrogate force. That concept is straightforward; the difficulty comes in the fact that all Section 127e expenditures are MFP-11 funds but not all MFP-11 funds are spent pursuant to Section 127e.⁸³

Nearly all SOF needs on Section 127e missions that an ordinary service member would require while deployed such as standard arms/ammo and BOS should be funded by the respective services using MFP-2 funds.⁸⁴ Those special operations-peculiar needs of SOF such as specialized weapons and equipment should be funded by USSOCOM with MFP-11⁸⁵ funds but not charged against the funding cap for the Section 127e operation since that spending does not benefit the surrogate force.⁸⁶ Violations of the Purpose Statute⁸⁷ become a concern if an EU uses MFP-11 funds to acquire service-common needs.⁸⁸ Therefore, judge advocates should check for a memorandum of understanding between USSOCOM and a particular service or a USSOCOM Exception to Policy regarding MFP-11 funds if reviewing a purchase using MFP-11 funds for a need that does not appear to be special operations-peculiar.⁸⁹

Improper classification of various types of spending on SOF in Section 127e operations poses two further risks. The first is accidental creation of possible ADA violations⁹⁰ as well as what may initially appear to be Time

⁸³ Mr. Cunningham Interview, *supra* note 30.

⁸⁴ WHITE PAPER, *supra* note 29, at page 3.

⁸⁵ *Id.*

⁸⁶ Mr. Cunningham Interview, *supra* note 30.

⁸⁷ 31 U.S.C.A. § 1301(a) (West 2019).

⁸⁸ WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. *See also* email from Lieutenant Colonel (Retired) Shelley R. Econom, Chief, Acquisition Law, USSOCOM, to author (Nov. 16, 2018, 09:00 EST) (on file with author) [hereinafter "Mrs. Econom Email"].

⁸⁹ WHITE PAPER, *supra* note 29, at 3-5; USSOCOM PowerPoint, *supra* note 23 at slide 12; *See also* Mrs. Econom Email, *supra* note 88.

⁹⁰ *See* Davidson, *supra* note 20, at 46-52. Lieutenant Colonel (Retired) Davidson contrasts the Department of Justice's Office of Legal Counsel view that only a violation of appropriations statute can constitute an ADA violation and the Government Accountability Office's view, which he advocates as the better view, that any statutory violation implicating agency appropriations can constitute an ADA violation. *Id.* As discussed above, the Major Force Program classifications are budgetary with a basis in the combatant commands' broad authorization statutes (10 U.S.C. §§ 166 & 167) rather

Statute violations⁹¹ if SOF MFP-11 needs are improperly lumped in with those of the surrogate force as Section 127e spending. The second risk is the distortion of USSOCOM spending on a micro-level with rippling effects on USSOCOM's annual budget and relation to the services on a macro-level that occurs when MFP-11 funds are routinely used for service-common needs as a matter of expediency and supposed efficiency.⁹² The role of the judge advocate is thus to have a basic understanding of the interplay between fiscal law and the budgeting process to resolve ambiguities as they arise with an eye toward protecting USSOCOM as the client before Congress and the services as holders of its purse strings.

Before closing this subsection we must note a significant exception to the MFP-2 rule discussed above is that all TSOCs must support newly-deployed SOF units for any and all requirements for the first 15 days of contingency and crisis response operations requiring time-sensitive troop deployments,⁹³ meaning that MFP-11 funds will actually be used for BOS until the appropriate service assumes funding with its MFP-2 funds.

D. Special Considerations in Section 127e Operations

This section will conclude with an overview of some practical problems that Section 127e operations often pose: logistical challenges, potential surrogate war crimes, and finally how Section 127e operations change over time and conclude. Specialized knowledge of these matters is beyond the scope of this primer, but judge advocates familiar with the basic concepts can pose the right questions to the right people in order to glean sufficient detail to keep the commander informed if facing one of these unique situations.

than in actual appropriations, so whether an ADA violation would actually be found would depend on the view adopted by the adjudicator.

⁹¹ Mr. Cunningham Interview, *supra* note 30. Provided that proper funds were and remain available for both special operations forces (SOF) expenses in Overseas Contingency O&M funds and surrogate force expenses in Section 127e funds, no Time Statute violation actually occurs.

⁹² WHITE PAPER, *supra* note 29, at 4; Mr. Cunningham Interview, *supra* note 30. Indeed Mr. Cunningham, the author of the WHITE PAPER noted that over-reliance on MFP-11 funds as an "easy button" was a major reason for USSOCOM's renewed emphasis on proper delineation between MFP-2 and MFP-11 funding starting in approximately mid-2015. *Id.*

⁹³ JOINT PUB. 3-05, *supra* note 61, at xiv and IV-5.

1. *Getting Specialized Equipment to the Right Place*

Moving properly-purchased equipment from the supplier in Location A to Location B where SOF and surrogates need it to execute a Section 127e operation can be daunting. Acquisition program managers at USSOCOM must be intimately familiar with various nations' arms control laws since USSOCOM sources materiel on a worldwide scale to meet operational and timeliness requirements.⁹⁴ Export licenses, overflight/landing permissions⁹⁵ and driving privileges for each affected country⁹⁶ all factor into where equipment is purchased and how it is routed to the site of the Section 127e operation. Another common hurdle associated with purchases of foreign military equipment by the United States is securing an End Use Certificate disclosing the recipient of the equipment.⁹⁷

Additional layers of complexity fall into place when suppliers go bankrupt or lose specialized licenses for manufacturing military hardware, forcing further-increased lead time on SOF units and their surrogates for equipment now effectively stuck abroad.⁹⁸ Some suppliers cannot be trusted with the operational details that would be discernible from an ordinary purchase order, so operational security necessitates that USSOCOM receives many equipment deliveries at a secure facility within the United States for subsequent delivery to the EU and surrogates overseas.⁹⁹

2. *Liability for Surrogates' War Crimes*

While the absence of the Leahy Vetting requirement¹⁰⁰ in Section 127e provides USSOCOM with speed and flexibility in choosing and equipping surrogates, it also increases the risk of funding surrogate forces who do not share our respect for the Law of Armed Conflict (LOAC).¹⁰¹

⁹⁴ Telephone Interview with Lieutenant Colonel (Retired) Shelley R. Econom, Chief, Acquisition Law, USSOCOM (Jan. 11, 2019) [hereinafter "Mrs. Econom Interview"].

⁹⁵ AEY, Inc., ASBCA No. 56470, 18-1 BCA ¶ 18.

⁹⁶ Mrs. Econom Interview, *supra* note 94.

⁹⁷ See U.S. DEP'T OF DEF., DIR. 2040.3, END USE CERTIFICATES (Nov. 14, 1991) (C1, Aug. 31, 2018). This Directive outlines the various approval requirements for executing of an End Use Certificate, according to the type of use and/or transfer restrictions the selling nation desires to impose upon the United States.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ USSOCOM DIRECTIVE, *supra* note 43, at 4.

¹⁰¹ See Bart, *supra* note 2, at 514-15.

Because no scholarly consensus or customary international law addresses liability for surrogates' war crimes,¹⁰² and because seemingly-isolated incidents may have great effects on the international stage, judge advocates must advise their units to maintain sound situational awareness of their surrogates' activities and be prepared to take necessary actions to shield unit members from liability for any war crimes committed by the surrogate force.

The LOAC does not impose a general legal duty for SOF to investigate a Section 127e surrogate's past war crimes or to intervene to stop future ones, but LOAC does impose a general duty for SOF to separate from a surrogate presently committing war crimes and to neither aid nor abet its commission of future war crimes.¹⁰³ In a scenario where SOF were somehow involved in the present commission of a war crime, the types of command responsibility theories applied in Tokyo and Nuremburg are unlikely to apply to Section 127e operations since SOF will generally lack the requirement of "effective control" over the surrogate activities.¹⁰⁴ Without effective control, liability for SOF for a surrogate's war crimes would likely only arise under international law and/or the Uniform Code of Military Justice where the facts indicated that SOF had actual knowledge of the surrogate's intent while providing assistance necessary to the commission of the war crime.¹⁰⁵

Even though the governing law is unclear and individual liability unlikely, SOF still have significant moral, ethical, and practical incentives to prevent surrogate forces from violating the LOAC.¹⁰⁶ In practical terms, judge advocates should advise units who encounter potential LOAC violations by surrogates to report all allegations; make practicable efforts to prevent the commission of a war crime; and, if unsuccessful, cease all support of the surrogate force until ordered otherwise.¹⁰⁷ As part of their duty to provide principled counsel, judge advocates should also remind units prior to commencing Section 127e operations of the moral and

¹⁰² See generally Bart, *supra* note 2.

¹⁰³ Bart, *supra* note 2, at 532-33.

¹⁰⁴ See *id.* at 516-25. While SOF certainly have the ability to influence the surrogate via the provision of funds, the ability to give orders and impose discipline are the critical factors the Law of Armed Conflict requires to establish the facts of a "superior/subordinate" relationship and "effective control" of the surrogate by SOF. *Id.* at 522-23.

¹⁰⁵ *Id.* at 532-33.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

ethical foundations of their nation and services as well as the practical impact their and their surrogates' actions can have on perceived U.S. legitimacy at home and abroad.

3. *Modifying and Concluding Section 127e Operations*

Unanticipated developments often necessitate modifications to Section 127e operational thresholds. The CDRUSSOCOM may approve minor increases in funding for Section 127e operations that remain within the scope of the original mission authority,¹⁰⁸ but significant in-scope funding increases require staffing through OSD and another round of congressional notification with the statutory fifteen-day waiting period prior to execution.¹⁰⁹ Proposed modifications to the scope of a Section 127e operation trigger what amounts to a second iteration of the entire staffing and approval process through the GCC and SOCOM, to include COM concurrence, congressional notification, and the statutory waiting period.¹¹⁰

Section 127e operations end for a variety of reasons. To avoid a Purpose Statute violation, a Section 127e operation must end when the underlying mission authority ends, when SOF lose access to the surrogate force, or the surrogate force ceases supporting U.S. interests in the fight against terrorism.¹¹¹ Upon the full termination of a Section 127e operation, the EU notifies both the GCC and USSOCOM of its conclusion.¹¹²

Once SOF support is no longer required for an operation, Section 127e funding must “off-ramp” or scale back in order to avoid Purpose Statute violations.¹¹³ Often a separate fiscal authority will then “ramp up” in

¹⁰⁸ USSOCOM DIRECTIVE, *supra* note 43, at 16. “Minor increases” are those which do not exceed the lesser of twenty percent of the original amount of funding or \$500,000. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The following are examples of proposals that would constitute a re-scope of a Section 127e operation: expanding the area of operations to include a new country, transferring a piece of significant military equipment to the surrogate force (if not previously approved), changing the type of supported surrogate force, and/or altering the operational authorities under which the Section 127e operation falls. *Id.*

¹¹¹ See USSOCOM DIRECTIVE, *supra* note 43, at 18.

¹¹² *Id.*

¹¹³ *Id.* at 16-17.

complementary fashion as the SOF elements give way to conventional U.S. troop and/or local support.¹¹⁴

Timing and prior planning are paramount in the off-ramping of Section 127e operations to avoid discontinuities in ongoing operational activities and within the relationships between forces. Judge advocates must pay close attention to the changing allocations of funds during this final phase of Section 127e operations.

IV. Conclusion

After a long, somewhat frustrating yet simultaneously satisfying day of research and phone calls, you are able to answer the GJA's questions. You call him back and, after learning he just completed the Graduate Course, inform him that elements of your battalion are preparing for a Section 127e operation overseas. He was correct that the United States Army Special Operations Command had recommended approval of the CONOPS a few weeks back, but the proposed mission still requires staffing through USSOCOM and the GCC prior to final SECDEF approval—all of which is in progress.

He seems impressed by your explanation of mission authority and the interplay between MFP-2 and MFP-11 funding for all the various aspects of the operation, saying that he too will need to become familiar with those concepts in his new role. As the conversation continues, you are able to ease his concerns about war crimes liability for our Soldiers. He knows the colonel will not be happy that some equipment is stuck in a warehouse overseas because the supplier went bankrupt between purchase and shipping, nor will he be pleased with the delay occasioned by USSOCOM not allowing one of its less-trustworthy suppliers to ship the other equipment directly to the surrogate force. However, he is confident he can now enable the colonel to understand those problems. He starts wrapping up the conversation by praising your ability to integrate several legal disciplines simultaneously to make the fine distinctions this Section 127e operation will require.

¹¹⁴ See Kate Clark, *Update on the Afghan Local Police: Making sure they are armed, trained, paid and exist*, AFGHANISTAN ANALYSTS NETWORK (July 5, 2017), <https://www.afghanistan-analysts.org/update-on-the-afghan-local-police-making-sure-they-are-armed-trained-paid-and-exist> (referencing the role of SOF in the formation of the Afghan Local Police (ALP) and the ALP's subsequent dependence on non-SOF funding and control by Afghanistan's Ministry of Interior).

He ends the conversation with a joke—and seems quite pleased you got it—that at least you and he do not have to worry about potential ADA violations for all this equipment bought for an operation that has not technically been approved yet.