

**A PERMANENT FRAMEWORK FOR CONDOLENCE  
PAYMENTS IN ARMED CONFLICT: A VITAL  
COMMANDER'S TOOL**

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*We offer our apology and condolences to the victims' families. We accept full responsibility for what happened in the hospital and will pay blood money for the victims' families.*<sup>1</sup>

I. Introduction

In December 2013, members of al Qaeda in the Arabian Peninsula (AQAP) stormed a hospital attached to the Ministry of Defense in Yemen, killing fifty-six patients and staff and leaving over two hundred innocent civilians wounded.<sup>2</sup> In a surprising public apology, the leader of AQAP announced that the hospital attack had been carried out against his orders, and that he intended to offer “blood money” to the families of the victims.<sup>3</sup> What was the reasoning behind this unexpected gesture? First, “blood money,” or a condolence payment, is culturally appropriate and expected

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<sup>1</sup> *Al Qaeda Branch in Yemen Regrets Hospital Attack*, N.Y. TIMES, Dec. 23, 2013, at A10 (quoting Qassim al-Raimi, the commander of Al Qaeda in the Arabian Peninsula).

<sup>2</sup> Ali Ibrahim al Moshki, *AQAP Apologizes for Hospital Attack in Ministry of Defense Operation*, YEMEN TIMES (Dec. 24, 2013), <http://www.yementimes.com/en/1740/news/3270/AQAP-apologizes-for-hospital-attack-in-Ministry-of-Defense-operation.htm>.

<sup>3</sup> *Id.*

in Yemeni culture.<sup>4</sup> Second, AQAP claims to be a champion of the Yemeni people, carrying out attacks on their behalf, and depends on the Yemeni population's backing.<sup>5</sup> Video footage of the hospital attack caused widespread outrage among the Yemeni people, weakening popular support for AQAP.<sup>6</sup> Arguably, AQAP did not offer blood money to the hospital victims because of a newfound desire to respect and honor human life. Rather, they did so because it was strategically advantageous to their insurgency.

Also in December 2013, the United States launched a drone strike in central Yemen on what was thought to be an AQAP convoy. The missile actually hit a convoy travelling to a wedding party, killing thirteen civilians.<sup>7</sup> Civilian deaths caused by the U.S. drone program in Yemen have bred resentment among Yemenis, undermining the United States' efforts to gain support from the local population in its campaign against AQAP.<sup>8</sup> The families of the victims rioted for condolence payments, yet the United States did not provide any money directly to the families, despite the knowledge that failure to do so could provoke increased anger toward the United States and encourage local support for AQAP.<sup>9</sup>

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<sup>4</sup> *Yemen: Dozens Jailed for Debts*, HUMAN RIGHTS WATCH (Apr. 21, 2014), <https://www.hrw.org/news/2014/04/21/yemen-dozens-jailed-debts> (discussing imprisonment of individuals who failed to pay blood money).

<sup>5</sup> See generally Katherine Zimmerman, *A New Model for Defeating al Qaeda in Yemen*, AEI.COM (Sept. 2015), <https://www.aei.org/wp-content/uploads/2015/09/A-New-Model-for-Defeating-al-Qaeda-in-Yemen.pdf>.

<sup>6</sup> See *Yemen's Hospital Massacre*, VICE NEWS (May 1, 2014), <https://news.vice.com/video/yemens-hospital-massacre>.

<sup>7</sup> Ahmed al-Haj, *Officials: U.S. drone strike kills 13 in Yemen*, WASH. POST (Dec. 12, 2013), [https://www.washingtonpost.com/world/officials-us-drone-strike-kills-13-in-yemen/2013/12/12/3b070f0a-6375-11e3-91b3-f2bb96304e34\\_story.html](https://www.washingtonpost.com/world/officials-us-drone-strike-kills-13-in-yemen/2013/12/12/3b070f0a-6375-11e3-91b3-f2bb96304e34_story.html).

<sup>8</sup> *Id.*

<sup>9</sup> See Greg Miller, *Yemeni Victims of U.S. Military Drone Strike Get More than \$1 Million in Compensation*, WASH. POST (Aug. 18, 2014), [https://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390\\_story.html](https://www.washingtonpost.com/world/national-security/yemeni-victims-of-us-military-drone-strike-get-more-than-1million-in-compensation/2014/08/18/670926f0-26e4-11e4-8593-da634b334390_story.html); see also Gregory D. Johnsen, *Nothing Says "Sorry Our Drones Hit Your Wedding Party" Like \$800,000 and Some Guns*, BUZZ FEED (Aug. 7, 2014), [www.buzzfeed.com/gregorydjohnsen/wedding-party-drone-strike#.dqXdLn6XP](http://www.buzzfeed.com/gregorydjohnsen/wedding-party-drone-strike#.dqXdLn6XP).

Stunningly, the Yemeni government ended up providing more than one million dollars in condolence payments to the families of the victims. *Id.* The authors of two articles cited previously in this footnote have theorized that the money actually came from the United States, funneled through the Yemeni government, but U.S. officials have refused to confirm that they had any involvement in the condolence payments. *Id.*; see also Cora Currier, *Hearts, Minds and Dollars: Condolence Payments in the Drone Strike Age*, PROPUBLICA (Apr. 5, 2013, 9:15 AM), <http://www.propublica.org/article/hearts-minds->

During past years of protracted conflict in Iraq and Afghanistan, U.S. military commanders have found that taking the moral high ground during counterinsurgency operations is strategically advantageous, including payment of compensation or condolence for civilian collateral damage.<sup>10</sup> Generally, U.S. military commanders have learned that it is beneficial to the security of U.S. forces to (1) adhere to the laws of armed conflict<sup>11</sup> even when enemies like AQAP do not; (2) attempt to minimize collateral damage; and (3) make amends for collateral damage when possible.<sup>12</sup>

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and-dollars-condolence-payments-in-the-drone-strike-age (claiming that Al Qaida in the Arabian Peninsula (AQAP) offered to send condolence payments to the drone victims in an attempt to inflame the population's resentment of the United States and to foster Yemeni support for AQAP).

<sup>10</sup> *Interview by Frontline with David Petraeus, Retired General, U.S. Army*, PUBLIC BROADCASTING SERVICE (Aug. 1, 2007), <http://www.pbs.org/wgbh/pages/frontline/haditha/interviews/petraeus.html> [hereinafter *Petraeus Interview*] (David Petraeus was the general responsible for revamping the U.S. military's counterinsurgency (COIN) strategy).

Maintaining the moral high ground, if you will, is actually important at every level: tactical, operational and strategic. At the tactical level . . . if you're seen as being less brutal, more concerned about the population, they are more likely to support you if they think there's a chance you can win. And that's an important distinction. At a strategic level, it's important because it does not give the enemy strategically—in this case, say, Al Qaeda central—opportunities to criticize us throughout the world. That's very, very important as well, because a lot of this struggle is being carried out in the marketplace of ideas: It's being carried out in cyberspace, on the Internet, in newspapers, on television. [There are a] certain number of inevitable incidents [of civilian harm]. But the more that you can minimize those, and the more you can, again, avoid those, of course the better off you are.

*Id.*

<sup>11</sup> See generally INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, LAW OF ARMED CONFLICT DESKBOOK (2014).

<sup>12</sup> See Luke N. Condra & Jacob N. Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. OF POL. SCI., 167–87 (2012). After conducting a statistical analysis of the relationship between civilian deaths and retaliation against U.S. forces, Condra and Shapiro reached the following conclusion:

Both Coalition forces and insurgents paid for their (mis)handling of civilians, at least in terms of subsequent violence. The argument is often made that even though terrorists or insurgents may not abide by the laws of war or seek to minimize collateral damage, abiding by those rules and taking on added risk is a moral obligation for forces representing liberal democracies. It turns out to be strategically advantageous: such behavior will be attractive to civilians. It also turns out that insurgents' sanguinary tendencies hurt them, at least in this

How, then, is it possible that in similar cases involving civilian casualties in Yemen, a terrorist organization like AQAP acted with more generosity to the civilian population, and with a higher degree of strategic long-term thinking, than did the U.S. military? Quite simply, the U.S. military did not have the legal authority to offer condolence payments to the Yemeni families in the first place.<sup>13</sup> Unlike AQAP, the U.S. military is dependent on a legislative branch holding the purse strings, and is constrained by the military's own rules and regulations controlling the means and methods of granting compensation or condolence for collateral damage.

The United States currently lacks a standing framework for addressing harm caused to civilians during all combat operations. However, history demonstrates that U.S. military commanders in almost every modern conflict have found the need to express condolences for civilian harm arising out of combat, and have come up with creative means to do so.<sup>14</sup> Without a standing condolence payment procedure in place, the U.S. military has, time after time, created *ad hoc* systems to enable commanders to address civilian harm, such as the Commander's Emergency Response Program (CERP) condolence payments used in Iraq and Afghanistan.<sup>15</sup> The United States' ability to provide CERP condolence payments in Iraq and Afghanistan has proven to be a valuable commander's tool, but these funding sources must be congressionally authorized and are both temporally and geographically limited.<sup>16</sup> By the time President Obama

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case, where information is a key constraint on the production of violence.

*Id.*

<sup>13</sup> See *infra* Section II.

<sup>14</sup> See Jordan Walerstein, *Coping with Combat Claims: An Analysis of the Foreign Claims Act's Combat Exclusion*, 11 CARDOZO J. CONFLICT RESOL. 319 (2009) (summarizing the various methods commanders have used to compensate civilian harm).

<sup>15</sup> See Marla Keenan & Jonathan Tracy, *White Paper—US Military Claims System for Civilians in Armed Conflict*, CENT. FOR CIV. IN CONFLICT (May 2010), [http://civiliansinconflict.org/uploads/files/publications/CENTER\\_Condolence\\_White\\_Paper\\_2010.pdf](http://civiliansinconflict.org/uploads/files/publications/CENTER_Condolence_White_Paper_2010.pdf) [hereinafter *Center 2010 White Paper*] (summarizing the history of condolence payments in Iraq and Afghanistan). In September 2003, the highest level of command in Iraq authorized condolence payments to be made out of the Commander's Emergency Response Program (CERP). *Id.* In November 2005, condolence payments were approved for use in Afghanistan. *Id.* Condolences are considered a gesture of sympathy only, given to ease civilian suffering. *Id.* They are not formal reparation, legal compensation, or an admission of fault or negligence. *Id.*

<sup>16</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY para. 7-89 (Apr. 2009) [hereinafter FM 3-24.2]. "Recent experiences have shown the effectiveness of using money to win popular support and further the interests and goals of units conducting counterinsurgency operations . . . . A counterinsurgency force can use money

leaves office, the United States may be engaged in combat actions in Iraq, Afghanistan, Syria, Libya, Yemen, and unknown other countries.<sup>17</sup> However, CERP condolence payments are only authorized currently in two active combat zones, Iraq and Afghanistan.<sup>18</sup> Despite the strategic advantage of condolence payments, the United States has not developed a condolence payment program that can be transferred from one combat zone to another in order to keep pace with incidents unfolding on the world stage.

Under the current statutory and legislative framework, the Department of Defense (DoD) will require additional authorization to make condolence payments for combat damage as our operations shift beyond Iraq and Afghanistan.<sup>19</sup> As U.S. forces move toward a global strategy based on regionally aligned forces and security cooperation with foreign militaries, U.S. troops will find themselves operating in nations all around the world without condolence tools at hand, should the need arise.<sup>20</sup> Enemies such as the self-proclaimed Islamic State in Iraq and Syria (ISIS) ignore country borders, making country-specific condolence authorizations less useful to commanders as U.S. troops follow the fight.<sup>21</sup> Now is the time for the United States to come to terms with the need for a permanent framework to offer condolence to civilian victims of conflict around the world. The aforementioned piecemeal approach, requiring congressional authorization to issue CERP condolence payments for combat damage in each new conflict, leaves commanders on the ground

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to . . . [p]rovide condolence payments to civilians for casualties from combined and coalition operations.” *Id.* See also *infra* Section II(B) for a discussion of the temporal and geographic restrictions of *ad hoc* condolence payment systems.

<sup>17</sup> Greg Jaffe, *Hope Fades on Obama’s Vow to Bring Troops Home before Presidency Ends*, WASH. POST (Oct. 12, 2015), [https://www.washingtonpost.com/politics/hope-fades-on-obamas-vow-to-bring-troops-home-before-presidency-ends/2015/10/12/cc0daaec-6781-11e5-9ef3-fde182507eac\\_story.html](https://www.washingtonpost.com/politics/hope-fades-on-obamas-vow-to-bring-troops-home-before-presidency-ends/2015/10/12/cc0daaec-6781-11e5-9ef3-fde182507eac_story.html) (discussing President Obama’s intent upon taking office to withdraw U.S. troops from Afghanistan and Iraq, only to then launch military strikes in seven different countries, recommit troops to Iraq to address the rise of Islamic State insurgents, and commit troops to remain in Afghanistan).

<sup>18</sup> See *infra* Section II(B)(2).

<sup>19</sup> See Captain Jeffrey Palmer, *Claims Encountered during an Operational Contingency*, 42 A. F. L. REV. 227, 227 (1997). “Claims personnel should be aware that their authority is limited by geographic boundaries and that contingencies, such as regional conflicts or humanitarian operations, frequently spill over into neighboring countries. These areas may not be considered within the parameters of a claims team’s settlement authority.” *Id.*

<sup>20</sup> See *infra* Section III(B).

<sup>21</sup> See Meghan Tinsley, *ISIS’s Aversion to Sykes-Picot Tells Us Much About the Group’s Future Plans*, MUFTAH.ORG (Apr. 23, 2015), <http://muftah.org/the-sykes-picot-agreement-isis/#.VOMhikdf1PF>.

in immature conflicts without a useful tool to shape their battlespace, as legislators in Washington lag behind. Commanders need a more efficient process to adequately express their sympathy when innocent civilians are harmed by their operations. Today's conflicts, mostly prolonged counter-insurgency (COIN) operations where condolence payments can be a tool to "win hearts and minds, make a permanent condolence scheme more important than ever."<sup>22</sup>

This article surveys the compensation and condolence systems available to U.S. military commanders, identifies their strengths and weaknesses, and proposes a legislative change to create a permanent condolence payment system for commanders to use in situations such as the drone attack on the Yemeni convoy. This article proposes a permanent condolence payment program that is strategically beneficial to commanders by adding world-wide portability and increased flexibility to condolence payment procedures. The U.S. military has received substantial external criticism for its compensation and condolence payment practices during conflicts in recent decades.<sup>23</sup> However, the commanders whose daily operations are impacted by the current system's flaws have voiced internal criticism as well.<sup>24</sup> It is within the legislative

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<sup>22</sup> See Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT'L L. 181 (2009).

[I]njury and death as incidental outcomes of military attack . . . have grown more prevalent and visible with new military technology and changes in warfare. Some of this growth owes to the expansion of battlefields into "battlespaces" . . . and some of it to the escalating frequency of asymmetric conflicts, where the principle of distinction is less than rigorously observed, especially, but not exclusively, by the technologically inferior party.

*Id.*

<sup>23</sup> See Elizabeth Gilbert, *The Gift of War: Cash, Counterinsurgency, and "Collateral Damage"*, 46 SECURITY DIALOGUE 403–21. "Victims don't want money, they want justice and accountability. Putting a price on a life can be insulting and have the opposite effect."

*Id.*

<sup>24</sup> E-mail from Colonel (Retired) Peter Mansoor, Professor of Military History, Ohio St. University, to author (Feb. 23, 1:09 PM) (on file with author) [hereinafter Mansoor E-mail].

In the Iraq War it took too long to approve a system for the awarding of *solatia* payments to civilian victims of American combat actions. Once procedures were in place the system worked more smoothly. The biggest issue was the limitation of damages awarded (\$1000 for a serious injury and \$2500 for an unintended death). For a woman

branch's power to create a new condolence payment system for commanders that will be a force multiplier, and now is the right time to do so.

## II. A Survey of Current Compensation and Condolence Programs

The U.S. military has developed both compensation and condolence programs. While compensation programs are more akin to "insurance" programs, attempting to make a victim whole for their loss, condolence programs are only meant to express sympathy to a victim for their loss.<sup>25</sup> This section will survey the various programs available to today's military commanders and analyze their suitability as modern commanders' tools.

### A. The Foreign Claims Act

The U.S. military already has a permanent compensation system for civilian harm in foreign countries, the Foreign Claims Act (FCA).<sup>26</sup> However, this compensation system does not cover harm caused by combat activities.<sup>27</sup> Due to the FCA's limitations, commanders, along with their judge advocates, have frequently engaged in legal and fiscal gymnastics to find a way to express condolence for harm caused to civilians arising out of combat activities.<sup>28</sup>

The purpose of the FCA is to promote and maintain friendly relations between the United States and "host countries" through the prompt settlement of meritorious claims when U.S. forces have caused harm in a foreign country.<sup>29</sup> The FCA can only be used to address harm caused by U.S. forces, a source of frustration when a coalition partner has caused civilian harm, but U.S. forces are the ones suffering from the local

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who just lost her husband and three children in a combat action (an actual event in my brigade's zone), the provision of \$10,000 was simply not enough to even begin to assuage her grief.

*Id.*

<sup>25</sup> See *infra* Section II(D).

<sup>26</sup> Foreign Claims Act, 10 U.S.C. § 2734 (2000).

<sup>27</sup> U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10.3(b) (21 Mar. 2008) [hereinafter DA PAM 27-162]. "Claims arising 'directly or indirectly' from combat activities of the U.S. armed forces are not payable." *Id.*

<sup>28</sup> See *infra* Section II(B) (discussing *ad hoc* condolence and compensation systems).

<sup>29</sup> Foreign Claims Act § 2734(a).

population's retaliation for the harm.<sup>30</sup> An Afghan whose car was struck by a coalition partner's convoy does not necessarily care whether the convoy was driven by American or British soldiers; he simply wants compensation. The FCA also does not compensate an individual who is harmed while supporting U.S. forces, such as a local interpreter.<sup>31</sup> The FCA's most significant limitation is its prohibition on payment of claims that result directly or indirectly from acts of combat, preventing the United States from using compensation to maintain friendly relations with those it accidentally harms when bombs are dropping and bullets are flying.<sup>32</sup> This "combat activity exclusion" continues to be a source of confusion and controversy due to its inconsistent application.<sup>33</sup> It is also a major source of frustration for combat units seeking to maintain the support of local national populations.

### *1. The Combat Activity Exclusion*

The FCA's combat activity exclusion prohibits payment of claims related to harm caused by "activities resulting directly or indirectly from

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See *Koohi v. United States*, 976 F.2d 1328, 1330 (9th Cir. 1992) (explaining the combat activities exception to the Foreign Claims Act (FCA)).

The combatant activities exception applies whether U.S. military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be "smart" or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other words, it simply does not matter for purposes of the "time of war" exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts.

*Id.*

<sup>33</sup> See Major Michael Jones, *Consistency and Equality: A Framework for Analyzing the "Combat Activities Exclusion" of the Foreign Claims Act*, 204 MIL. L. REV. 144 (2010); see also Marla Keenan & Jonathan Tracy, *White Paper—U.S. Military Claims System for Civilians*, CENT. FOR CIV. IN CONFLICT (2008), [http://civiliansinconflict.org/uploads/files/civilian\\_casualties\\_white\\_paper\\_.pdf](http://civiliansinconflict.org/uploads/files/civilian_casualties_white_paper_.pdf) [hereinafter *Center 2008 White Paper*]. "The FCA 'combat exclusion' appears to be applied arbitrarily . . . FCCs almost universally invoke the 'combat exclusion' anytime gunfire is involved. In our experience, erring on the side of the 'combat exclusion' . . . is [frequently] inappropriate as other factors may in fact prove the incident did not involve combat." *Id.*



action by the enemy, or by the Armed Forces of the United States engaged in armed conflict, or in immediate preparation for impending armed conflict.”<sup>34</sup> This exclusion has suffered from haphazard application, and some judge advocates have stretched logic to circumvent the combat activity exclusion to pay a claim.<sup>35</sup> Different judge advocates have interpreted the combat exclusion narrowly or broadly, often depending on how motivated they are to pay a certain claim.<sup>36</sup> For example, in an escalation of force incident involving a civilian approaching a checkpoint in Iraq, one judge advocate determined that the combat activity exclusion did not apply and paid \$7000 for a civilian’s death.<sup>37</sup> Another unit with a substantially similar claim determined that the combat activity exclusion did apply, and denied the claim entirely.<sup>38</sup>

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<sup>34</sup> U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS (8 Feb. 2008) [hereinafter AR 27-20].

<sup>35</sup> Jonathan Tracy, Testimony before the U.S. Senate Committee on Appropriations Subcommittee on Foreign Relations, Apr. 1, 2009 [hereinafter Tracy Testimony]. “Some units and lawyers handled substantially similar cases in drastically different ways. For example, different rules of evidence and procedure were applied in adjacent areas of Baghdad.” *Id.*

<sup>36</sup> One judge advocate refused to pay any claims whatsoever, believing the money would all go to “terrorists.” This assertion is based on the author’s professional experiences as the Chief of Claims for Multinational Corps-Iraq in 2008.

<sup>37</sup> *Center 2008 White Paper*, *supra* note 33.

On February 28, 2005, U.S. forces erected a checkpoint in Baghdad near Al Mahdya. Kamal was driving his truck in the area around 7:30 pm. As he approached the checkpoint, U.S. forces opened fire on the vehicle. He sustained multiple gunshot wounds and the car burned with him inside it. Witnesses stated that he was “very far away (130 [meters])” from the forces and was driving very slowly. His father filed a claim on behalf of his son with the 4th Combat Team, 3rd Infantry Division. The adjudicating [judge advocate] stated, “Statements and pictures support story. No weapons found in vehicle and civilian was [approximately] 130 [meters away].” The [judge advocate] recommended a payment of \$7000.

*Id.*

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

Consider [a similar case] in which the claimant’s brother was killed while driving near a checkpoint. In the file is a note from a U.S. servicemember stating the “man is innocent . . . [the unit] fired a warning shot. It accidentally ricocheted and hit the truck.” The man died of his injuries but the claim was denied because of the “combat exclusion.” The Foreign Claims Act is intended to provide continuity, but this case is irreconcilable with the previous claim. One unit’s conclusion was the exact opposite of the second unit’s, illustrating an inconsistent method of adjudication.

Inconsistent application of the combat activity exclusion has led to resentment of the United States among some civilian populations, having the opposite effect of “promoting friendly relations.”<sup>39</sup> As one judge advocate noted,

Unfortunately, the use of the combat exclusion can undermine support of U.S. military efforts from the local population. In much the same way that payment of claims can create goodwill and a positive perception of U.S. forces, denial of payment can have the opposite effect. While any claimant who is denied compensation will be upset and dissatisfied, the situation can become exponentially worse when a claimant is denied compensation due to improper analysis or lack of sufficient investigation. While the claimant may not immediately realize that his claim was improperly adjudicated, subsequent discussions with other successful claimants may reveal inconsistencies between [units handling claims]. These inconsistencies ultimately result in distrust of the foreign claims system and U.S. forces.<sup>40</sup>

There are valid arguments for maintaining a combat activity exclusion. The United States does not have unlimited wealth from which to pay for every act of destruction carried out during armed conflict, war being destructive by nature. One judge advocate termed the desire to pay for as much damage as possible as the “Santa Clause Syndrome” and cautioned judge advocates that a certain degree of callousness is required when applying the combat activity exclusion.<sup>41</sup>

In the publication *Legal Lessons Learned from Afghanistan and Iraq*, the consensus of judge advocates implementing the FCA was that the combat activity exclusion did not further friendly relations with local nationals, but these judge advocates also displayed a practical

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*Id.*

<sup>39</sup> See Jones, *supra* note 33, at 156.

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

<sup>41</sup> See Palmer, *supra* note 19, at 231. “Avoid the ‘Santa Claus Syndrome,’ not only because there is no legal authority for claims payments based solely on compassion, but also because it creates a disparity in how other claimants may be treated by claims personnel who follow.” *Id.*

understanding that the FCA is not an endless source of funds and must be limited in some way:

Many [judge advocates] argue that excluding combat claims runs afoul of the spirit and intent of the FCA, which is “to promote and maintain friendly relations through the prompt settlement of meritorious claims.” A broad reading of the combat exception, so the argument goes, results in complaints and difficulties with host nation inhabitants when seemingly legitimate claims go unpaid; on the other hand, a narrow reading of the exception is a “force multiplier” and helps “win the hearts and minds” when more claims are paid. A counterargument is that Congress did not intend for the FCA to be the statutory mechanism for rebuilding a country in the middle of or in the wake of combat—such a large undertaking should be a separate legislative and political undertaking, not unlike the *Marshall Plan* to rebuild Germany in the aftermath of World War II. Thus, one lesson might be that Congress should reconsider the combat exception under the FCA so that [judge advocates] will have greater flexibility and authority to pay claims in combat.<sup>42</sup>

It would be fiscally impossible for the United States to act as “Santa Clause,” or to use compensation or condolence payments to rebuild a country. Not only is it fiscally impossible, there is no established legal norm requiring the United States to pay for collateral damage during armed conflict.<sup>43</sup> As the DoD’s recently published *Law of War Manual* states, “Although reasonable efforts should be made to spare civilians from unnecessary harm when seizing or destroying enemy property, the law of war imposes no obligation to compensate for loss of, or damage to, private property imperatively demanded by the necessities of war, including damage incidental to combat operations.”<sup>44</sup> The combat activity exclusion of the FCA essentially restates the law of war norm that lawful combatants are privileged to commit necessary and proportionate harm without

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<sup>42</sup> See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEP. 2001–1 MAY 2003) 180–81 (2004).

<sup>43</sup> U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL para. 5.17.5.1 (June 2015) [hereinafter DOD LAW OF WAR MANUAL].

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

obligation to compensate for that harm.<sup>45</sup>

However, the *Law of War Manual* goes on to highlight the use of compensation during counterinsurgency operations: “As a matter of practice, during counter-insurgency operations, U.S. forces have often made payments to, or taken other actions on behalf of, civilians suffering loss.”<sup>46</sup> The fact that the United States has addressed the FCA’s combat activity exclusion through *ad hoc* condolence and compensation programs in most recent conflicts, most of them being counterinsurgency operations, highlights that the current FCA framework fails to meet the needs of today’s commanders. One of the FCA’s main strengths, on the other hand, is thoroughly developed and detailed procedures and regulations for its enactment, providing excellent guidance for the Foreign Claims Commissions (FCCs) that adjudicate claims under the FCA.

## 2. Foreign Claims Commissions

Compensation decisions under the FCA are made by FCCs, normally consisting entirely of judge advocates with no requirement for input from a commander or intelligence officers.<sup>47</sup> In that sense, the FCA is a legal-centered apparatus as opposed to a commander’s tool. Judge advocates may make compensation decisions in a vacuum with no discussion of the

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<sup>45</sup> Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1790 (2009). “In essence, the FCA internalizes the law of war norm of the combatant’s privilege, allowing compensation for tort and other injuries caused by the U.S. military only as long as those injuries occurred outside combat operations.” *Id.*

<sup>46</sup> DOD LAW OF WAR MANUAL, *supra* note 43, para. 5.17.5.1.

<sup>47</sup> See AR 27-20, *supra* note 34, para. 10-8:

Normally, a member of a [Foreign Claims Commission (FCC)] will be either a commissioned officer or a claims attorney. At least two members of a three-member FCC must be [judge advocates] or claims attorneys. In exigent circumstances, a qualified non-lawyer employee of the Armed Forces may be appointed to an FCC, subject to prior approval by the Commander, [U.S. Army Claims Service]. Such approval may be granted only upon a showing of the employee’s status and qualifications and adequate justification for such appointment (for example, the lack of legally qualified personnel). The FCC will be limited to employees who are citizens of the United States. An officer, claims attorney, or employee of another Armed Force will be appointed a member of an Army FCC only if approved by the Commander, [U.S. Army Claims Service].

*Id.*

impact of injecting large sums of money into the battlespace, and without a true understanding of the claimant's position in the area of operations.<sup>48</sup> Although an FCC is required to determine that a claimant is friendly to the United States, there is no requirement for the FCC to consult with intelligence officers who may possess critical information regarding a certain claimant's allegiances, before handing them large sums of money.<sup>49</sup>

A non-judge advocate FCC has the authority to pay a claim up to \$5000, while a single judge advocate FCC may authorize payments up to \$15,000. Single FCCs may also deny claims within their monetary authority.<sup>50</sup> A three-member FCC, which must include at least two judge advocates, may pay up to \$50,000 and may deny claims in any amount.<sup>51</sup> Claims valued over \$50,000 must be sent to the U.S. Army Claims Service (USARCS) at Fort Meade, Maryland, for approval.<sup>52</sup> The USARCS must forward any claim over \$100,000 to the Secretary of the Army (SECARMY) for approval.<sup>53</sup>

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<sup>48</sup> See Frank J. McGovern, *Paying the Claims of War*, 31 PA. LAW. 32, 43–44 (2009) (discussing the reaction of Iraqis to the large sums of money paid under the FCA).

If a claim has been paid previously, some Iraqis will try to resubmit a claim that worked to see if it will work again when a new unit takes over an area. It is important to realize that the average Iraqi earns approximately \$1500 to \$2000 per year. A claims card can be like a winning lottery ticket. Soldiers are advised not to give out claims cards unless the incident is actually witnessed. Often we hear stories about having many children to feed, being a widow or just having an extremely difficult time and needing assistance. We have to explain that we are not a welfare office and that although we wish that we could help every individual who walks in the door that is not possible. This is U.S. taxpayer money and we can use the funds only for the specific purpose for which it is designated.

*Id.* See also Heidi Lynn Osterhout, *No More Mad Money: Salvaging the Commander's Emergency Response Program*, 40 PUB. CONTRACT L. J. 4 (2011) (In general, injection of large sums of money into a counterinsurgency battlespace may have unintended consequences. Although distribution of funds may initially reduce violence, "the funding can spark new tensions and rivalries in local communities. It also causes local populations to feel entitled to help. Without proper prioritization, the assistance can hurt the local economy in the long run.").

<sup>49</sup> See AR 27-20, *supra* note 34.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

Understandably, claims forwarded from a conflict zone to the USARCS or SECARMY may take weeks or months to be received depending on communication conditions in the battlespace concerned, and even longer to be resolved once it is received, given the workload of these important entities. This timeline is often too slow for the unit on the ground, which may be dealing with an unhappy local national who may see such a delay as an insult.<sup>54</sup> Moreover, claims in such large amounts inherently involve significant damage or harm. As an example, U.S. forces may destroy a large orchard owned by a prominent local sheikh, causing \$150,000 in damage. The loss of the orchard not only means its field hands are now out of work, and more likely to be drawn to support the insurgency, but an important sheikh with significant influence over the local population now has no reason to support U.S. forces, and every reason to use his influence against them. Such dynamics on the ground mean that swift payment to the sheikh is crucial to the security of U.S. troops in the area.

Currently, FCA payments come from money budgeted by the Headquarters of the Department of the Army (HQDA) to USARCS, not from unit operational funds.<sup>55</sup> Accordingly, there is no battlespace commander making a decision whether a claim is worth paying out of unit funds that could be used for another important mission. While it is an advantage that FCA payments are not fiscally constrained by a unit's other

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<sup>54</sup> See *Center 2010 White Paper*, *supra* note 155 (citing Senate Committee on Foreign Relations, The Mutual Security Act of 1956, 84th Cong., 2d sess., 1956, S. Rep. 2273, 9–10).

<sup>55</sup> See AR 27-20, *supra* note 34, para. 13-6(b).

The claims open allotment is the fund from which personnel, torts, and foreign tort claims are paid . . . . Following the annual [c]ongressional appropriation to the [Department of Defense], funds are allotted to [Headquarters, Department of the Army] Operating Agency 22 (OA22), an office of Resource Services-Washington (RS-W). The OA22 provides [the U.S. Army Claims Service (USARCS)] with open allotment funds on a quarterly or monthly basis. In turn, as USARCS receives this funding, it updates the budget allocations for each claims office. Centrally managed by the USARCS budget office, the allotment provides the flexibility essential for the worldwide administration of claims funds that by law are paid from [fifteen] separate accounts, including civilian personnel, marine casualty, and Federal and foreign tort claims. The management of this allotment by USARCS allows the organization to move funds quickly in order to pay claims around the world without unnecessary delay.

*Id.*

obligations, the fact that a commander, along with intelligence staff, is not required to be involved in the compensation process means that a judge advocate may not be making a decision on a claim with a comprehensive and global understanding of its impact.<sup>56</sup> In the example above regarding the sheikh's orchard, the commander and intelligence staff would likely have key information to assist the judge advocate in making a determination or expediting the claim.

### 3. *Compensation—Not Condolence*

The FCA is designed to compensate for a loss as opposed to merely expressing condolence for a loss. The Army regulation implementing the FCA uses terms such as “damages” and “entitlement to compensation,” discusses factors in determining compensation amounts, and requires deduction of any insurance coverage from a compensation amount.<sup>57</sup> On the other hand, the FCA is explicitly prohibited from compensation that is “based solely on compassionate grounds,” placing the FCA squarely in the realm of compensation out of a sense of legal or policy-based obligation, and not as a mere expression of condolence for a loss.<sup>58</sup> Because the FCA is a compensation scheme, as opposed to a condolence scheme, it actually provides for an appellate process, allowing claimants who are dissatisfied with the handling of their claim an avenue for reconsideration.<sup>59</sup>

### 4. *The FCA as a Tool for Traditional Warfare*

The FCA has some significant benefits in addition to its appellate process, such as its high compensation thresholds obtained from an independent funding source.<sup>60</sup> However, it should be noted that the FCA and its predecessor, the 1918 Indemnity Act, are creatures of the world wars of the last century, traditional wars with clear front lines.<sup>61</sup> The 1918 Indemnity Act was a compensation scheme directed to address harm

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<sup>56</sup> See *infra* Section IV(E).

<sup>57</sup> See AR 27-20, *supra* note 34, para. 10-2(a).

<sup>58</sup> *Id.* para. 10-4(d).

<sup>59</sup> *Id.* para. 10-10.

<sup>60</sup> AR 27-20.

<sup>61</sup> John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages*, 41 LOY. L.A. L. REV. 1455, 1460 (2008); Indemnity Act (American Forces Abroad), ch. 57, Pub. L. No. 65-133, 40 Stat. 532 (1918), *repealed by* Act of Apr. 22, 1943, 57 Stat. 66, § 5 (1943).

caused by American soldiers camped far behind the front lines during World War I.<sup>62</sup> During World War I, the first large-scale mechanized war, the United States shipped over 100,000 motor vehicles to Europe:

The cars and trucks America had so successfully delivered to the western front quickly began to cause mayhem. Soldiers were driving motorized vehicles on roads built for horse-drawn vehicles in towns accustomed to horse-drawn speeds. The situation was a prescription for injury and accidental death. The carnage was so great that it even affected those who were sent to try to resolve it. In May 1916, an auto accident took the life of the British officer charged with compensating French civilians injured by British army vehicles.<sup>63</sup>

As a predecessor to the FCA, the 1918 Indemnity Act was not concerned with combat-related damage.<sup>64</sup> Rather, it aimed to compensate for damage caused by U.S. soldiers engaged in non-combat activities such as driving a vehicle from one camp to another.<sup>65</sup> Following the United States' entry into World War II, President Franklin Roosevelt quickly moved to update the 1918 Indemnity Act, taking steps toward creating what is today's FCA.<sup>66</sup> The move to update the law was prompted by the United States' plan to station troops in Iceland, far from any front lines.<sup>67</sup> The Prime Minister of Iceland would agree to the presence of U.S. troops only if the United States agreed to compensate the inhabitants of Iceland for any damage occasioned by U.S. military activities.<sup>68</sup> President Roosevelt agreed to this condition, and the 1918 Indemnity Act evolved into the FCA.<sup>69</sup>

The key takeaway behind the historical underpinnings of the FCA is clear: the United States created the FCA to address U.S. soldiers causing negligent damage in foreign countries, far behind the front lines and unrelated to combat. Given that today's counterinsurgency operations

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<sup>62</sup> John Fabian Witt, *supra* note 61.

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

<sup>64</sup> *Id.* at 1458–61.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Christopher V. Daming, *When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act*, 39 WASH. U. J. L. AND POL'Y 309, 316–17 (2012).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*



lack front lines, it is doubtful that a compensation system designed for traditional warfare can truly be a valuable modern commander's tool.<sup>70</sup> As one judge advocate astutely observed, "In contrast to the clearly defined trenches of World War I and the massive fronts of World War II, the conflicts of the post-World War II era, from the hazy, jungle warfare of Vietnam to the nation-building in Iraq and Afghanistan, have strained the FCA to the breaking point."<sup>71</sup> It is the limitations of the FCA that have spurred the use of *ad hoc* condolence and compensation systems.

### B. *Ad Hoc* Condolence and Compensation Systems

Judge advocates and commanders alike have historically struggled with using the FCA in conflict zones and sought means to legally circumvent the combat activity exclusion.<sup>72</sup> The United States has instituted some sort of FCA work-around in almost every armed conflict since World War I.<sup>73</sup> However, *ad hoc* systems are often implemented arbitrarily with little guidance, sometimes increasing resentment among the local population rather than fostering goodwill.<sup>74</sup>

In Vietnam, U.S. Forces frustrated with the combat activity exclusion of the FCA began processing combat claims funded by "assistance-in-kind funds" from Military Assistance Command, Vietnam.<sup>75</sup> In Grenada, judge advocates frustrated by the combat activity exclusion worked with USARCS to establish a combat claims compensation program using funds from the U.S. Agency for International Development (USAID).<sup>76</sup> In Panama, the FCCs on the ground received DoD Operations and Maintenance Funds to pay combat claims, while the Department of State (DoS) set up its own combat claim program through a Letter of Instruction with the government of Panama covering a compensation system to be run

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<sup>70</sup> See Walerstein, *supra* note 14, at 331.

<sup>71</sup> *Id.*

<sup>72</sup> See Tracy Testimony, *supra* note 35; see also FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975 41 (2003).

<sup>73</sup> See Tracy Testimony, *supra* note 35.

<sup>74</sup> See *White Paper—US Military Claims System for Civilians*, CENTER FOR INNOCENT VICTIMS IN ARMED CONFLICT, [http://civiliansinconflict.org/uploads/files/civilian\\_casualties\\_white\\_paper\\_.pdf](http://civiliansinconflict.org/uploads/files/civilian_casualties_white_paper_.pdf) (last visited May 26, 2016).

<sup>75</sup> FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI, 42 (2004).

<sup>76</sup> Walerstein, *supra* note 14 at 333.

by Panama and funded by the DoS.<sup>77</sup> In other conflicts, units have sought authorization to use what are known as *solatia* payments.

### 1. *Solatia*

The term *solatium*<sup>78</sup> is derived from Latin, and refers to an expression of sympathy or recognition of loss. *Solatia* is “defined as ‘anything that alleviates or compensates for suffering or loss—compensation,’ derived from solace, ‘to give comfort to in grief or misfortune.’”<sup>79</sup> *Solatia* payments are distinguished from claims under the FCA because they are purely expressions of sympathy, not an admission of any form of liability or obligation to compensate.<sup>80</sup> Additionally, unlike the FCA, *solatia* payments are not explicitly limited to cases where U.S. forces caused the harm.<sup>81</sup> The term “compensation” is often used when discussing *solatia*, but these payments are not meant necessarily to make a victim financially whole.<sup>82</sup> *Solatia* may be made through monetary donation, but might also include funeral flowers or some other expression of sympathy.<sup>83</sup> *Solatia* should be made in accordance with local custom as an expression of sympathy toward a victim or his or her family and is common in some overseas commands.<sup>84</sup> *Solatia* payments are paid from unit operations and maintenance funds, not from USARCS disbursements or some other

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<sup>77</sup> BORCH, *supra* note 75.

<sup>78</sup> The term *solatium* is defined in law as “[d]amages allowed for injury to the feelings.” LAW DICTIONARY, <http://thelawdictionary.org/solatium/> (last visited May 13, 2016) (plural: *solatia*).

<sup>79</sup> Jacqueline H. Wilson, Blood Money in Sudan and Beyond: Restorative Justice or Face-Saving Measure? (Mar. 25, 2014) (unpublished Ph.D. thesis, Georgetown University), [https://m.repository.library.georgetown.edu/bitstream/handle/10822/709806/Wilson\\_georgetown\\_0076D\\_12674.pdf?sequence=1&isAllowed=y](https://m.repository.library.georgetown.edu/bitstream/handle/10822/709806/Wilson_georgetown_0076D_12674.pdf?sequence=1&isAllowed=y).

<sup>80</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN (2007) [hereinafter GAO CONDOLENCE REPORT].

<sup>81</sup> See AR 27-20, *supra* note 34, para. 10-11; see also DA PAM 27-162, *supra* note 27, para. 10-10.

<sup>82</sup> DA PAM 27-162, *supra* note 27, para. 10-10.

<sup>83</sup> See Palmer, *supra* note 19, at 238–39.

In some foreign countries, especially parts of the Far East and Southwest Asia, a person who is involved in an accident is expected to immediately express sympathy to the victim or the victim's family by making a solatium payment . . . . Examples of “in kind” solatia are floral arrangements and fruit baskets.

*Id.*

<sup>84</sup> See AR 27-20, *supra* note 34, para. 10-11.

appropriated fund.<sup>85</sup> This distinction means that a commander's decision to offer a *solatia* payment in a given case means those funds will not be available for some other part of the unit's mission.

*Solatia* payments are only authorized in four countries on a permanent basis: Micronesia, Japan, Korea, and Thailand.<sup>86</sup> In order to make *solatia* payments in other countries, some authority must first determine that *solatia* payments are culturally appropriate for the area concerned.<sup>87</sup> It is unclear who the approval must be for these *ad hoc* determinations. One regulation refers to a Command Claims Service or USARCS as appropriate authorities.<sup>88</sup> Another authoritative source refers to local commanders having the authority to determine the propriety of *solatia* in a certain country.<sup>89</sup> In actual practice, the DoD General Counsel and U.S. ambassadors have also made *solatia* determinations in the past.<sup>90</sup> Contradictory regulations and practice make it difficult to determine who truly has the authority to authorize *solatia* in a given country.

Until 2004, the DoD specifically prohibited the use of *solatia* in Afghanistan and Iraq, having determined (incorrectly) that condolence payments were not a commonly accepted practice in these countries.<sup>91</sup>

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

<sup>86</sup> *Id.*

Payment of *solatia* in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands. *Solatia* payments are known to be a custom in the Federated States of Micronesia, Japan, Korea, and Thailand. In other countries, the FCC should consult the CCS or Commander, USARCS for guidance.

*Id.*

<sup>87</sup> See AR 27-20, *supra* note 34, para. 10-11.

<sup>88</sup> *Id.*

<sup>89</sup> See DA PAM 27-162, *supra* note 27, para. 10.10(b) (21 Mar. 2008). "Although *solatia* programs are usually administered under the supervision of a command claims service, they are essentially a theater command function, whose propriety is based on a local finding that *solatia* payments are consistent with prevailing customs." *Id.*

<sup>90</sup> See Memorandum, Deputy General Counsel (International Affairs), Department of Defense, to Chairman, Joint Chiefs of Staff, Subject: *Solatia* (26 Nov. 2004) [hereinafter *Solatia* Memorandum] (determining that *solatia* is appropriate in Iraq and Afghanistan); see also BORCH, *supra* note 75, 211 (discussing the U.S. Ambassador to Somalia approving *solatia* payments in Somalia and delegating authority to make payments to the Unified Task Force Commander and Chief of Staff).

<sup>91</sup> See Tracy Testimony, *supra* note 35.

Exactly how the DoD reached this conclusion is confusing.<sup>92</sup> There is abundant evidence that such payments are common in both countries.<sup>93</sup> One commander in Iraq admitted that, out of necessity, he had scraped together cash to make condolence payments before *solatia* was even authorized.<sup>94</sup> In response to commanders on the ground clamoring for a way to make condolence payments, and with urging from judge advocates in the field, in 2004 the DoD General Counsel issued an opinion that *solatia* was appropriate under Iraqi and Afghani custom.<sup>95</sup>

Although commanders were happy to have another tool in their kit-bag, *solatia* is not the best commander's tool for two main reasons. First, as noted above, *solatia* requires a high-level authority to determine that it is appropriate in any given country—and in the past that determination has been incorrect—leaving commanders on the ground at a disadvantage.<sup>96</sup>

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Between October 2001 and September 2003 all condolence-type payments were specifically prohibited in Afghanistan and Iraq by order of Central Command. In fact, originally, the U.S. Central Command, the command responsible for Iraq, ordered *Solatia* or sympathy payments not be allowed in Iraq, meaning there was no supplement to fill the gap left by the combat exclusion of the FCA. This order also applied to Afghanistan. Because of this rule, when I began adjudicating claims and meeting with Iraqis, I could offer no monetary assistance for civilian casualties caused during combat operations. This lasted until October 2003.

*Id.*

<sup>92</sup> Both the 2003 and 2008 versions of Department of Army Pamphlet 27-162 state in paragraph 10-10 that *solatia* is common in the Middle East:

In certain countries, particularly those within Asia and the Middle East, an individual involved in an incident in which another is injured or killed or property is damaged may, in accordance with local custom, pay *solatia* to a victim, the victim's family or another person authorized by the victim (such as a tribal leader) without regard to liability.

See DA PAM 27-162, *supra* note 27. It is an interesting point that our own Pamphlet acknowledges that it is common in the Middle East and yet it was deemed inappropriate.

<sup>93</sup> See *infra* Section II(C) for a discussion of blood money.

<sup>94</sup> See Cora Currier, *How Much Does the U.S. Pay for Accidentally Killing a Civilian in a Drone Strike*, YAHOO! NEWS (Apr. 5, 2013), [http://news.yahoo.com/much-does-u-pay-accidentally-killing-civilian-drone-160332955.html;\\_ylt=A0LEVj\\_n4J9WHAsACUcnnIIQ;\\_ylu=X3oDMTByNXM5bzY5BGNvbG8DYmYxBHBvcwMzBHZ0aWQDBHNlYwNzcg](http://news.yahoo.com/much-does-u-pay-accidentally-killing-civilian-drone-160332955.html;_ylt=A0LEVj_n4J9WHAsACUcnnIIQ;_ylu=X3oDMTByNXM5bzY5BGNvbG8DYmYxBHBvcwMzBHZ0aWQDBHNlYwNzcg) (citing a retired General who admitted finding his own funds to make condolence payments before they were authorized).

<sup>95</sup> *Solatia* Memorandum, *supra* note 90.

<sup>96</sup> Compare *id.* with Tracy Testimony, *supra* note 35.

Second, *solatia* payments are funded by unit operations and maintenance funds and therefore compete with a commander's other mission priorities.<sup>97</sup> On the other hand, *solatia* is useful because it has no combat activity exclusion, and few procedural obstacles to swift payment once authorized in a country. Commanders used *solatia* payments in Iraq from June 2004 to January 2005, and in Afghanistan from October 2005 to the present.<sup>98</sup> *Solatia* payments became less frequent as a program called the Commander's Emergency Response Program became a new source for condolence payments.

## 2. *The Commander's Emergency Response Program*

The CERP was conceived as a funding mechanism to allow commanders in Iraq to quickly respond to the needs of the local population, such as humanitarian relief and reconstruction projects.<sup>99</sup> The program was initially funded from the discovery of secret caches of millions of U.S. dollars hidden by the Saddam Hussein regime.<sup>100</sup> The CERP funds were authorized for condolence payments in Iraq in September 2003, and extended to Afghanistan in November 2005.<sup>101</sup> Although judge advocates now had a resource to address the FCA's combat exclusion, little guidance was issued regarding how to process condolence payments using CERP.<sup>102</sup> Additionally, just as *solatia* payments must compete with other missions funded by a unit's operation and maintenance funds, CERP condolence payments had to compete with other CERP projects, such as humanitarian relief and reconstruction, rather than coming from claims-specific funding like FCA claims.<sup>103</sup> One claims judge advocate explained his frustration with CERP as follows:

I lacked money because the vast majority of my brigade's CERP funds went to various reconstruction projects.

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<sup>97</sup> See AR 27-20, *supra* note 34, para. 10-11.

<sup>98</sup> See GAO CONDOLENCE REPORT, *supra* note 80.

<sup>99</sup> Memorandum, Administrator of the Coalition Provisional Authority, to the Commander of Coalition Forces, Subject: Commanders' Emergency Response Program (16 June 2003).

<sup>100</sup> Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1, 3.

<sup>101</sup> See *Center 2010 White Paper*, *supra* note 15.

<sup>102</sup> See Tracy Testimony, *supra* note 35. "Another significant problem I encountered with the program arose from the *ad hoc* nature inherent to the program because of the manner in which it was created. There were no rules or solid guidance provided." *Id.*

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

Understandably, my commander prioritized CERP funds for hospitals, schools, or power stations, at the expense of condolence payments. The perception was that fixing a school and employing Iraqi contractors allowed funds to go further than paying a widow for her husband's death.<sup>104</sup>

Just as with *solatia*, condolence payments under CERP became a matter of prioritizing which funds would go to other unit missions. Although it was initially funded by secret caches of U.S. dollars, the CERP evolved into an appropriated fund, subject to yearly congressional action.<sup>105</sup> Therefore, the availability of CERP in any conflict zone for a specific time period is merely temporary, and is subject to the legislative process.<sup>106</sup>

Some guidance on the handling of the CERP condolence payments was provided in *The Commander's Guide to Money as a Weapons System: Tactics, Techniques and Procedures*, referred to as the Money as a Weapons System (MAAWS).<sup>107</sup> The MAAWS was a creation of the conflicts in Iraq and Afghanistan, where "money is touted as a 'non-kinetic force' that can win the hearts and minds of the local population by stimulating the economy through infrastructure development, job creation, and business stimulation."<sup>108</sup> The MAAWS clearly defined how units should use money as a weapon in COIN operations.

As its title suggests, [the MAAWS] provides guidelines on how and why money is to be deployed in the field. The rationale for the weaponization of money is captured as follows: "Warfighters at brigade, battalion, and company level in a counterinsurgency (COIN) environment employ money as a weapons system to win the hearts and minds of the indigenous population to facilitate defeating the insurgents."<sup>109</sup>

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

<sup>105</sup> Army Techniques Publication Number 1-06.2, The Commander's Emergency Response Program (CERP), 5 April 2013, para. 1-1.

<sup>106</sup> *Id.*

<sup>107</sup> Multi-National Corps-Iraq, Money as a Weapon System (Nov. 1, 2009); U.S. Forces-Afghanistan Pub 1-06, Commander's Emergency Response Program SOP (2009) [hereinafter Afghanistan CERP SOP].

<sup>108</sup> Emily Gilbert, *Money as a "Weapons System" and the Entrepreneurial Way of War*, 1 CRITICAL MIL. STUD. 202 (2015).

<sup>109</sup> *Id.* (citations omitted).

Under the Afghanistan CERP Standard Operating Procedure (SOP), a supplement to the MAAWS, CERP condolence payments may be paid to express sympathy and to provide urgent humanitarian relief to individual Afghans or Afghan people in general.<sup>110</sup> Urgent humanitarian relief might include a payment to assist a family that has lost its breadwinner due to U.S. action.<sup>111</sup> However, unlike the FCA, the CERP evolved to allow for condolence payments even when U.S. forces were not responsible for the harm.<sup>112</sup> Payments termed as “hero payments” or “martyr payments” quickly became tools for commanders to encourage Iraqi and Afghan nationals to continue to fight insurgent forces.<sup>113</sup> The direct kin of local nationals lost fighting against insurgents could qualify for these types of CERP payments.

Condolence payments from CERP funds are only authorized if an FCA claim is not available, and most claims SOPs state that claims denied under the FCA must be reconsidered for suitability as CERP payments.<sup>114</sup> However, in practice, this often does not happen, and claims are denied outright.<sup>115</sup> Additionally, the local population does not care which U.S. law allows for payment of their claim, they simply want to be recompensed in some manner.<sup>116</sup>

The Afghanistan CERP SOP defines “condolence payment” as follows:

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<sup>110</sup> Afghanistan CERP SOP, *supra* note 107.

<sup>111</sup> The loss of a male breadwinner in a patriarchal society is completely devastating to a family as a wife/mother may have no means to support her family. *See generally Women 2000*, UNITED NATIONS (Dec. 2001), [http://www.un.org/womenwatch/daw/public/wom\\_Dec%2001%20single%20pg.pdf](http://www.un.org/womenwatch/daw/public/wom_Dec%2001%20single%20pg.pdf).

<sup>112</sup> Memorandum for Secretaries of the Military Departments, Dec. 18, 2008, Commander’s Emergency Response Fund (CERP) Guidance, 15, [http://comptroller.defense.gov/Portals/45/documents/fmr/archive/12arch/12\\_27\\_Dec08.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/archive/12arch/12_27_Dec08.pdf).

<sup>113</sup> Marlin Paschal, *Knowing When to Say No and Providing a Way Forward: The Commander’s Emergency Response Program and the Advising Judge Advocate*, ARMY LAW. Sept. 2011, at 29.

<sup>114</sup> *See* LESSONS LEARNED, *supra* note 42, at 185.

<sup>115</sup> *See Center 2010 White Paper*, *supra* note 15. “Some brigades recognized the necessity of appropriately adjudicating each claim and systematically referred meritorious, yet non-compensable FCA claims to receive condolences, while others summarily denied any claim filed because of the FCA’s combat exclusion.” *Id.*

<sup>116</sup> Mansoor E-mail, *supra* note 24. “Local nationals do not read, much less understand, U.S. laws. Telling them that the Foreign Claims Act, a law passed in Washington, had any validity whatsoever on their soil would be just plain weird.” *Id.*

Damage to property or person caused by [United States], coalition, or supporting military organizations during a specific combat operation. For example, a Task Force enters a village to perform a clearing operation. Upon arrival at the village, one vehicle in the convoy hits an individual on a bicycle. Since the Task Force was conducting a combat operation, this is a condolence/battle damage situation.<sup>117</sup>

Under the Afghanistan CERP program, a U.S. commander in the grade of O-5 can approve up to \$2500 per person or damaged property, while a U.S. commander in the grade of O-6 can approve up to \$5000 per person or damaged property.<sup>118</sup> Commander's Emergency Response Program condolence payments do not require a legal review, but in practice most condolence payments have been reviewed by a judge advocate, especially because of the requirement that they be vetted for FCA applicability.<sup>119</sup>

The authority to use CERP funds in Iraq expired in 2011 along with the United States' withdrawal from Iraq.<sup>120</sup> However, following the rise of the self-proclaimed Islamic State and the United States' subsequent military reengagement in Iraq, Congress authorized up to \$5,000,000 of CERP funds already approved for use in Afghanistan for fiscal year 2016 to be available for use as condolence payments in Iraq.<sup>121</sup> This renewed authority to use CERP funds in Iraq is a tacit admission that the United States anticipates future collateral damage from operations in Iraq despite the previous "withdrawal."<sup>122</sup> A retired Marine colonel stated that he was

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<sup>117</sup> Afghanistan CERP SOP, *supra* note 107.

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

<sup>119</sup> *Id.* at 4.B.2.

<sup>120</sup> Stuart W. Bowen, *Learning from Iraq: A Final Report from the Special Inspector General for Iraq Reconstruction, March 2013*, COUNCIL ON FOREIGN RELATIONS 45 (Mar. 6, 2013), <http://www.cfr.org/iraq/learning-iraq-final-report-special-inspector-general-iraq-reconstruction-march-2013/p30167>; *Learning From Iraq*, GLOBAL SEC'Y (Mar. 2013), <http://www.globalsecurity.org/military/library/report/2013/sigir-learning-from-iraq.pdf>.

<sup>121</sup> National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92 §1211, Stat. 1356 (2015) [hereinafter NDAA 2016].

<sup>122</sup> See Kate Brannan, *Pentagon Ready to Pay for the Iraqi Civilians It Kills. Next Step: Admit It Kills Civilians*, DAILY BEAST (Nov. 8, 2015, 9:00 PM), <http://www.thedailybeast.com/articles/2015/11/08/pentagon-ready-to-pay-for-the-iraqi-civilians-it-kills-next-step-admit-it-kills-civilians.html>. In the spring of 2015, the House and Senate defense committees debated whether CERP should be authorized again in Iraq. *Id.* The committees agreed to give the Department of Defense (DoD) access to Afghanistan CERP dollars for use in Iraq, on the condition that they would be used to cover accidental damage and death payments only, not for infrastructure or reconstruction. *Id.*



not surprised that U.S. military commanders wanted to start another CERP fund in Iraq, noting that CERP can make life easier for commanders due to its lack of bureaucratic procedural requirements. In commenting on its usefulness, the Marine Colonel stated, “They can respond quickly to things that come up . . . . You don’t have to put in forms and wait.”<sup>123</sup> Commander’s Emergency Response Program money is essentially “walking around money” for commanders, hence its popularity as a commander’s tool.<sup>124</sup>

### 3. *United States Agency for International Development Ad Hoc Programs*

Judge advocates in Grenada, frustrated by the combat activity exclusion of the FCA, turned to the USAID for funds to pay claims. In both Afghanistan and Iraq, the USAID has supplemented military condolence and compensation programs with its own aid programs including assistance for victims of conflict.<sup>125</sup> In May 2003, and in subsequent annual appropriations, Congress authorized the USAID to spend approximately \$40,000,000 to assist victims of U.S. military operations in Iraq.<sup>126</sup> Congress likewise has authorized \$60,000,000 for the *Afghan Civilian Assistance Program*, which includes assistance for victims of war.<sup>127</sup>

The USAID, however, has been careful to distinguish its programs in Iraq and Afghanistan from military condolence and compensation programs, specifying that its assistance is not “compensation” or “reparations.”<sup>128</sup> Rather, USAID assistance is “provided through contracts with local vendors to provide war victims with needed medical care, establish a livelihood, and/or rebuild homes destroyed by the war.”<sup>129</sup> Although the USAID has stepped in to work with judge advocates in the

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<sup>123</sup> *Id.* (quoting Retired Marine Colonel Mark Cancian).

<sup>124</sup> *Id.* “[The] CERP was originally envisioned to be walking-around money that commanders could use quickly and with few strings attached to respond quickly to the needs of the people they were supposed to be protecting in either Iraq or Afghanistan.” *Id.*

<sup>125</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, REPORT NO. E-267-08-002-P, AUDIT OF USAID/IRAQ’S MANAGEMENT OF THE MARLA RUZICKA IRAQI WAR VICTIMS FUND, (2008) [hereinafter RUZICKA REPORT].

<sup>126</sup> *Id.*

<sup>127</sup> Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 164 (2003).

<sup>128</sup> RUZICKA REPORT, *supra* note 125.

<sup>129</sup> *Id.*

past, such as in Grenada, their true role is long-term development.<sup>130</sup> Relying on the USAID to assist commanders requiring condolence funds is not a realistic way ahead, especially because the USAID does not operate in immature theaters.

### C. Condolence Payments around the World

While Army Regulation (AR) 27-20 only recognizes *solatia* as a known custom in the Federated States of Micronesia, Japan, Korea, and Thailand, *solatia*-like concepts such as “blood money” are traditional in many cultures around the world.<sup>131</sup> *Solatia*-like concepts are part of tribal or religious legal systems in some countries, while other countries have actually codified condolence payments into their formal judicial systems.<sup>132</sup>

#### 1. Blood Money in Islam

The U.S. military has been engaged in long-term kinetic operations in Iraq<sup>133</sup> and Afghanistan,<sup>134</sup> brief kinetic operations in Libya<sup>135</sup> and Pakistan,<sup>136</sup> joint security operations in Nigeria, maintains a permanent

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<sup>130</sup> Walerstein, *supra* note 14, at 333.

<sup>131</sup> See AR 27-10, *supra* note 34.

Payment of *solatia* in accordance with local custom as an expression of sympathy toward a victim or his or her Family is common in some overseas commands. *Solatia* payments are known to be a custom in the Federated States of Micronesia, Japan, Korea, and Thailand. In other countries, the FCC should consult the CCS or Commander, USARCS for guidance.

*Id.*

<sup>132</sup> Noreen Malone, *How Does Blood Money Work?*, SLATE (Mar. 20, 2009), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/03/how\\_does\\_blood\\_money\\_work.html](http://www.slate.com/articles/news_and_politics/explainer/2009/03/how_does_blood_money_work.html).

<sup>133</sup> BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2015 (2015).

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

<sup>135</sup> *Id.*

<sup>136</sup> Philip Rucker et al., *Osama bin Laden buried at sea after being killed by U.S. forces in Pakistan*, WASH. POST (May 2, 2011), [https://www.washingtonpost.com/politics/osama-bin-laden-is-killed-by-us-forces-in-pakistan/2011/05/01/AFXMZyVF\\_story.html](https://www.washingtonpost.com/politics/osama-bin-laden-is-killed-by-us-forces-in-pakistan/2011/05/01/AFXMZyVF_story.html)

camp in Djibouti,<sup>137</sup> and maintains air bases in Turkey<sup>138</sup> and Qatar.<sup>139</sup> A common thread tying these countries together is the religion of Islam.<sup>140</sup> The bulk of the U.S. military's activities in the past decades have taken place in Muslim-majority countries, where the payment of *diya*, meaning "blood money" or "financial compensation for homicide or injury" in Arabic, is either codified in statute or expected under common or tribal law.<sup>141</sup> *Diya* is not necessarily an admission of legal liability or acceptance of individual accountability or guilt. Rather, the payment of *diya* is a conciliatory act, often taking place among tribes or clans rather than between individuals.<sup>142</sup> In many cultures where *diya* is commonly practiced, collective guilt is also common, meaning members of a victim's group or tribe might view every member of a perpetrator's group or tribe as legitimate targets for revenge.<sup>143</sup> *Diya* payments are often collected from a group of people and accepted by a victim's group collectively, as opposed to being a transaction between individuals.<sup>144</sup>

The goal of *diya* is to stem retaliatory violence and restore peaceful relations, and the acceptance of *diya* is often viewed as a tacit agreement not to retaliate for perceived harm.<sup>145</sup>

The ultimate goal of blood money is to bring relationships, if not to the point of forgiveness and reconciliation, at least to the point where the aggrieved no longer feel the need for retribution or revenge above and beyond an accepted level of retaliation on par, or in lieu of retaliation at all; in essence, to break the cycle of deadly violence.<sup>146</sup>

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<sup>137</sup> SALAZAR, *supra* note 133; *see also Welcome to Camp Lemonnier, Djibouti*, CNIC, [http://www.cnic.navy.mil/regions/cnreurafswa/installations/camp\\_lemonnier\\_djibouti.html](http://www.cnic.navy.mil/regions/cnreurafswa/installations/camp_lemonnier_djibouti.html) (last visited May 26, 2016).

<sup>138</sup> *Incirlik Air Base*, AIR FORCE, <http://www.incirlik.af.mil/> (last visited May 26, 2016).

<sup>139</sup> Kia Atkins, *CSAF visits Al Udeid*, AIR FORCE (Dec. 22, 2014), <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/558627/csaf-visits-al-udeid.aspx>.

<sup>140</sup> *The world in muslim populations, every country listed*, DATABLOG, <http://www.the-guardian.com/news/datablog/2009/oct/08/muslim-population-islam-religion> (last visited May 26, 2016).

<sup>141</sup> *See* Scott C. Lucas, *Diya*, THE OXFORD ENCYCLOPEDIA OF ISLAM AND LAW (2016), <http://www.oxfordislamicstudies.com/article/opr/t349/e0039>; *see also* M. J. L. HARDY, BLOOD FEUDS AND THE PAYMENT OF BLOOD MONEY IN THE MIDDLE EAST (1963).

<sup>142</sup> *See* Wilson, *supra* note 79.

<sup>143</sup> *Id.* at 27.

<sup>144</sup> *Id.* at 110.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 16

American commanders in Iraq realized that they could take advantage of the tribal settlement concept to enhance their own security.

[In Iraq] the claims program was not only expanded to promote general goodwill; it was also intended to allow U.S. soldiers to take advantage of the Iraqi system of tribal settlement. In this system, the extended family of the victim of a death, injury or slight to honor gives up the right of revenge against the extended family of the perpetrator and reconciles with them after receiving a payment of blood money . . . . Such payments by U.S. forces would limit violence against them by those whose civilian family members had been injured or killed in U.S. operations.<sup>147</sup>

Interestingly, the concept of *diya* mirrors customary international law by acknowledging that those actually participating in combat are not entitled to condolence payments.<sup>148</sup> Under the *diya* framework, the family of an insurgent killed by U.S. forces during combat would not seek condolence.<sup>149</sup> However, the family of an innocent civilian killed by U.S. forces would feel entitled to *diya*.<sup>150</sup>

In April of 2003, U.S. forces killed eighteen civilians in Fallujah, Iraq.<sup>151</sup> Even more civilians were wounded in the incident, and the mayor of Fallujah informed U.S. forces that the only way to prevent mass retaliation for the incident would be to pay *diya*.<sup>152</sup> As one news source

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<sup>147</sup> Katherine Blue Carroll, *The Strangest Tribe: U.S. Military Claims in Iraq*, 22 MIDDLE EAST POLICY 40–41 (2015).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 43.

The restriction here to civilian deaths, and not those of Iraqis engaged in attacking U.S. forces, is an important one. Not only did the U.S. military not pay condolence payments in such situations, but Iraqi tribal law also suspends the system of negotiated payment during times of declared warfare. Iraqis seldom attempted to make claims for those hurt or killed while fighting.

*Id.*

<sup>151</sup> Hamza Hedawi, *U.S. Military Uses Unorthodox Tactics to Woo Violent Iraqi City*, ASS'D PRESS (July 30, 2003), <http://www.freerepublic.com/focus/f-news/955437/posts>.

<sup>152</sup> *Id.*

noted, the condolence payment did prevent retaliation. “Attacks against U.S. forces in Fallujah and its outlying districts which raged sporadically from May through early July have dropped markedly. It has been nearly two weeks since an American was killed in the area.”<sup>153</sup> Clearly, condolence payments are an accepted part of Iraqi culture, as well as in other Muslim cultures, and the period of conflict in Iraq and Afghanistan during which condolence payments were not authorized placed U.S. troops at risk of retaliation for civilian harm. A permanent condolence system would prevent such a mistake from occurring.

## 2. *Blood Money in Non-Muslim Countries*

The concept of blood money is not present solely in Muslim societies, and even in Muslim countries the concept of blood money existed in pre-Islamic tribal societies.<sup>154</sup> As one scholar noted, “One of the most amazing aspects of blood money is that it can be Islamic and non-Islamic, it can work with pastoralists and farmers, and it has functioned from Papua New Guinea to Albania.”<sup>155</sup>

Key elements across geographical, historical, ethnic and religious boundaries include:

1. Compensation in cases of homicide;
2. Payment (or contributions) by the perpetrator’s extended family or community passed to the community or family of the victim (with family being defined by degrees of closeness);
3. A sense that this collection and transference of payment constitutes a form of accountability for the wrong or harm; and,
4. Some sense of remedy; in essence, an intent to prevent or stop the taking of vengeance or a continual cycle of escalating revenge; in other words, breaking the cycle of violence.<sup>156</sup>

None of the four countries in which *solatia* is permanently authorized

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<sup>153</sup> *Id.*

<sup>154</sup> Wilson *supra* note 79, at 45.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 17.

are majority Muslim countries.<sup>157</sup> The U.S. military's most developed *solatia* program is in practice in Korea. The U.S. military's use of *solatia* in Korea, locally referred to as *hapuigeum*, is highly regulated down to the type of envelope to be used to present payment.<sup>158</sup> In Korea, *hapuigeum* is often brokered by the police as a way to settle matters outside of court.<sup>159</sup>

In Japan, condolence payments are known as *mimaikin* and are clearly distinguished from compensation because they are given as an expression of sympathy rather than an effort to make the victim whole.<sup>160</sup> The U.S. military has a permanent presence in Korea and Japan, and therefore has a strong interest in doing whatever it can to maintain good relations with the local population. The presence of the United States in Iraq and Afghanistan has been so prolonged, the same considerations should apply. In fact, these considerations should apply in any COIN conflict when U.S. forces must maintain the support of the local population.

#### D. Condolence—Not Compensation

While the FCA is a compensation scheme, *solatia* is clearly a condolence scheme. Condolence payments are not an admission of legal liability and in no way constitute a waiver of sovereign immunity exposing the United States to legal suit. It is crucial to distinguish between condolence payments and compensation payments. As discussed briefly above, it is also important to acknowledge that there is no legal obligation for the United States to make compensation or condolence payments for harm arising out of legal activities during armed conflict.<sup>161</sup> This distinction is key for the United States to avoid creating a new legal norm—that there is an obligation to pay for combat damage.

While International Humanitarian Law (IHL) provides for compensation resulting from a violation of IHL, such as the intentional killing of a civilian, there is no international legal obligation for a party to a conflict to compensate for legal collateral damage, such as the

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<sup>157</sup> DATABLOG, *supra* note 140.

<sup>158</sup> U.S. Forces Kor., REG. 526-11, UNITED STATES FORCES KOREA RELATIONS WITH KOREAN NATIONALS: CONDOLENCE VISITS AND SOLATIA, (28 Jan. 2010).

<sup>159</sup> Adam Walsh, *Rape Victim Speaks Out*, KOREA HERALD (Mar. 30, 2010), <http://www.koreaherald.com/view.php?ud=20090812000108>.

<sup>160</sup> Eric A. Feldman, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, 62 DEPAUL L. REV. 335 (2013).

<sup>161</sup> DoD LAW OF WAR MANUAL, *supra* note 43, para. 5.17.5.1.

unintentional killing of a civilian in an otherwise legal attack.<sup>162</sup> Notwithstanding the absence of any legal obligation, some have argued that there is a moral imperative to compensate for harm to civilians in armed conflict.<sup>163</sup> Amends are beginning to be recognized at the United Nations. The 2010 and 2012 United Nations Reports of the Secretary-General on the Protection of Civilians in Armed Conflict describe the making of amends as an emerging norm in international law; however, the norm is discussed in the context of harm caused by a law of war violation as opposed to lawful collateral damage.<sup>164</sup> The 2010 report of the United Nations Special Rapporteur on Extrajudicial Killings called on the international community to pay attention to the emerging practice of making amends and to study its significance, but again, the amends are in the context of a breach of the laws of armed conflict.<sup>165</sup> Making amends for lawful collateral damage is akin to a strict liability standard, where wrongfulness or negligence is not a factor, and would be financially unfeasible for most parties to an armed conflict.

There is a trend in international law over the past decade to conflate

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<sup>162</sup> *Id.*

<sup>163</sup> See generally Harvard International Human Rights Law Clinic, *Frequently Asked Questions on Amends*, CIVILIANS IN CONFLICT, [http://civiliansinconflict.org/uploads/files/publications/Amends\\_FAQ\\_2013.pdf](http://civiliansinconflict.org/uploads/files/publications/Amends_FAQ_2013.pdf). “U.S. Senator Patrick Leahy made the case for the moral imperative behind making amends when he stated in 2009, ‘To not respond, I think, goes to our very conscience and our very morality.’” *Id.*

<sup>164</sup> U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Doc. S/2012/376 (May 22, 2012), <https://docs.unocha.org/sites/dms/Documents/SG%20Report%20on%20PoC%2022%20May%202012.pdf>; U.N. Secretary-General, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, U.N. Soc. S/2010/579 (Nov. 11, 2010), <http://reliefweb.int/node/375487>. The 2010 report states,

I note the emerging practice of several States, one that other parties to armed conflict might consider, of acknowledging the harm they cause to civilians and compensating victims. The practice of making amends may range from public apologies to financial payments and livelihood assistance provided to individuals, families and communities. This practice must not be seen, however, as an alternative to prosecuting those responsible for violations of international humanitarian and human rights law and delivering justice to the victims and their families and communities.

*Id.*

<sup>165</sup> U.N. Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston*, U.N. Doc. A/HRC/14/24 paras. 84–88 (May 20, 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.pdf>.

human rights law with international humanitarian law, and a growing expectation that parties to an armed conflict comport themselves like a domestic police force as opposed to a combat force.<sup>166</sup> The United States takes the position that in an armed conflict, international humanitarian law is the *lex specialis*, and there is no legal obligation to make compensation or condolence payments during an armed conflict.<sup>167</sup> Any decision to make a condolence payment is a policy decision, not based on any legal requirement. Harm to civilians in armed conflict is tragic but often unavoidable. Collateral damage that is lawful under the laws of armed conflict should not require compensation.

In fact, the United States has likely refrained from adopting a permanent condolence system because of concern about creating a new international norm which would then bind it to pay for collateral damage in all future conflicts.<sup>168</sup> The United States should not bind itself to mandatory compensation in all future counterinsurgency operations, let alone total war situations. Such a legal norm would be impractical and financially disastrous. A practical approach prevents the United States from accepting compensation or condolence payments as a legal obligation.

The United States must avoid creating a new international legal norm by being clear that a permanent condolence system is an expression of sympathy only and not compensation. The provision of condolence payments is not *prima facie* evidence of legal liability for causing harm, and in no way is a waiver of sovereign immunity.<sup>169</sup> At the same time, a

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<sup>166</sup> Wells Bennett, *The Extraterritorial Effect of Human Rights: The ECHR's Al-Skeini Decision*, LAWFARE (July 12, 2011), <https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision>.

<sup>167</sup> See Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, 46 IUS GENTIUM 265, 289 (2015).

<sup>168</sup> See Ryan Scoville, *How Do American Courts (and Scholars) Ascertain Customary International Law?*, LAWFARE (Oct. 29, 2015), <https://lawfareblog.com/how-do-american-courts-and-scholars-ascertain-customary-international-law>. “The established doctrine is that custom arises from general and consistent state practice that is backed by a sense of legal obligation. For the most part, this has been understood to require broad surveys of foreign state practice, plus inquiries into official motives.” *Id.*; see also Gilbert, *supra* note 23, at 412. “This may explain why [the] campaign to have military payments recognized as an *entitlement* of war (and not optional) received considerable pushback, especially from militaries, for it would transform the international norms of war and principle of ‘collateral damage’ as they currently exist.” *Id.*

<sup>169</sup> See Witt, *supra* note 61, at 1458–59 (2008).



condolence payment should not constitute a bar to future claims against the United States. Condolence payments must be accompanied by culturally appropriate and earnest condolence expressions. In fact, criticism of recent U.S. compensation schemes have involved allegations that the United States seeks to wash its hands of any liability for civilian harm through condolence payments.<sup>170</sup> By adopting a practical approach to the handling of condolence payments, the United States not only addresses some of the criticisms currently leveled against it, it creates the foundation from which to argue against any future efforts to make such payments a legal obligation under international law.

### III. Condolence Payments as a Commander's Tool

#### A. Counterinsurgency Operations

Counterinsurgency is the primary philosophical tactic used to address security challenges faced by the United States in this century.<sup>171</sup> The U.S. Army's own doctrine has established condolence payments as a valuable tool in COIN operations.<sup>172</sup> Commanders and judge advocates have

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The basic jurisdictional rule in American law (as in international law) was one of sovereign immunity: a state may not be hauled against its will into its own civil courts or into those of coequal sovereigns . . . . [Under] traditional international law rules, members of the armed forces of one state who go with their armies into the territory of another are generally accountable only to their own legal system, not to the legal system of the state in which they find themselves.

*Id.*

<sup>170</sup> See Gilbert, *supra* note 23, at 412. "The profligate disbursement of money by troops is thus used not only to constitute civilian harm as accidental but to deny accountability."

*Id.*

<sup>171</sup> Eliot A. Cohen, *Preface to U.S. Gov't Interagency Counterinsurgency Initiative*, U.S. GOV'T COUNTERINSURGENCY GUIDE (Jan. 2009), <http://www.state.gov/documents/organization/119629.pdf>.

<sup>172</sup> See FM 3-24.2, *supra* note 16, para. 7-89.

Recent experiences have shown the effectiveness of using money to win popular support and further the interests and goals of units conducting counterinsurgency operations . . . . A counterinsurgency force can use money to . . . [r]epair damage resulting from combined and coalition operations . . . [and p]rovide condolence payments to civilians for casualties from combined and coalition operations.

*Id.*

observed that condolence payments can contribute to a unit's overall force protection and mission objective.<sup>173</sup> In fact, a unit's lack of ability to provide condolence payments has been shown to make a unit more vulnerable.<sup>174</sup>

In Afghanistan in 2001, the Taliban was offering aid to civilians harmed by U.S. attacks, while the U.S. military still lacked authority to provide condolence payments.<sup>175</sup> This lack of authority to express condolence "exposed a strategic vulnerability and opened [the United States] to charges of indifference to the plight of civilians."<sup>176</sup> This absence of condolence authority does little to draw the allegiance of the local population towards the United States and away from armed insurgents. As one American lawyer and former intelligence officer in Iraq noted,

By foregoing a broader, culturally expected reconciliative process [such as a condolence payment], the U.S. military misses valuable opportunities to engage aggrieved Iraqi family members, demonstrate genuine compassion and sympathy, explain their objectives in Iraq, and increase mutual understanding. This missed opportunity sacrifices a chance to potentially win that Iraqi parent's "heart and mind" through dialogue.<sup>177</sup>

Commanders value the ability to make condolence payments as quickly as possible, and add that the payment transaction offers an opportunity for dialogue with the local population and personal expression of sympathy.<sup>178</sup>

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<sup>173</sup> See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994–2008, 256 (1 Sept. 2008) [hereinafter FORGED IN THE FIRE].

<sup>174</sup> See *infra* Section IV(F).

<sup>175</sup> See Ronen, *supra* note 22, at 101–02.

<sup>176</sup> *Id.*

<sup>177</sup> Jeremy Joseph, *Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments*, 23 NEGOT'N J. 219, 221 (2007).

<sup>178</sup> See *Marines Continue Condolence Payments in Najaf*, GLOBAL SEC'Y (Oct. 6, 2004), <http://www.globalsecurity.org/military/library/news/2004/10/mil-041006-centcom01.htm>. In September 2004, following weeks of intense fighting in Najaf, Iraq, by multinational and Iraqi security forces against Shiite militias, a Marine unit sent a mobile condolence payment team through neighborhoods to expedite condolence payments to civilians caught in the crossfire. *Id.*

In both Iraq and Afghanistan, condolence payments became key commanders' tools. Protracted COIN operations ideally limit fighting, but can involve a great degree of unwanted civilian harm due to fighting in populated areas and lack of a uniformed or clearly distinguished enemy.<sup>179</sup> At the same time, COIN operations include a focus on nation-building and winning hearts and minds, fostering positive relationships with the local population crucial to mission success.<sup>180</sup> Contemporary COIN theory focuses on avoiding the alienation of the civilian population.<sup>181</sup>

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We've gone mobile to ensure every Najafi gets the opportunity to get quickly compensated for legitimate losses or injury," said [Colonel] Anthony Haslam, commanding officer of the Marine unit. "We're thinking outside the box to expedite a slow process, motivated by the desire to make life better for the locals.

*Id.*

<sup>179</sup> See Ronen, *supra* note 22.

<sup>180</sup> *Id.* at 215–16.

*Ex gratia* payments are limited to a discrete type of conflict, even if those constitute the principal conflicts in which the [United States] and its allies have been involved since World War II. These are conflicts where the injuring Western powers have perceived their opponents not as a monolithic enemy but as a mixture of potential allies and enemy insurgents. The objectives of the Western powers have been broader than merely a military counterinsurgency victory, and include nation and state-building and reconstruction. These powers also maintain a visible presence among the civilian population.

*Id.*

<sup>181</sup> W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 INTERCULTURAL HUM. RTS. L. REV. 1 (2013).

Yet, there are compelling pragmatic, strategic reasons why payment for collateral damage in elective armed conflict should not fall prey to these economic disinclinations. In the so-called second and third generation modes of warfare, innovated and used with devastating effect by Chairman Mao and General Giap, the support of the non-combatant population is deemed vital. Hence, contemporary counterinsurgency theory now focuses on avoiding alienating the non-combatant population. In those terms, timely compensation to individuals who have suffered collateral damage should be seen as a strategic device . . . . The point is that "strategic compensation" is self-serving; in the area of collateral damage, strategic compensation and international human rights converge.

*Id.*

Condolence payments have proven to be an effective tool in “winning hearts and minds” and stemming violence against U.S. servicemembers.<sup>182</sup> This is in contrast to the FCA, which, as discussed above, was designed as a tool for traditional warfare, not COIN operations, and explicitly prohibits payments made solely out of compassion.<sup>183</sup>

Condolence payments in COIN operations mirror the concept of blood money, particularly because counterinsurgency operations often involve protracted presence of U.S. military among a foreign population. The U.S. combat unit represents the group from whom the payment is collected. The payment is made by a certain unit on behalf of persons, whether known or unknown, who inflicted harm that is being attributed to the unit or to the U.S. military writ large. The payment may be made to the individual harmed, but might be made to that individual’s dependents or some other representative group. The hope of the U.S. military is that the payment will foster good relations and dissuade retaliation.<sup>184</sup> In theory, a group that feels their loss has been properly acknowledged by the U.S. military is less likely to retaliate by supporting insurgent groups or joining insurgent groups themselves.<sup>185</sup>

Professor Katharine Blue Carroll, a professor of political science at Vanderbilt University, was part of a human terrain team in Iraq in 2008 and 2009.<sup>186</sup> She observed how important it is for soldiers to integrate cultural knowledge into their COIN operations, especially regarding the handling of claims and condolence payments, by stating,

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<sup>182</sup> See Ronen, *supra* note 22, at 215–16.

<sup>183</sup> See *supra* Section II(A)(4) (discussing the FCA’s roots in traditional warfare).

<sup>184</sup> Reisman, *supra* note 181.

<sup>185</sup> See Carroll, *supra* note 147, at 50.

Iraqis were, in fact, willing to treat the U.S. military as a fellow tribe to the extent that they offered it access to their ancient system of tribal settlement, allowing American soldiers to pay [condolence] and avoid the revenge attacks that tribal-minded Iraqis, at least, were culturally required to attempt. This was probably most likely when the payments were appropriate and, ideally, not unilaterally set; when the U.S. military took responsibility for the incident; and when the claims process did not dishonor the victim or his or her family.

*Id.*

<sup>186</sup> See Carroll, *supra* note 147, at 41.

Examining U.S. military claims payments through the lens of Iraq's system of tribal settlement contributes to the ongoing debate about the role of cultural knowledge in U.S. military operations . . . . It may also assist in developing U.S. military claims system in future conflicts, as similar forms of customary dispute resolution exist throughout much of the Middle East, Africa, Southeast Asia and even Latin America. In fact, these forms of customary law may not only be relevant to issues of designing claims systems where they are prevalent, but also to negotiating the peaceful end to conflicts in those places.<sup>187</sup>

Professor Carroll also noted that in a country where blood money is expected as condolence, it is crucial to emphasize that a condolence payment is not a form of compensation or an attempt to relieve the United States of legal liability for the harm caused.<sup>188</sup> This is in contrast to the majority of the standard forms given to local nationals during the claims process, which indicate that accepting compensation or condolence relieves the United States of legal liability for the harm caused.<sup>189</sup> A commander on the ground is not likely to be concerned with a potential lawsuit against the United States down the road. The commander's concern is accomplishing the mission and keeping troops safe, including being safe from retaliation for collateral damage.

## B. Non-Combat Operations

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 47.

<sup>189</sup> An example of a legal liability waiver is available for viewing on the American Civil Liberties Union (ACLU) website pursuant to a Freedom of Information Act disclosure. Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request, Army Bates 24349-24394, <https://www.aclu.org/sites/default/files/webroot/natsec/foia/log2.html>. The language on the form states the following:

Your claim . . . filed pursuant to the Foreign Claims Act has been approved in the amount of \$3500.00. The proposed payment, if accepted, will constitute a full and final satisfaction of your claim against the United States and against any of its entities and a full and final waiver by you of your claim against the United States and against any of its entities.

*Id.*

Condolence payments are not only important during combat operations. For instance, legal personnel assigned to Combined Joint Task Force-Horn of Africa (CJTF-HOA) conducting non-combat operations noted in an after-action report (AAR) that a condolence payment made within twenty-four hours of an incident is customary in many East African cultures, and that this quick timeline did not allow for the thorough investigation and adjudication process required under the FCA.<sup>190</sup> When CJTF-HOA fell under the authority of U.S. Central Command, they had been authorized to pay *solatia*.<sup>191</sup> However, when CJTF-HOA was reorganized to fall under Africa Command (AFRICOM) they lost *solatia* authority and lacked any mechanism for a quick payment to an aggrieved foreign national in the form of a condolence or *solatia* payment.<sup>192</sup> While the CJTF-HOA AAR recommended working with AFRICOM Office of Legal Counsel (OLC) to institute a condolence payment mechanism, this authority gap would not have existed in the first place if a permanent condolence payment scheme were in place.<sup>193</sup>

The Army is moving toward a regionally aligned force model, directing units to align with specific foreign nations for training and operations.<sup>194</sup> This training concept includes increased security cooperation operations, meaning U.S. troops find themselves engaged in training exercises with foreign militaries around the world.<sup>195</sup> For example, one brigade stationed at Fort Riley, Kansas, was engaged in 128 separate missions in twenty-eight different African countries in 2013 alone.<sup>196</sup>

Not only does the U.S. military increasingly engage in military training abroad, it also sends troops to act as “advisors” in active combat zones, such as advising the Ugandan military in areas where the Lord’s

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<sup>190</sup> Combined Joint Task Force-Horn of Africa, Staff Judge Advocate AFTER ACTION REPORT: CAMP LEMMONIER DEPLOYMENT JULY 11–MAY 12 (May 22, 2012) (maintained by CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See Rosa Brooks, *Portrait of the Army as a Work in Progress*, FOREIGN POL. (May 8, 2014), <http://foreignpolicy.com/2014/05/08/portrait-of-the-army-as-a-work-in-progress/>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

Resistance Army is active.<sup>197</sup> The presence of U.S. troops in countries with compromised security and weak rule of law has the potential to quickly escalate. The possibility for U.S. troops to find themselves suddenly engaged in combat in any of these nations is not far-fetched. While the FCA would apply in any of these countries for non-combat damage, there is no current, permanent framework to address the possibility of addressing collateral damage from combat should it arise in any of these nations around the world.

### C. Condolence Payment Program Challenges

Condolence payments are a commander's tool, and just like any tool, they are only as effective as the individual who wields them. Insensitive condolence payment procedures can have an opposite effect than their intent and insinuate that the United States is attempting to absolve itself of any responsibility.<sup>198</sup> Even in countries where "blood money" is culturally accepted, condolence payments may be insulting to local populations if they are not accompanied by an appropriate expression of apology.<sup>199</sup> One Iraqi sheikh explained, "You can never pay the price of a human soul; it is too valuable. So the family has to accept that the [condolence payment] is not that. It is a payment for forgiveness and moving forward."<sup>200</sup> If a condolence payment is not handled properly, it may be counter-productive.

Condolence payments have not always been accepted as effective commander's tools by U.S. courts. *Koohi v. United States*, the seminal case discussing the combat activities exception, set forth three main arguments against paying combat claims: first, the possibility of paying for damage might have a chilling effect on our troops and make them more timid at a time when they should be forcefully overcoming enemy forces; second, combat by its very nature is overwhelmingly violent, and it is not

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<sup>197</sup> Karl Wycoff, Deputy Assistant Secretary, Bureau of African Affairs, Department of State, Remarks at The Center for Strategic and International Studies (Feb. 23, 2012) (explaining that President Obama had authorized a small number of U.S. troops to work with Ugandan forces pursuing the Lord's Resistance Army, engaging in training and operational planning).

<sup>198</sup> See Gilbert, *supra* note 23, at 407. "[T]he military's appeal to local customs are somewhat disingenuous, in that military compensation has a much longer genealogy that suggests that the money is paid out of military self-interest rather than response to local needs." *Id.*

<sup>199</sup> *Id.* at 403–21 (2015).

<sup>200</sup> See Carroll, *supra* note 147, at 47.

logical to compensate a few claimants when violence is impacting an entire population; and third, servicemembers should not be punished for injuring members of the enemy military or civilian population during combat.<sup>201</sup> None of these arguments actually apply in the context of COIN operations.

There is no evidence that the possibility of having to pay a condolence claim has ever impacted a combat mission. The actual restraint on decision-making in combat is the commander's adherence to rules of engagement, not the financial considerations of a condolence payment.<sup>202</sup> Especially in the COIN context, the negative reaction caused by civilian harm is more persuasive than financial considerations. When a commander determines whether and how to attack a target, the assessment includes whether the expected military advantage will be disproportionate to the potential civilian casualties, and the associated negative impact of the operation in the long term.<sup>203</sup>

The argument that it is illogical to compensate just a few victims of conflict when an entire region is at war may be consistent with conventional war, where the focus is kinetic operations and total defeat of the enemy. However, this argument is not persuasive in the context of

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<sup>201</sup> *Koohi v. United States*, 976 F.2d 1328, 1334–35 (9th Cir. 1992).

<sup>202</sup> See James F. Garrett, *Necessity and Proportionality in the Operation Enduring Freedom VII Campaign* (Mar. 15, 2008) (Strategy Research Project, U.S. Army War College), <http://www.dtic.mil/dtic/tr/fulltext/u2/a479007.pdf> (discussing the analysis a commander and judge advocate engage in when determining whether to engage a target, financial considerations not being mentioned among the criteria).

<sup>203</sup> See GANESH SITARAMAN, *THE COUNTERINSURGENT'S CONSTITUTION: LAW IN THE AGE OF SMALL WARS* 50 (2012).

In counterinsurgency, the military side of the proportionality balancing test is thus handicapped by the fact that any attack may cause backlash. As a result, counterinsurgency might interpret proportionality not as military benefits versus humanitarian costs but rather as a cost-benefit analysis, in which humanitarian and strategic interests operate on both sides of the scale and incorporate direct and indirect effects. Most important, military action appears both as a cost and a benefit, not just as a benefit: killing civilians and even legitimate targets might be costly in terms of winning over the population if it could result in substantial backlash. Counterinsurgency's proportionality test therefore places a thumb on the scale against military action. As a result, proportionality in counterinsurgency is likely to be far more humanitarian in its orientation than was proportionality in conventional warfare.

*Id.*



COIN operations, where the mission shifts from total war to winning hearts and minds:

Counterinsurgency's win-the-population approach differs from kill-capture in two ways. First, although counterinsurgency has a place for killing and capturing enemies, kill-capture is not the primary focus. Because insurgents gain strength from the acquiescence of the population, the focus of counterinsurgency is building the population's trust, confidence, and cooperation with the government. Second, counterinsurgency is not limited to military operations. It includes political, legal, economic, and social reconstruction in order to develop a stable, orderly society, in which the population itself prevents the emergence or success of the insurgency.<sup>204</sup>

The final *Koohi* argument, that servicemembers should not be punished for injuring enemies or civilians, makes little sense. Should a servicemember harm someone in a manner violating the laws of war, the Uniform Code of Military Justice will provide for their punishment.<sup>205</sup> However, a condolence payment cannot be construed to be a punishment against that servicemember, especially if the payment comes from a condolence-specific fund and not from the servicemember's unit's operational or CERP funds. A soldier should be punished for violating the laws of war.<sup>206</sup> The fact that those acts required a condolence payment does not enter into the decision to punish for commission of a crime.

Condolence payments are not a perfect instrument, but if the United States can trust its military commanders to make life-and-death decisions, they should be trusted to use their own judgment in determining whether condolence payments should be used in a certain battlespace and in which cases. When necessary, the use of condolence payments could always be withheld by higher authorities or restricted through operational orders, and in joint and coalition environments, in consultation with U.S. multinational partners. The permanent condolence payment system proposed below relies on the good judgment of commanders at all levels,

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<sup>204</sup> See Sitaraman, *supra* note 45, at 1771.

<sup>205</sup> See DoD LAW OF WAR MANUAL, *supra* note 43, para. 18.19.3.1 "The principal way for the United States to punish members of the U.S. armed forces for violations of the law of war is through the Uniform Code of Military Justice." *Id.*

<sup>206</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 507 (18 July 1956).

judge advocates, and other key staff on the ground.

#### IV. A New Approach: A Permanent Condolence Payment System

This article's proposed permanent condolence payment framework would be a commander's tool available throughout the DoD. Congress has taken the steps to create a DoD-wide authority for condolence payments, and the President has emphasized the need to make such payments, but the DoD has not taken any steps to operationalize the condolence payment framework through a directive or service-specific updates to regulations governing claims and condolence payments.

##### A. Executive Order 13732

On July 1, 2016, President Obama signed Executive Order 13732, titled United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving Use of Force.<sup>207</sup> Executive Order 13732 directs all relevant U.S. departments and agencies to enhance their focus on the prevention of harm to civilians in conflict, as well as to offer condolence payments.<sup>208</sup> Executive Order 13732 states, "In furtherance of U.S. Government efforts to protect civilians in U.S. operations involving the use of force in armed conflict . . . , and with a view toward enhancing such efforts, relevant departments and agencies shall continue to take certain measures in present and future operations."<sup>209</sup> The order continues, "In particular, relevant agencies shall, consistent with mission objectives and applicable law, including the law of armed conflict . . . acknowledge U.S. Government responsibility for civilian casualties and offer condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed."<sup>210</sup> At first glance, it appears that the President of the United States has ordered the DoD to offer condolence payments in all future armed conflicts. The implied task, then, would be for the DoD to create a permanent condolence payment system. However, the DoD has not yet taken any steps to put the order into effect, and the tasking is extremely broad. In fact, the position of the DoD is that Executive Order 13732 is not actually a tasking for agencies to take any

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<sup>207</sup> Exec. Order No. 13732, 3 C.F.R. 81 (2016).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

action at all.<sup>211</sup> Rather, it is simply a restatement of best practices already in place:

Executive Order 13732 is declaratory in nature, expressing the best practices currently in place, including those related to offering condolence payments to the families of civilians harmed in combat operations. Such *ex gratia* payments are a tool available to commanders for addressing civilian harm, where the commander determines they are feasible, appropriate, and consistent with military objectives. As such, commanders have the authority they need to implement effective condolence payments programs.<sup>212</sup>

This interpretation does seem consistent with the language of the order, which states: “The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians.”<sup>213</sup> Further, even if President Obama’s intent was to order the creation of a new condolence payment mechanism, he does not possess the power to fund such a mechanism.<sup>214</sup>

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<sup>211</sup> E-mail from Tara Jones, Foreign Affairs Specialist, Office of the Under Secretary of Defense for Policy (August 19, 2016 4:17 PM) (on file with the author) [hereinafter Jones E-mail].

<sup>212</sup> *Id.*

<sup>213</sup> Exec. Order No. 13732, *supra* note 207.

<sup>214</sup> See Dino P. Christenson & Douglas L. Kriner, *Symposium: Executive Discretion and the Administrative State: Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897, 908 (2015).

[W]e argue that presidents consider more than just whether Congress or the courts will act affirmatively to overturn a unilateral presidential order. Rather, presidents consider the longer-term political costs that unilateral action may entail. These political costs can take many forms, two of which are particularly important. First, when presidents act unilaterally, they may burn bridges with members of Congress opposed to the action on political, ideological, or even constitutional grounds. To be sure, in almost all circumstances, presidents will be able to carry the day and beat back any legislative effort to undo what they have done unilaterally. However, the ill will so generated on Capitol Hill may prove politically costly the next time the president’s policy wishes require action that only Congress can take. For example, despite being a rather blunt instrument, Congress retains the power of the purse and therefore, ultimately, the power to support or de-fund most policies that presidents begin unilaterally.

Congress, on the other hand, does have the ability to fund a condolence payment program, but without the powers to fund a program and the powers to authorize a program acting in concert, a permanent condolence payment program will never be realized.

#### B. Operationalizing Section 8121

Vermont Senator Patrick Leahy has been a long-time proponent of a permanent condolence payment system for civilian harm.<sup>215</sup> During a contentious and hurried legislative session regarding the 2015 federal budget, Senator Leahy's staff slipped a framework and funding authorization for battle compensation into Section 8121 of the 2015 Consolidated and Further Continuing Appropriations Act.<sup>216</sup> Section 8121 allows the Secretary of Defense to allocate funding from the Pentagon budget to an *ex gratia* payment program.<sup>217</sup> Even though Section 8121 passed into law along with the rest of the Appropriations Act, the DoD has not yet taken any steps to put Section 8121 into action.<sup>218</sup> The Department of Defense states that Section 8121 created an appropriation only, and not the actual authority to create a payment program.<sup>219</sup> The fact that U.S.

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<sup>215</sup> See Johnsen, *supra* note 9.

<sup>216</sup> See Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014); see also Johnsen, *supra* note 9.

Senator Leahy's Staff Member, [Tim Rieser], was working on slipping the provision directly into the appropriations bill . . . a giant end run around the Pentagon's defenses to give the department money it didn't want. Nothing could be stripped out; either everything went through or nothing did. That was the setup—an all-or-nothing bill against a ticking clock—that Rieser used to turn his language into law. No one from the Pentagon had time to find it, let alone block it. More than 300 pages into the bill, the single paragraph, innocuously titled Section [*sic*] 8127, and its eight subsections, taking up just over two pages of text, were easy to miss.

*Id.*

<sup>217</sup> *Ex gratia*, meaning “from favor” in Latin, is a common legal term for a payment made out of a sense of moral obligation as opposed to legal obligation. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ex%20gratia> (last visited May 26, 2016).

<sup>218</sup> E-mail from The Office of Senator Patrick Leahy (D-Vt), author of section 8121 (May 18, 2016 5:46 PM) (on file with the author) [hereinafter Leahy E-mail].

<sup>219</sup> Jones E-mail, *supra* note 212.

legislators would rather extend the Afghanistan CERP fund to cover new U.S. engagements in Iraq rather than breathe life into Section 8121 may indicate the U.S. government prefers to continue a piecemeal approach to honoring civilian harm caused by our forces.

Section 8121 of the 2015 Consolidated and Further Continuing Appropriations Act is a starting point, but it is not a permanent solution by any means. First, Section 8121 only tapped into the \$30,824,752,000 in DoD-wide funds appropriated for Fiscal Year 2015.<sup>220</sup> These funds were only made available for Fiscal Year 2015, meaning that this funding source has already elapsed without an authorization in place to use the funds. Second, Section 8121 provided that the Secretary of Defense could prescribe regulations governing *ex gratia* payments for damage, personal injury, or death that is incident to combat operations of the U.S. Armed Forces in a foreign country.<sup>221</sup> The Secretary of Defense has not prescribed any such regulations. The Secretary also has not appointed or delegated the authority to appoint any military commanders as individuals authorized to provide *ex gratia* payments in their discretion, as section 8121 allows.<sup>222</sup>

Although Section 8121 appears to be dead in the water, it is useful to evaluate its well thought-out details. Under Section 8121 an *ex gratia* payment may only be provided if: (1) the prospective foreign civilian recipient is determined by the local military commander to be friendly to the United States; (2) a claim for damages would not be compensable under [the FCA]; and (3) the property damage, personal injury, or death was not caused by action by an enemy.<sup>223</sup> Section 8121 clearly states that any *ex gratia* payments are not admission or acknowledgment of legal

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Regarding Section 8121 of Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014), it is my understanding that this provision created an appropriation only. As previously stated, we believe DoD currently has the appropriate tools necessary to ensure an effective condolence payment program as one tool for commanders to address civilian harm.

*Id.*

<sup>220</sup> H.R. Rep. No. 114-139, 114th Cong., (2015–2016) Department of Defense Appropriations Bill, 2016 (2016) “Fiscal year 2015 appropriation . . . [is] \$30,824,752,000.” *Id.*

<sup>221</sup> See Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113-235, 128 Stat. 2130 (2014).

<sup>222</sup> Leahy E-mail, *supra* note 218.

<sup>223</sup> Consolidated and Further Continuing Appropriations Act, *supra* note 221.

obligation to compensate, just like *solatia*.<sup>224</sup>

Section 8121 also provides that the Secretary of Defense should determine whether an *ex gratia* program is appropriate in a particular setting, and,

The amounts of payments, if any, to be provided to civilians determined to have suffered harm incident to combat operations of the Armed Forces under the program should be determined pursuant to regulations prescribed by the Secretary and based on an assessment, which should include such factors as cultural appropriateness and prevailing economic conditions.<sup>225</sup>

Section 8121 mandates that any payments require legal review, and a written record of any payment offered or denied must be kept by the local commander and submitted to an appropriate office designated by the Secretary of Defense.<sup>226</sup> Section 8121 also places a reporting requirement on the Secretary of Defense, requiring an annual report to congressional defense committees on the efficacy of the *ex gratia* payment program, “including the number of types of cases considered, amounts offered, the response from *ex gratia* payment recipients, and any recommended modifications to the program.”<sup>227</sup>

This article’s proposed permanent condolence payment program mirrors Section 8121, but suggests additional enhancements and details to ensure that such a program will be as useful and flexible as possible for commanders. One such suggestion is an annual reporting requirement.<sup>228</sup> Although an annual reporting requirement would be one more task burdening a commander’s already significant reporting obligations, the data gathered would be valuable for assessing how U.S. forces are causing and addressing collateral damage. Additionally, Section 8121, recommends that the Secretary of Defense hold the authority for condolence payments to be made in certain areas of operations.<sup>229</sup> In contrast, the proposed permanent condolence system would operate from the standpoint that the authority to offer condolence is a default

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<sup>224</sup> *See id.*

<sup>225</sup> *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *Id.*

<sup>228</sup> *See id.*

<sup>229</sup> *Id.*

presumption that may then be withheld by higher authorities should they choose to do so, an already familiar approach to managing authorities, with the most notable example being the U.S. Standing Rules of Engagement.<sup>230</sup>

### C. An Envelope of Money Is Not Enough—Actual Condolence Is Required

Simply dispensing money to victims does not meet the intent of condolence payments.<sup>231</sup> A condolence payment will only foster reconciliation if the victims feel that their loss is truly recognized.

Unfortunately [the condolence payment] process as it currently stands—condolence payment *sans* dialogue—is relatively ineffective because it lacks what lies at the core of the traditional Arab practice associated with condolence payments: a reconciliative process. By handing out payments with minimal dialogue and interaction, America is failing to achieve its counterinsurgency goal in this area, and both the Iraqi population and U.S. troops pay the price.<sup>232</sup>

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<sup>230</sup> *Id.*; see INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY JA 422, OPERATIONAL LAW HANDBOOK 81–84 (2015).

Discussing the standing rules of engagement and use of supplemental measures: “Absent implementation of supplemental measures, commanders are generally allowed to use any weapon or tactic available and to employ reasonable force to accomplish his or her mission, without having to get permission first.

*Id.*

<sup>231</sup> See Carroll, *supra* note 147, at 43.

I argue that Iraqis did accept such payments as [condolence], especially when U.S. payments were negotiated, came with an acceptance of responsibility, and were not paid in a way that further dishonored the victim’s family. However, the U.S. military was inconsistent in applying these three criteria to its claims payments across the course of the war.

*Id.*

<sup>232</sup> Joseph, *supra* note 177, at 224.

The ability to engage in a truly reconciliative process is both resource- and security-dependent. Sufficient staff, including translators and security personnel, are necessary to carry out a reconciliation mission. Security considerations are paramount, and a unit may not always have the ability to engage in a dialogue safely.

One suggestion for truly effective mediation is to involve a respected local authority as a mediator of the condolence payment event, such as a religious leader, mayor, tribal elder, or a nongovernmental organization worker.<sup>233</sup> In the context of Iraq, one scholar suggested that “the mediator should be a respected community figure, to ensure the aggrieved Iraqi feels the process is meaningful, independent and credible: an Iraqi process, led by Iraqis for the purpose of Iraqi rehabilitation, but with American participation.”<sup>234</sup> This is in contrast to the “perfunctory, quota-driven, shrink-wrapped, and prescribed DoD mediation program where Iraqi participants are ushered through like extras on a movie set.”<sup>235</sup> One brigade commander in Iraq regularly engaged local sheikhs to facilitate condolence payments.<sup>236</sup> “The benefit of this was not only that the family gave up their right of revenge; it also strengthened the influence of those sheikhs willing to work with that brigade.”<sup>237</sup>

When the actual payment method of condolence is culturally appropriate, it is more likely to meet the aim of enhancing U.S. security. For example, in Iraq, when a *diya* payment is made, members of both tribes then sit together for coffee or a meal.<sup>238</sup> In Iraqi tribal culture, it is against custom to share food with someone involved in an outstanding dispute.<sup>239</sup>

Iraqis intending to take revenge against Americans despite having received payments would have been unlikely to share meals with them, yet Iraqis did eat with Americans who delivered payments. [One unit that ate lunch with the Iraqis accepting a condolence payment]

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<sup>233</sup> *Id.* at 234.

<sup>234</sup> *Id.* at 245. “The independent value of a cathartic, reconciliative, culturally-tailored process can play a role beyond Iraq, such as ongoing operations in Afghanistan, and future nation-building operations.” *Id.*

<sup>235</sup> *Id.* at 235.

<sup>236</sup> See Carroll, *supra* note 147, at 48.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 44.

<sup>239</sup> *Id.*



never experienced subsequent violence traceable to the [death for which condolence was made].<sup>240</sup>

In regions where security allows for non-military agencies, such as USAID or units akin to provincial reconstruction teams (PRTs), there may be an opportunity for units to augment whatever expertise their own civil affairs officers possess by teaming with PRTs or offices such as the USAID Office of Conflict Management and Mitigation, which conducts field work around the world fostering reconciliation.<sup>241</sup>

#### D. Combat Activity as a Factor, Not an Exclusion

Under the FCA framework, the combat activity exclusion is a total bar to compensation, whereas *solatia* and CERP condolence payments procedures contain no guidance at all regarding the nature of the causation of harm.<sup>242</sup> A middle-ground for a permanent condolence payment framework would include the combat-related causation of the harm as a factor to be weighed in determining whether to make a payment, rather than a total bar.<sup>243</sup> The gravity of the harm should be taken into

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<sup>240</sup> *Id.* Another example of a culturally appropriate condolence payment being an effective means of preventing violence is quite powerful.

In late 2003, north of Baghdad, soldiers shot at what they believed were insurgents hiding in the bushes near where an IED had recently gone off, but they killed two young sisters from a village near their base. Although the girls' village had previously been quiet, each night for a week after their deaths, mortars were shot from their village into the base. The unit's commander ultimately paid the girls' family \$2000, an amount that was suggested to him by the local police chief. The payment was delivered at a meeting modeled on the tribal system. The mortars stopped immediately, and it was six months or more before the base had any problem from the village again. The girls' family was very poor, and the American soldiers handled the payment well, both of which probably encouraged the family to accept the amount (the police chief may have checked it with them in advance).

*Id.*

<sup>241</sup> See Joseph, *supra* note 177, at 239.

<sup>242</sup> See DA PAM 27-162, *supra* note 27, para. 10-101-06 (discussing payment of *solatia* "without regard to liability" and not deriving necessarily "from legal responsibility"); see also Afghanistan CERP SOP, *supra* note 107, at 13-14 (stating only that the death, injury, or battle damage must be caused by U.S. or coalition forces, placing no further restrictions on causation of harm).

<sup>243</sup> See Jones, *supra* note 33, at 144.

consideration, and whether the harm was incurred during combat should be considered. Combat elements should also be taken into consideration as a part of the totality of the circumstances. The causation of the harm would be weighed as a factor just as the “friendliness” of the victim is weighed.

#### E. The Condolence Committee

In order for condolence payments to be truly useful as a commander’s tool, the commander and commander’s staff must have meaningful input and coordination regarding the condolence payment process. A Condolence Committee, an entity akin to an FCC, should be created to involve the battlespace commander and judge advocate at a minimum, and intelligence officers and civil affairs personnel, when such assets are assigned to the unit concerned. A single judge advocate or trio of judge advocates should not be making condolence payments in a vacuum. Consultation with the commander and intelligence officers should be required for substantial payments. Where civil affairs assets are available for consult, they may also prove a valuable part of a condolence determination.

Intelligence staff officer involvement in the Condolence Committee would be a two-way street: the intelligence officer can inform the Condolence Committee regarding knowledge of the alleged incident, the nature of the victim, and the impact of the potential payment on the battlespace. The intelligence officer, along with civil affairs officers, could then also play a key role in planning the actual payment event. Involvement of intelligence assets in the condolence process would be a key intelligence-gathering tool, offering an opportunity to interact closely with the local population.<sup>244</sup>

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Because there will always be situations where claims must be denied, this article does not advocate elimination of the combat exclusion altogether; the combat exclusion serves a valid purpose. The funds allocated to pay foreign claims are obviously limited and courts have recognized that there are legitimate reasons for denying claims that result from combat.

*Id.*

<sup>244</sup> See, e.g., Walerstein, *supra* note 14. “Furthermore, based upon information from those claims and related investigations, the claims lawyers were so successful in intelligence-gathering, including locating a hidden weapons cache and arresting an enemy soldier, that

Most brigades have intelligence officers with the capacity to gather human intelligence and counter-intelligence.<sup>245</sup> A unit's mission would benefit from intelligence officers routinely debriefing Condolence Committee members and interpreters regarding their interaction with local citizens during the claims process.<sup>246</sup> Intelligence officers are actually encouraged to integrate with other operations. "It has the advantage of placing the team in contact with the local population and allowing it to spot, assess, and interact with potential sources of information."<sup>247</sup>

Involving intelligence officers in the Condolence Committee process would also highlight any overlap between the local citizens meeting with the Condolence Committee and persons, areas, and activities already known to have intelligence significance.<sup>248</sup> Moreover, depending on

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a counterintelligence soldier was assigned to the claims office." *Id.* (citing Borch); *see also* BORCH, *supra* note 74, at 75–76.

<sup>245</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTION OPERATIONS (Sept. 2006).

<sup>246</sup> *Id.* at 5-22.

U.S. forces have many opportunities to interact with the local population in the normal course of their duties in operations. This source perhaps is the most under-utilized [Human Intelligence] collection resource. Some U.S. forces, such as combat and reconnaissance patrols, are routinely tasked and debriefed by the appropriate level G2/S2. Others, such as medical teams or engineers who have extensive contact with the local population, should also be debriefed.

*Id.*

<sup>247</sup> *Id.* at 3-6.

<sup>248</sup> Note that a civilian population's response to collateral damage is often to withhold information from the armed force that caused the damage. In that respect, attempting to make amends for the collateral damage is both an opportunity to collect information from the local population and to increase the likelihood that the population will continue to provide information. *See* Condra & Shapiro, *supra* note 12, at 167–87.

We hypothesize that collateral damage causes local noncombatants to effectively punish the armed group responsible by sharing more (less) information about insurgents with government forces and their allies when insurgent (government) forces kill civilians. Such actions affect subsequent levels of attacks because information shared with counterinsurgents facilitates raids, arrests, and targeted security operations which reduce insurgents' ability to produce violence. It thus follows that collateral damage by Coalition forces should lead to increased insurgent attacks against Coalition forces, while collateral damage caused by insurgents should lead to fewer such attacks. Our

whether the Condolence Committee operates in a secured area or travels into unsecured areas, force protection considerations must be taken into account. Intelligence officers involved in the Condolence Committee could advise on situational awareness and force protection issues to ensure the Condolence Committee mission is carried out safely.

#### F. Higher Payment Thresholds

Many commanders and judge advocates have observed that the ability to pay claims quickly is essential.<sup>249</sup> Failure to offer condolence quickly may be perceived as adding insult to injury by the victim or victim's kin. As the Acting Secretary of the Navy wrote to Congress in 1956,

Experience in connection with the presence of our armed forces in foreign countries has demonstrated that the failure to pay promptly for damages done to native residents by members of our forces is one of the principal sources of irritation which adds considerable difficulty to the maintenance of cordial relations with foreign people.<sup>250</sup>

Low payment thresholds requiring higher and higher levels of approval hamper the prompt settlement of claims. Sending claims to USARCS or SECARMY is especially cumbersome and delays condolence payments. Some soldiers in Iraq became aware of local tribal custom's three day limit to make condolence payments.<sup>251</sup> As one soldier noted,

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data not only are consistent with this argument, but also allow us to cast doubt on several prominent alternative explanations.

*Id.*

<sup>249</sup> See Petreaus Interview, *supra* note 10.

You can certainly do everything you can to minimize those types of injuries and deaths, to minimize damage to infrastructure and so forth, but there will be some, and over time you'd have to have a quick response to that. And the *solatia* payment for death or for injury, payments for damage—you have to have a very rapid response capability.

*Id.*

<sup>250</sup> See *Center 2010 White Paper*, *supra* note 15 (citing Senate Committee on Foreign Relations, The Mutual Security Act of 1956, 84th Cong., 2d sess., 1956, S. Rep. 2273, 9–10).

<sup>251</sup> See Carroll, *supra* note 147, at 49.

“we had three days before it was ‘game on’ for them.”<sup>252</sup> Failure to pay a condolence claim in a timely manner can jeopardize the security of a unit. Retired Colonel Peter Mansoor, who commanded a brigade in Baghdad in 2004, noted,

[Condolence] payments must be timely enough to forestall revenge killings and halt the rumor mill before it takes off at light speed. In the Ready First Combat Team, we would work [condolence] payments as much as possible through local dignitaries such as tribal sheiks or imams. Normally the payments were made in a matter of days, after we had enough time to investigate the incident in question. Sooner is better in these cases.<sup>253</sup>

Low thresholds for payments may also be insulting, leading local nationals to the conclusion that lives are not valued by the United States.<sup>254</sup> One former claims judge advocate in Iraq explained,

Every Iraqi I spoke with on the issue expressed disbelief I could only offer \$2500 for the death of a human being. Not one Iraqi I encountered ever said the amount made sense or was equitable. The irony is that if an Iraqi filed a claim with me because a military truck on a routine patrol hit the man’s parked car, I could pay him for the full value of his vehicle [as a non-combat claim under the FCA]. However, if the same man filed a claim because his five-year-old daughter was killed by a stray bullet from a firefight involving U.S. forces, I could only pay the man \$2500—if that. Binding a brigade to \$2500 in

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<sup>252</sup> *Id.*

<sup>253</sup> See Mansoor E-mail, *supra* note 24.

<sup>254</sup> See *Center 2010 White Paper*, *supra* note 15.

Under the FCA, the full market value may be paid for a Toyota run over by a tank, but under the current condolence system only 2500 [U.S. dollars] (standard) may be paid for a breadwinner killed in Iraq or Afghanistan. Valuation of life, injury, or property should be decided with guidance from experts on local cultures and local leaders, and ultimately on a case-by-case basis with no arbitrary ceiling. The amount must demonstrate genuine regret for losses suffered and must not be so low as to add insult to injury.

*Id.*

every case limits the unit's ability to adequately assist in most cases. The artificial limit left survivors bitter and frustrated with the process and[,] in turn[,] the U.S. military.<sup>255</sup>

On the other hand, there must be some control and fiscal accountability. As the Special Inspector Generals for Iraq Reconstruction and Afghanistan Reconstruction have noted, neither of the U.S. military's recent long-term engagements have given the American taxpayer good value for their money.<sup>256</sup>

This article's suggested Condolence Committee scheme would ensure accountability and fiscal responsibility while offering swifter response and greater flexibility: a one-member judge advocate Condolence Committee may grant condolence payments up to \$1000. A two-member Condolence Committee consisting of one judge advocate and one company commander may grant condolence payments up to \$10,000. A three-member Condolence Committee consisting of one judge advocate, one battalion commander, and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may grant up to \$50,000. A three-member condolence committee consisting of one judge advocate, one brigade commander (or Special Court-Martial Convening Authority), and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may grant up to a \$75,000 condolence payment. A four-member condolence committee consisting of one judge advocate, one staff judge advocate, one flag officer (or General Court Martial Convening Authority) and one additional staff officer (judge advocate, civil affairs, or intelligence officer) may approve a condolence payment of up to \$150,000. Payments over \$150,000 are submitted to USARCS for approval. To ensure flexibility, commanders may withhold or delegate authorization levels as they see fit to meet the needs of a particular battlespace.

#### G. Funding Sources

While the FCA has its disadvantages, one of its positive aspects is that FCA payments are centrally funded from USARCS.<sup>257</sup> Commanders on

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<sup>255</sup> See Tracy Testimony, *supra* note 35.

<sup>256</sup> See Osterhout, *supra* note 48.

<sup>257</sup> See *supra* Section II(A).

the ground do not need to weigh the choice to make a claim payment against their other mission priorities or other funding needs, as with *solatia*, which is funded from a unit's operations and maintenance funds.<sup>258</sup> Also, unlike with CERP, commanders do not need to prioritize a key infrastructure project over the decision to pay condolence.<sup>259</sup> Ideally, a permanent condolence payment system would be centrally funded by augmenting the budget of USARCS and its sister-service equivalents to fund the program.

#### H. Filing Procedures and Preliminary Review

Currently, condolence payments come about in two ways: a unit aware of an incident may affirmatively seek out a victim to make amends, or a victim will attempt to file a claim with a unit, and if it is denied under the FCA, it may then be paid out as a condolence payment.<sup>260</sup> Local nationals who file claims with U.S. units are not concerned with which legal authority or regulation will lead to their payment, they are only concerned with receiving some acknowledgment of their loss.<sup>261</sup> This article's proposed framework will make it easier for units to make condolence payments. Moreover, it will allow a local national to file a claim with a unit that may result in either a FCA payment or condolence payment, depending on the nature of the cause of the harm. This article's proposed framework allows units to streamline procedures for FCA and condolence payments, lessening frustration among the local population who may not understand why differing payment authorities are important.

Arguments for a unified claims system have recommended extending an appellate process similar to that of the FCA to condolence payments.<sup>262</sup> However, given that this recommendation is for a condolence framework and not a compensation framework, one could argue it does not make sense to have an appellate process. Either the United States wants to extend condolence or it does not. Allowing for an appeals process makes the condolence payment more of an entitlement rather than an offer of sympathy, and drags the United States toward dangerous ground where

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<sup>258</sup> See *supra* Section II(B)(1).

<sup>259</sup> See *supra* Section II(B)(2).

<sup>260</sup> But see *Center 2010 White Paper*, *supra* note 15 (noting that some units summarily denied claims under the FCA and did not then consider them as condolence claims).

<sup>261</sup> See Mansoor E-mail, *supra* note 24.

<sup>262</sup> See *Center 2010 White Paper*, *supra* note 15 (arguing for a uniform appeals process for condolence payments).

there is a real risk of creating a new international legal norm for compensation.

However, the U.S. military does not always get its facts correct when investigating whether condolence should be paid. For example, a unit may refuse to offer condolence based on its misunderstanding of an incident. Rather than offering an appellate process, individuals seeking condolence payments should have the opportunity for a “preliminary review” of their situation, upon which a member of the Condolence Committee can provide guidance concerning information that must be gathered in order to likely result in a condolence payment. For instance, if time and security considerations allow, a Condolence Committee should conduct an initial review of an individual’s request for condolence; they may advise the individual as to what additional information or evidence they would need to perfect their request and allow them an opportunity to return to the Condolence Committee for an official review. This preliminary review offers the harmed individual a quasi-appellate process, in that a condolence packet that may have otherwise been denied outright could be improved and brought back for further consideration.

#### I. No Uniform Valuations

A major criticism of the use of the FCA, CERP, and *solatia* in Iraq and Afghanistan has been the lack of consistency in payment valuations.<sup>263</sup> Another major criticism, the inconsistent application of the FCA’s combat activities exception, would likely be solved through implementation of the permanent condolence payment system. However, the problem of valuation remains. While the loss of one life might be valued at \$1000,

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<sup>263</sup> See Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 549 (2014).

Of the relatively few claims paid in Iraq and Afghanistan between 2003 and 2006, the average payment for loss of life under the FCA is slightly more than \$4200. However, much variance exists, with one family being paid \$33,000 for the loss of three of their children’s lives and payments at the lower end reaching about \$2400. Given the variations in ease of claims and in the amounts paid, we echo John Fabian Witt’s call for additional systemization in this realm, for example through the development of disposition and payment matrixes similar to the Federal Sentencing Guidelines.

*Id.*



another local national might receive \$5000 for damage to a crop. Frequently, larger dollar amounts were handed out for vehicle damage than for the loss of life.<sup>264</sup> Inconsistent valuations can prove extremely insulting to victims and often fail to convey true sympathy. Some have suggested the development of systematic matrices to calculate damages, similar to tables used by insurance claims or adjusters.<sup>265</sup> Judge advocates on the ground have developed their own compensation tables in the past.<sup>266</sup> For example, a brigade might develop a valuation table listing the standard valuation for a chicken, a vehicle, and even for the value of a child versus a mother.

The need for greater consistency in valuing condolence payments is directly at odds with the need for U.S. forces to maintain flexibility to suit missions in diverse regions and circumstances.

In recent years the damages law of the United States armed forces has cast the problem in bold relief. Call it the dilemma of law and strategy. In the law of foreign claims, as the field is known, the relationship between legality and tactical advantage is often inverse. The more law-like the claims payment system, the less tactical flexibility soldiers have to deploy money as a weapon tailored to the terrain of the battlefield. The more flexible it is, the less law-like it tends to be. Commanders and claims officers in Afghanistan and Iraq seem to understand this much better than the official doctrine suggests. But in these theaters, the opposite problem has come to the fore. Unconstrained tactical flexibility produces inconsistent determinations, and lawless inconsistency may be as strategically harmful as overly legalistic rigidity. The nub of the law strategy dilemma is that legality is both a threat and an imperative.<sup>267</sup>

Developing a standard valuation tool at a high echelon, whether DoD-wide or service-specific, while helpful in standardizing condolence payments, would remove the ability of U.S. forces to adapt the condolence payment

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<sup>264</sup> See Witt, *supra* note 61, at 1474.

<sup>265</sup> *Id.* at 1477.

<sup>266</sup> See COMBINED JOINT TASK FORCE-82, AFGHANISTAN FOREIGN CLAIMS STANDARD OPERATING PROCEDURE (2007) (on file with author).

<sup>267</sup> See Witt, *supra* note 61, at 1457.

system to their specific missions.

A permanent condolence payment system should not require a standardization of payment values, but such a measure should be allowed at different levels of command. Just as echelons of command restrict rules of engagement for their area of operations, echelons of command should endeavor to conduct cultural and economic research to create a standard valuation tool if they deem such a measure appropriate for their mission.

## V. Conclusion

If necessity is the mother of invention, commanders and judge advocates have shown time after time that condolence payment systems are necessary by creating work-arounds to the FCA. Condolence payments are crucial to successful implementation of COIN strategy, and all signs point toward COIN being the conflict of our future. Without a permanent condolence payment system, U.S. commanders are trapped in a permanent game of “catch-up,” lobbying for condolence payment authority, and as in the cases of Iraq and Afghanistan, waiting years for a response from Congress or higher DoD authorities. This lack of condolence authority has, in fact, proved to be a security risk for U.S. forces. Rather than doom ourselves to recreating the wheel in every new conflict, it is in the interest of U.S. forces to have a standing condolence payment mechanism. Legislating a perfect condolence payment system is impossible, but by giving commanders the authority and funds to make condolence payments, along with minimal regulatory guidance, we can trust our commanders and their staff to employ a condolence payment program in a manner that is both compassionate and leads to mission success.

The key to an effective condolence payment program is portability and flexibility, allowing commanders to use their good judgment in its implementation, with the aid of key staff members such as intelligence personnel and judge advocates. Congress might balk at the concept of dedicating a large pot of money to condolence payments, but as can be seen in its recent renewal of CERP in Iraq in the amount of \$5,000,000, the legislature does seem to understand the importance of condolence payments.<sup>268</sup> The U.S. government has a track record of funding projects that commanders on the ground simply do not want, whether it is a

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<sup>268</sup> See NDAA 2016, *supra* note 121.

\$34,000,000 building in Afghanistan that commanders repeatedly said was not needed, or \$436,000,000 spent on Abrams tanks that the Army has flatly stated they do not want.<sup>269</sup>

History has shown that commanders truly do want access to condolence payments to assist them in their missions. Failure to enact a permanent condolence payment system will lead to future periods of insecurity for commanders, just as in Iraq and Afghanistan. As U.S. forces continue to operate in more and more nations around the world—entirely in COIN operations—the U.S. government is at a key juncture to give commanders the tool that they want and need.

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<sup>269</sup> See Rajiv Chandrasekaran, *A Brand New Military Headquarters in Afghanistan and Nobody to Use It.*, WASH. POST (July 10, 2013), [https://www.washingtonpost.com/world/national-security/a-brand-new-us-military-headquarters-in-afghanistan-and-nobody-to-use-it/2013/07/09/2bb73728-e8cd-11e2-a301-ea5a8116d211\\_story.html](https://www.washingtonpost.com/world/national-security/a-brand-new-us-military-headquarters-in-afghanistan-and-nobody-to-use-it/2013/07/09/2bb73728-e8cd-11e2-a301-ea5a8116d211_story.html); see also Richard Lardner, *Abrams Tank Pushed by Congress Despite Army's Protests*, HUFF. POST (June 28, 2013), [http://www.huffingtonpost.com/2013/04/28/abrams-tank-congressarmy\\_n\\_3173717.html](http://www.huffingtonpost.com/2013/04/28/abrams-tank-congressarmy_n_3173717.html).