

# SECRETARY OF DEFENSE 1000 DEFENSE PENTAGON WASHINGTON, DC 20301-1000

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MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEFS OF THE MILITARY SERVICES
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Implementation of Section 8057, DoD Appropriations Act, 2014 (division C of Public Law 113-76) ("the DoD Leahy law")

The Department is committed to complying with the DoD Leahy law. U.S. Forces' engagements with foreign security forces reflect U.S. values. The ethical and accountable behavior of our partner nation's security forces is critical to our long-term success.

This memorandum provides implementation guidance with respect to several significant changes to the DoD Leahy law. Except as provided below, none of the funds made available by the Department of Defense Appropriations Act, 2014 (the Act) may be used to provide any training, equipment, or other assistance to members of a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed gross violations of human rights (GVHR).

Guidance regarding the terms used in the DoD Leahy law are at Tab A. DoD has reviewed certain DoD authorities and other DoD-funded activities to determine how each is affected by the DoD Leahy law. The results of that review are at Tab B, which includes the list of authorities and other DoD activities examined and how each is affected (or not) by the DoD Leahy law. Questions regarding whether Leahy vetting is required for a specific DoD-funded activity should be directed to the DoD Component's legal adviser. The Under Secretary of Defense (Policy) (USD(P)), in coordination with the DoD Office of General Counsel and the Joint Staff, will monitor changes in existing authorities and review new authorities with regard to the application of the DoD Leahy law and provide updated guidance, as appropriate.

As required by Section 8057(d), all DoD Components will promptly report any relevant information in their possession about GVHR by units of foreign security forces to the Office of the Under Secretary of Defense for Policy (Stability and Humanitarian Affairs) through the Joint Staff (J-5). USD(P) will develop and implement detailed procedures on GVHR reporting within the Department and procedures to share all such information on a timely basis with the Department of State (DOS).

The DOS automated vetting system, International Vetting and Security Tracking System (INVEST), will normally be used to vet foreign security forces in advance of providing DoD-



funded training, equipment, or other assistance. As appropriate, USD(P) will coordinate with the DOS to develop procedures for vetting on a program-specific or case-specific basis.

The DoD Leahy law provides for two exceptions to the general prohibition, as follows:

- if the Secretary of Defense, after consultation with the Secretary of State, determines that the government of the proposed recipient country has taken all necessary corrective steps; or
- (2) if the equipment or other assistance is necessary to assist in disaster relief operations or other humanitarian or national security emergencies.

With regard to item (1), USD(P), in consultation with the DOS, will establish guidance for DoD on the use of this exception, to include the process for remediating units of foreign security forces; the actual use of the exception is subject to a Secretary of Defense determination, following consultation with the Secretary of State.

With regard to item (2), the reliance on the exception will normally be memorialized in a relevant execute order, deployment order, or other authorizing document approved by the Secretary of Defense. With respect to disaster relief operations and humanitarian emergencies, a U.S. military commander with assigned forces at or near the immediate scene of a foreign disaster may rely on this exception to take prompt action to save human lives in accordance with DoD Directive 5100.46, paragraph 4.f. The relevant Combatant Commander will promptly notify the Secretary of Defense, through the Joint Staff and USD(P), that the exception has been invoked.

The "national security emergencies" exception will be applied narrowly. Authority to rely upon that exception is withheld to the Secretary of Defense and Deputy Secretary of Defense.

The DoD Leahy law also provides that the Secretary of Defense, after consultation with the Secretary of State, may waive the prohibitions if the Secretary of Defense determines that such waiver is required by extraordinary circumstances.

USD(P) is delegated authority to approve and transmit to the appropriate congressional committees a report, as required by Section 8057(e), within 15 days of the exercise under the DoD Leahy law of an exception or a waiver.

USD(P) will issue this policy and the attached implementation guidance in an appropriate DoD issuance within 180 days of the date of this memorandum.

Thank you.

Attachments: As stated

#### TAB A

**Training:** For purposes of the DoD Leahy law, training includes DoD-funded formal or informal instruction by officers or employees of the United States, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aids, and military advice to units of a foreign security force or members thereof.

# Training does not include:

- (1) Incidental familiarization, safety, and interoperability training with a foreign security force when necessary to permit conducting a bilateral or multilateral military exercise.
- (2) Individual and collective interface activities (e.g., individual or subject matter expert exchanges, military-to-military contacts, seminars, conferences, partnership, predeployment site surveys (PDSS), planning and coordination visits, and other small unit exchanges) where the primary focus is interoperability or mutually beneficial exchanges and not training of foreign security forces. Such activities must be examined on a case-by-case basis to ensure the primary purpose is met. Note also that even though an activity may not constitute training, payment of the incremental or personnel expenses of foreign security forces to attend such an activity may constitute "other assistance," thereby making the DoD Leahy law applicable. (See "Other Assistance" below for further guidance on such activities.)

**Equipment:** for purposes of the DoD Leahy law, "equipment" will have the same meaning as "defense articles" as that term is defined in section 644 of the Foreign Assistance Act of 1961, as amended (22 U.S. Code § 2403), as follows:

- "(1) any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war;
- "(2) any property, installation, commodity, material, equipment, supply, or goods used for the purposes of furnishing military assistance;
- "(3) any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article listed in this subsection; and
- "(4) any component or part of any article listed in [(1)-(3)]; but shall not include merchant vessels or, as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011), source material (except uranium depleted in the isotope 235 which is incorporated in defense articles solely to take advantage of high density or pyrophoric

characteristics unrelated to radioactivity), byproduct material, special nuclear material, production facilities, utilization facilities, or atomic weapons or articles involving Restricted Data."

Other Assistance: For purposes of the DoD Leahy law, the term "other assistance" includes any use of DoD funds, whether through contract, direct payment, grant, the provision of services and assistance-in-kind, or any other means, that increases the capacity or capability of a unit of a foreign security force or a member thereof. Other assistance does not include:

- (1) use of DoD funds where the increase in the capacity or capability of a unit of a foreign security force or a member thereof is purely incidental;
- (2) DoD-funded logistic or other support provided pursuant to specific statutory authority to foreign security forces participating in a combined military or stability operation with U.S. forces; or
- (3) payment of incremental or personnel expenses of a member of a security force of a foreign country to participate in an exercise or attend a conference, seminar, or similar meeting if the exercise, conference, seminar, or similar meeting (a) does not include training, as defined above; (b) is undertaken primarily to enhance the security interests of the United States; and (c) it is determined that the participation or attendance by such country is necessary to the achievement of the fundamental objectives of the exercise, conference, seminar, or similar meeting and that those objectives cannot be achieved unless the United States pays the incremental or personnel expenses of the member of the security force of such a country.

Gross Violations of Human Rights (GVHR): For the purposes of the DoD Leahy law, GVHR will have the same meaning as "gross violations of internationally recognized human rights" as that term is defined in section 502B(d)(1) of the Foreign Assistance Act of 1961, as amended, as follows:

"The term 'gross violations of internationally recognized human rights' includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person."

### Application of the DoD Leahy Law to Certain Current DoD Authorities and Programs

The revised DoD Leahy law (currently provided at Section 8057, Department of Defense (DoD) Appropriations Act, 2014) is applicable if the answer to the following two questions is "yes:"

- 1) Is DoD-funded training, equipment, or other assistance ("assistance") being provided?
- 2) Are the recipients members of a unit of a foreign security force?

The revised DoD Leahy law applies to the use of funds appropriated in the DoD Appropriations Act, 2014.

DoD has reviewed certain DoD authorities and other DoD-funded activities to determine how each is affected by the DoD Leahy law. The below list contains the results of that review but is not a comprehensive list of all DoD authorities or programs to which the law applies or may apply in the future. Consult your component legal adviser and responsible office if you have any questions.

# **DoD Authorities and Programs:**

Acquisition and Cross-Servicing Agreements (ACSA) and Expanded ACSA – Responsible office: Joint Staff. This is not assistance; ACSA authorizes reimbursable logistic support, supplies, and services. (10 USC 2342 and Section 1202 of the National Defense Authorization Act (NDAA) for Fiscal Year 2007, as amended.)

# Afghanistan - Related Authorities:

- Afghanistan Infrastructure Fund Responsible offices: Asia-Pacific Security Affairs
  (Afghanistan, Pakistan, and Central Asia) (APSA (APC)) and DoD Comptroller. This is
  assistance, but it is not provided to members of a unit of a foreign security force. Leahy
  vetting is not required. (Afghanistan Infrastructure Fund provision of the DoD
  Appropriations Act, 2014.)
- Afghanistan Security Forces Fund (ASFF) Responsible office: APSA (APC) and DoD Comptroller. ASFF is appropriated to provide "assistance ... to the security forces of Afghanistan." This is assistance, and it may be provided only to members of a unit of a foreign security force; Leahy vetting is required. (ASFF provision in the DoD Appropriations Act, 2014.)

- Commander's Emergency Response Program (CERP) Responsible offices: APSA (APC) and DoD Comptroller. This is assistance, but it should not be provided to members of a unit of foreign security forces; Leahy vetting is not required. (Section 1201 of the NDAA for Fiscal Year 2012, as amended, and Section 9005 of the DoD Appropriations Act, 2014.)
- Task Force for Business and Stability Operations (TFBSO) Responsible offices: TFBSO and APSA (APC). The presumption is that this is assistance. Such assistance should not be provided to members of a unit of foreign security force; Leahy vetting not likely to be required. (Section 1535 of the Ike Skelton NDAA for Fiscal Year 2011, as amended, and Section 9011 of the DoD Appropriations Act, 2014.)
- Transfer of defense articles that have not been excessed to the defense and security forces of Afghanistan (Section 1222) Responsible offices: APSA (APC) and Acquisition, Technology, and Logistics (AT&L). This is assistance to members of a unit of a foreign security force; Leahy vetting is required. (Section 1222 of the National Defense Authorization Act for Fiscal Year 2013.)

Asia-Pacific Regional Initiative – Responsible offices: APSA and U.S. Pacific Command (USPACOM). Funds are made available to enable the USPACOM to execute Theater Security Cooperation activities such as humanitarian assistance, and payment of incremental and personnel costs of training and exercising with foreign security forces. Payment of certain incremental or personnel costs may meet the criteria for exclusion under the definition of "other assistance." If training or any equipment or other assistance, is provided to members of a unit of a foreign security force, Leahy vetting is required. (Section 8084 of the DoD Appropriations Act, 2014.)

Aviation Leadership Program – Responsible offices: U.S. Air Force and Defense Security Cooperation Agency (DSCA). Authorizes the President to waive the requirement for equitable contribution of support and services from each participating country, and provides that costs incurred by the United States shall be charged to the current applicable appropriations accounts or funds of the participating USG departments and agencies. If equitable contributions are waived, and costs are charged against the appropriations accounts or funds of a DoD component, then such contributions are assistance to members of a unit of a foreign security force, and DoD Leahy vetting is required. (Section 544 of the Foreign Assistance Act of 1961, as amended (FAA).)

Cooperative Threat Reduction (CTR) – Responsible office: Global Strategic Affairs (Counter-Weapons of Mass Destruction) (GSA (C-WMD)). This is assistance; Leahy vetting is required if the assistance is being provided to the members of a unit of a foreign security force.

(Section 1501 of P.L. 104-201; Section 1301(a)(2) of P.L. 105-261; and Section 1303 of P.L. 110-181.)

Counter-Lord's Resistance Army (C-LRA) – Responsible offices: Special Operations and Low Intensity Conflict (Special Operations and Counter Terrorism) (SOLIC (SOCT)) and International Security Affairs (Africa) (ISA (AFR)). Leahy vetting is required under the DoD and State Leahy laws. Authorizes support to specified foreign forces participating in operations to mitigate and eliminate the threat posed by the LRA. (Section 1208 of the NDAA for Fiscal Year 2014.)

Counternarcotics-related authorities – Responsible office: SOLIC (Counter Narcotics and Global Threats) (SOLIC (GNCT)). Assistance is provided under these authorities; Leahy vetting is required if the assistance is being provided to members of a unit of a foreign security force.

- Section 1033 of the NDAA for Fiscal Year 1998, as amended (may involve the use of funds to provide equipment/assistance to the members of a unit of a foreign security force).
- Section 1004 of the NDAA for Fiscal Year 1991, as amended (may involve the use of funds to provide training, transportation, analytical support, construction, or other assistance to the members of a unit of a foreign security force).
- Section 1021 of the NDAA for Fiscal Year 2005 and Section 1022 of the NDAA for Fiscal Year 2004, as amended, rely predominantly on the underlying authority of Section 1033 and Section 1004.

Developing Countries Combined Exercise Program (DCCEP) – Responsible office: Strategy Plans and Forces (Security Cooperation) (SFP (SC)). By statute, DCCEP meets the criteria for exclusion from the definition of "other assistance"; Leahy vetting is not required. (10 USC 2010.)

**Drawdown** – Responsible offices: OSD Policy Regional Desks and the Joint Staff. The State Leahy and DoD Leahy laws are likely applicable. The presumption should be that current-year DoD funds, regardless of how minimal the amount may be, will be expended to support the drawdown of defense articles, defense services, and training, or of nonlethal commodities, services, and training, from DoD stocks as authorized under the particular drawdown, or to contract for commercial transportation for purposes of the drawdown as authorized under section 506(c) of the FAA. The "national security emergencies" exception under the DoD Leahy law may be available to overcome the prohibitions in the law with regard to drawdown determinations under section 506(a)(1). (Sections 506 and 552(c)(2) of the FAA.)

Enhancing the capability of foreign countries to respond to incidents involving weapons of mass destruction (Section 1204) – Responsible office: GSA (C-WMD). Authority to conduct activities to enhance the capability of foreign countries to respond to incidents involving weapons of mass destruction. This is assistance; if the specific approved activity is to enhance the capabilities of members of a unit of foreign security forces, Leahy vetting is required. (Section 1204 of the NDAA for Fiscal Year 2014.)

Global Security Contingency Fund (GSCF) – Responsible office: SOLIC (SOCT). Leahy vetting is required under the State Leahy law, even in circumstances where it arguably might not be subject to the DoD Leahy law. Authorizes the provision of training, equipment, and supplies to enhance the capacity of a country's national military forces, other national security forces, and the government agencies responsible for such forces to: 1) conduct border and maritime security, internal defense, and counterterrorism operations; and 2) participate in or support military, stability, or peace support operations consistent with U.S. foreign policy and national security interests. Additionally, GSCF authorizes assistance to the justice sector (including law enforcement and prisons), rule of law programs, and stabilization efforts in cases in which the Secretary of State, in consultation with the Secretary of Defense, determines that conflict or instability in a country or region challenges the existing capability of civilian providers to deliver such assistance. The provision of such assistance must be in compliance with the State Leahy law. (Section 1207 of the NDAA for Fiscal Year 2011, as amended.)

Humanitarian authorities – Responsible office: SOLIC (Stability and Humanitarian Affairs) (SOLIC (SHA)).

- Humanitarian and civic assistance (HCA) in conjunction with military operations.
  Section 401 provides that HCA may not be provided directly or indirectly to any
  individual, group, or organization engaged in military or paramilitary activity. This is
  assistance, but the assistance is not being provided to members of a unit of a foreign
  security force, so Leahy vetting is not required. (10 USC 401.)
- Transportation of humanitarian relief supplies to foreign countries. Authorizes DoD to transport goods furnished by an non-governmental organization (NGO) and intended for humanitarian assistance. Section 402 provides that the supplies transported under the section may not be distributed directly or indirectly to any individual, group, or organization engaged in a military or paramilitary activity. This is assistance, but the assistance is not being provided to members of a unit of a foreign security force, so Leahy vetting is not required. (10 USC 402.)
- Foreign disaster assistance. Authority to provide disaster assistance (transportation, supplies, services, and equipment) outside the United States to respond to manmade or natural disasters when necessary to prevent loss of lives or serious harm to the

environment. This is assistance. There is no legal prohibition against providing the assistance to a foreign security force, but as a matter of policy such assistance may not be provided to foreign security forces. Therefore, Leahy vetting is not required so long as the assistance is not provided to members of a unit of a foreign security force. (10 USC 404.)

- Humanitarian assistance. This is assistance, but as a matter of policy such assistance may not be provided to foreign security forces, so Leahy vetting is not required. If the assistance is to be provided to members of a unit of a foreign security force, an exception provided for in the DoD Leahy law to the law's prohibitions to assist in "disaster relief operations" or "humanitarian ... emergencies" may be available. (10 USC 2561.)
- Humanitarian demining assistance. This is assistance. If DoD funds are used to provide training, equipment, or other assistance to the members of a unit of a foreign security force to train/equip the members to conduct humanitarian demining, Leahy vetting is required. An exception provided for in the DoD Leahy law to the law's prohibitions to assist in "disaster relief operations" or "humanitarian ... emergencies" may be available. (10 USC 407.)
- Excess nonlethal supplies. Authority to make available for humanitarian relief purposes any nonlethal excess supplies of the DoD; such supplies shall be transferred to the Secretary of State, who shall be responsible for the distribution of such supplies. This is assistance, but it is unlikely that this authority would involve the use of funds to provide training, equipment, or other assistance to the members of a unit of a foreign security force, so Leahy vetting is likely not required. (10 USC 2557.)

Latin American Cooperation (Section 1050) and African Cooperation (Section 1050a) – Responsible offices: U.S. Africa Command, U.S. Southern Command, SPF (SC), and DSCA. Training under Section 1050 (Latin American cooperation) or Section 1050a (African countries cooperation) is assistance. Payment of certain incremental personnel expenses may meet the criteria for exclusion from the definition of "other assistance." If training or any equipment or other assistance is provided to members of a unit of a foreign security force, Leahy vetting is required. (10 USC 1050 and 1050a.)

Ministry of Defense Advisors Program (MODA) - Responsible office: SPF (SC). This is assistance; Leahy vetting is required if the assistance is being provided to the members of a unit of a foreign security force. (Coordinate with DOS to determine whether MOD personnel involved in the MODA program are members of a unit of a foreign security force.) (Section 1081 of the NDAA for Fiscal Year 2012, as amended.)

Office of Security Cooperation-Iraq (OSC-I) – Responsible office: ISA (Middle East) (ISA (ME)). Authority provides for non-operational training of MOD and Iraq CT Security Forces in an institutional environment. Training provided under this authority is assistance, and it may be provided only to members of a unit of a foreign security force; Leahy vetting is required. (Section 1215(f) of the NDAA for Fiscal Year 2012, as amended.)

Payment of Personnel Expenses (1051) – Responsible offices: SPF (SC) and DSCA. Payment of certain personnel costs may meet the criteria for exclusion from the definition of "other assistance." If payment of such expenses falls within the definition of "other assistance" and is provided to members of a unit of a foreign security force, Leahy vetting is required. (10 USC 1051.)

Regional Centers – Responsible offices: OSD Policy Regional Desks, SPC (SC) and DSCA. Participation in Regional Center activities will be on a reimbursable basis, except where waived; payment may be made by the participant, by the participant's government, by a U.S. Government department or agency other than DoD, or by gift or donation. Use of DoD appropriated funds to pay the costs of foreign personnel is assistance. Leahy vetting is required if the payments are for participation of the members of a unit of a foreign security force. (10 USC 184.)

Regional Defense Combating Terrorism Fellowship Program (CTFP) – Responsible office: SOLIC (SOCT). This is assistance. Leahy vetting is required if the assistance is being provided to members of a unit of a foreign security force. Regardless, all CTFP recipients (including non-military Ministry of Defense and Security Officials) are subject to Leahy vetting under current DoD policy. (10 USC 2249c.)

Section 1206 Program (Authority to build the capacity of foreign forces) – Responsible office: SOLIC (SOCT). Leahy vetting is required under the State Leahy law, even in circumstances where it arguably might not be subject to the DoD Leahy law. Authorizes the provision of equipment, supplies, training, and small-scale military construction activities to: 1) build the capacity of a foreign country's national military forces, maritime security forces, and/or security forces (including non-MoD elements) to conduct counterterror operations; or 2) build the capacity of a foreign country's national military forces to participate in or support military and stability operations in which U.S. armed forces are participating. The provision of such assistance must be in compliance with the State Leahy law (Section 620M of the FAA). (Section 1206 of the NDAA for Fiscal Year 2006, as amended.)

Special Operations Forces: training with friendly foreign forces (also referred to as Joint Combined Exchange Training (JCET)) – Responsible office: SOLIC(SOCT). Because the ancillary benefit of training with U.S. SOF may increase partner-nation capabilities, JCETs have been determined to be DoD-funded training; Leahy vetting is required. (10 USC 2011.)

State Partnership Program (SPP) – Responsible office: SPF (SC). Refer to the relevant statutory authorities under which SPP activities are conducted. The DoD Leahy may apply to the extent the underlying authority authorizes the use of DoD funds to provide training, equipment, or other assistance to the members of a unit of a foreign security force. (Section 1205 of the NDAA for Fiscal Year 2014.)

Training of General Purpose Forces of the United States Armed Forces with Military and Other Security Forces of Friendly Foreign Countries (Section 1203) – Responsible office: SOLIC (SOCT). Authority to train with members of a unit of a foreign security force. This is assistance; Leahy vetting is required. (Section 1203 of the NDAA for Fiscal Year 2014.)

Warsaw Initiative Fund and Defense Institution Reform Initiative (DIRI) programs – Responsible office: SPF (SC). Refer to the relevant statutory authorities upon which these programs rely.

### **Coalition Support programs:**

Such programs are not assistance. These authorities allow DoD to provide support to foreign security forces to enable such forces to operate with U.S. forces in coalition or combined operations. These programs include:

- Lift and Sustain for Afghanistan Responsible offices: APSA (APC), Joint Staff, and DoD Comptroller. DoD may provide supplies, services, transportation, and other logistical services to coalition forces supporting U.S. military and stabilization operations in Iraq and Afghanistan. (Section 1234 of the NDAA for FY 2008, as amended.)
- Global Lift and Sustain Responsible offices: Joint Staff and DoD Comptroller.
   Logistics support, supplies, and services to allied forces participating in a combined operation with the U.S. armed forces. Support must be essential to the success of the combined operation and the allied forces would not be able to participate in the combined operation but for the provisions of logistics support. (10 USC 127d.)
- Coalition Support Fund (CSF) Responsible offices: APSA (APC), ISA (ME), and DoD Comptroller. CSF authorizes reimbursement to a foreign government for logistical, military, and other support provided to U.S. military operations in support of Operation Enduring Freedom. (Coalition Support Fund provision in the DoD Appropriations Act, 2014.)
- Coalition Readiness Support Program (CRSP) Responsible offices: APSA (APC), SPF (SC), Joint Staff, and DoD Comptroller. Authorizes use of CSF funds to provide specialized training and to procure supplies and specialized equipment, and to provide

such supplies and loan such equipment on a non-reimbursable basis to coalition forces supporting U.S. military operations in Afghanistan. (Coalition Support Fund provision in the DoD Appropriations Act, 2014.)

Section 1208 – Responsible office: SOLIC (SOCT). Authorizes support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by U.S. Special Operations Forces to combat terrorism. (Section 1208 of the Ronald W. Reagan NDAA for Fiscal Year 2005, as amended.)

# Other authorities:

Determinations regarding whether Leahy vetting is required must be made on a case-by-case basis when relying on other authorities not specifically addressed herein that involve the use of DoD funds to provide training, equipment, or other assistance to members of a unit of a foreign security force (e.g., 10 U.S.C. 127, Emergency and Extraordinary Expense, or 10 U.S.C. 166a, Combatant Commander's Initiative Fund, and Secretarial designee status for receipt of non-reimbursable military medical care).