

**CONSISTENCY AND EQUALITY:
A FRAMEWORK FOR ANALYZING THE “COMBAT
ACTIVITIES EXCLUSION” OF THE FOREIGN CLAIMS ACT**

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I. Introduction

You are a member of a three-person Foreign Claims Commission (FCC) responsible for investigating and reviewing foreign claims submitted in the Multinational Division Central-South area of operations. As you begin reviewing the large stack of recently-submitted foreign claims, you come across a claim related to an incident that occurred in the vicinity of Masayyib, Iraq.¹ The claimant alleges that his brother and sister-in-law were killed, and two other family members were injured, by U.S. Soldiers while driving near Masayyib. The claims packet includes numerous documents including medical treatment records, statements from the claimant, a claims card with the unit’s contact information, and photographs of the bodies. The claimant demands payment in the sum of \$30,000. A review of available statements and associated reports establishes that a force escalation (FE) incident had occurred at a traffic control point southwest of Musayyib on Route Wichita. According to the report and statements from members of the unit concerned, the traffic control point was properly established under the unit standard operating procedures. Warning signs were in place and the Soldiers were trained

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¹ This scenario is based on Foreign Claim 05-IF9-T-022–20 (Apr. 2006), *available at* http://www.aclu.org/natsec/foia/pdf/Army0366_0370.pdf [hereinafter Foreign Claim 05-IF9-T-022–20]. The American Civil Liberties Union submitted a Freedom of Information Act request for “all records relating to the killing of civilians by U.S. forces in Iraq and Afghanistan since 1 January 2005.” *See id.* The Department of Defense responses were organized into a searchable database, which includes Foreign Claims, Army Regulation 15-6 investigations, and records of trial. *See id.*

on FE procedures. The Soldiers manning the traffic control point followed established procedures when a civilian vehicle approached and failed to stop. The Soldiers attempted to stop the vehicle using hand-and-arm signals, verbal commands, warning lights, and warning shots. When the vehicle continued to approach, the patrol fired at the vehicle with two M249 Squad Automatic Weapons (SAW). The vehicle was immediately disabled and rolled to a stop at the side of the road approximately 150 meters away from the entry of the traffic control point. The Soldiers also reported that the driver appeared to be slumped over the steering wheel of the vehicle and did not appear to be moving. For some inexplicable reason, the Soldiers proceeded to re-engage the vehicle firing approximately 200 additional rounds into the car. The two front passengers, Mr. A and Mrs. A died of gunshot injuries at the scene. Two of the rear passengers, Mr. B and Mrs. B, were severely wounded. The Soldiers immediately transported Mr. B and Mrs. B from the traffic control point to the nearest hospital. During the convoy to the hospital, the Soldiers accidentally crashed into a white sedan parked on the side of the road, severely damaging the passenger door (the sedan owner also filed a claim).

As the FCC tasked with adjudicating this claim, you immediately recognize that portions of this claim may be payable, while other portions of this claim will likely be excluded as combat under the combat exclusion of the Foreign Claims Act. After looking for guidance, you realize that while Army Regulations provide some examples of combat and non-combat activities, there is no methodology you can use to reliably and accurately apply the combat exclusion. In fact, varying interpretations of the applicable authority could result in significantly different results when this claim is adjudicated. You recognize that a framework for analyzing claims involving combat is necessary to ensure that the combat exclusion is being applied with consistency and equality throughout the theater of operations.

Unfortunately, claims such as this are all too common in Iraq and Afghanistan.² Claims resulting from FE incidents at traffic control points

² This observation is based on the author's personal experiences as the Chief of Client Services for the Multi-National Corps-Iraq, Office of the Staff Judge Advocate (OSJA), at Camp Victory, Iraq, in 2006 [hereinafter Author's Personal Experience]. As the Chief of Client Services, the author was responsible for adjudicating foreign claims as part of a three member Foreign Claims Commission.

and during convoy operations are especially frequent.³ Soldiers are often placed in difficult situations where they must quickly decide whether or not to engage a target that may or may not be hostile. The resulting claims are also difficult to analyze and adjudicate.⁴ The facts are often confusing, witness statements are generally scarce, evidence is limited, and the desire to compensate seemingly innocent claimants is overwhelming.⁵ A review of claims submitted in Iraq that involve similar facts to the ones described above reveal that FCCs have provided compensation to claimants in some cases.⁶ However, numerous other FCCs have denied claims that contain almost the same factual circumstances.⁷ This disparity reveals a problem with the way FCCs analyze and adjudicate foreign claims.

The Foreign Claims Act's (FCA) stated purpose is to promote and maintain friendly relations through the prompt settlement of meritorious claims.⁸ However, the FCA specifically bars payment of claims that result directly or indirectly from acts of the Armed Forces of the United States in combat.⁹ This provision is commonly referred to as the "combat exclusion," and it continues to be a source of confusion and controversy for many deployed judge advocates.¹⁰ In order to have an effective foreign claims program, FCCs must analyze claims in a way that results in consistent and accurate application of the combat exclusion.

This article proposes a framework for analyzing claims that may involve the combat exclusion to achieve an effective foreign claims program. The article first examines the FCA's provisions on the combat exclusion. Next, it addresses how the combat exclusion is applied by FCCs in Iraq and Afghanistan, identifying problems that result from the way that the combat exclusion is currently applied. Next, it examines the legal authority relating to the combat exclusion. Finally, it proposes a model framework to assist with the analysis of foreign claims that

³ See Documents received from the Department of the Defense in response to ACLU Freedom of Information Act Request, <http://www.aclu.org/natsec/foia/log.html> (last visited Dec. 21, 2008) [hereinafter ACLU Claims Database].

⁴ Author's Personal Experience, *supra* note 2.

⁵ *Id.*

⁶ See ACLU Claims Database, *supra* note 3.

⁷ See *id.*

⁸ 10 U.S.C. § 2734 (2006).

⁹ *Id.*

¹⁰ Author's Personal Experience, *supra* note 2.

involve combat. While this framework complies with legal authorities, it also addresses problems that were identified during studies of FCC decision-making processes. Ultimately, the framework, which is visually summarized in a figure with four decision-making considerations, will provide judge advocates with a method of analysis that minimizes the problems associated with the combat exclusion, thereby increasing the effectiveness of the foreign claims program.

II. The Commander's Emergency Response Program (CERP) and Solatia

Although there are programs, such as CERP and solatia, which may provide monetary payment for losses suffered by third-country nationals, this article focuses on the requirements of the Foreign Claims Act. The CERP is the result of an effort to provide commanders in Iraq with a stabilization tool for the benefit of the Iraqi people.¹¹ The CERP money originally came from stockpiles of cash maintained by the Ba'ath Party discovered by U.S. Soldiers.¹² During the early stages of Operation Iraqi Freedom, Soldiers of the 3d Infantry Division found more than a hundred aluminum boxes containing about \$650 million in the residential cottages of Ba'ath Party officials.¹³ When the initial stockpiles of seized cash ran out, Congress authorized the use of appropriated funds to continue the CERP in Iraq and Afghanistan.¹⁴ The inherent flexibility of the CERP has allowed commanders, often through their assigned judge advocates, to provide financial compensation to claimants whose claims would otherwise be excluded due to combat activity.¹⁵

Despite the apparent effectiveness of CERP, it is not a substitute for the FCA, nor should it be relied upon as a way to circumvent the FCA's combat exclusion. First, CERP is not designed to fully compensate for losses. The CERP condolence payments are simply an expression of

¹¹ Colonel 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.

¹² *Id.*

¹³ David Zucchini, *Troops Find Baghdad Stash: \$650 Million—Little-Noticed Cottages Hold Boxes of Cash*, S.F. CHRON, Apr. 19, 2003, at A-10.

¹⁴ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003).

¹⁵ Martins, *supra* note 11, at 18.

sympathy,¹⁶ limited in amount, usually by standard operating procedures.¹⁷ Generally, a CERP condolence payment for a death is capped at \$2,500.¹⁸ Compensation for a wrongful death under the FCA would likely be much higher because of the authority to settle claims for higher amounts and because payments are designed to compensate the claimant in accordance with local law or custom.¹⁹ Second, CERP is a relatively new creation and has only been authorized for use in Iraq and Afghanistan.²⁰ It is unclear if the CERP will be available in future conflicts. Because of the uncertain future of CERP and the financial limits placed on CERP condolence payments, it is important to maximize the use of the FCA and ensure that it is used to its full potential.

In addition to foreign claims and CERP, solatia payments may also be available as a form of compensation. Solatia payments provide funds to victims and family members who suffer injury, loss or damage.²¹ An offering of Solatia conveys personal feelings of sympathy or condolence toward the victim or the victim's family.²² While such feelings do not necessarily arise from legal responsibility, payments are intended to express remorse.²³ Solatia payments are made from the unit's operation and maintenance funds pursuant to directives established by the appropriate commander for the area concerned.²⁴ 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.²⁵ Accordingly, use of solatia payments is limited only to those areas where local custom allows for its implementation.²⁶

¹⁶ MULTI-NATIONAL CORPS-IRAQ, MONEY AS A WEAPON SYSTEM, at C-15 (1 June 2007) [hereinafter MAAWS].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS paras. 10-5, 10-9 (8 Feb. 2008) [hereinafter AR 27-20].

²⁰ See Martins, *supra* note 12, at 9, 10.

²¹ U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-10 (21 Mar. 2008) [hereinafter DA PAM. 27-162].

²² *Id.*

²³ *Id.*

²⁴ *Id.* Solatia funds are not disbursed from claims allocations. *Id.*

²⁵ *Id.*

²⁶ *Id.*

III. Introduction to Foreign Claims

A. History and Implementation of the Foreign Claims Act

On 1 July 1941, U.S. Marines were deployed to Iceland, after a formal invitation, in response to Nazi aggression in Europe.²⁷ Shortly after the deployment, the Secretary of the Navy petitioned Congress for a statutory waiver of sovereign immunity and a mechanism for the payment of claims that resulted from damages caused by U.S. forces.²⁸ Congress passed the FCA on 2 January 1942.²⁹ The statute was originally limited in duration.³⁰ It was only supposed to apply during the national emergency declared by President Roosevelt.³¹ However, Congress extended the FCA multiple times until it ultimately became permanent in 1956.³² Since 1956, the statute has undergone numerous modifications, usually resulting in an increase in the monetary limits on compensation.³³

Under the current structure described by Army Regulation 27-20, *Claims*, foreign claims are adjudicated by a single FCC or a three-person FCC.³⁴ Foreign Claims Commissions are appointed by the Commander of the U.S. Army Claims Service (USARCS).³⁵ They are responsible for investigating all claims that are referred to a commission as well as arranging for payment of valid claims, proposing settlements, and denying invalid claims.³⁶ Currently, a three-member FCC has the authority to settle claims for an amount not to exceed \$50,000.³⁷ A three-member FCC can deny a claim submitted for any amount.³⁸ A single-member FCC, consisting of a judge advocate or claims attorney, has the authority to settle claims for an amount not to exceed \$15,000.³⁹ Any claim that does not exceed \$15,000 can also be disapproved by a

²⁷ *Id.* para. 10-1.

²⁸ *Id.*

²⁹ 10 U.S.C. § 2734 (2006).

³⁰ DA PAM. 27-162, *supra* note 21, para. 10-1.

³¹ *Id.*

³² 10 U.S.C. § 2734.

³³ *Id.*

³⁴ AR 27-20, *supra* note 19, para. 10-6.

³⁵ *Id.* para. 10-6(b).

³⁶ *Id.*

³⁷ *Id.* para. 10-9(d).

³⁸ *Id.*

³⁹ *Id.* para. 10-9(c).

single-member FCC.⁴⁰ Foreign Claims Commissions calculate settlement offers based on numerous factors including the nature of the evidence provided, the results of the FCC's investigation, local laws and customs, as well as the estimated monetary values resulting from the loss, damage, or injury.⁴¹

B. The Purpose and Basic Provisions of the Foreign Claims Act

The stated purpose of the FCA is to promote "friendly relations" between host nations and U.S. forces.⁴² However, the FCA does not provide for the payment of all claims. Only inhabitants of foreign countries may submit claims under the FCA.⁴³ Additionally, the FCA specifically defines the types of claims that will be accepted for adjudication.⁴⁴ The FCA excludes claims that are combat-related, allowing a claim only if

it did not arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the armed forces of the United States, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission.⁴⁵

This provision is commonly referred to as the "combat exclusion" of the FCA, and it continues to create confusion among many FCCs.⁴⁶ For example, when asked about his understanding of the combat exclusion, one judge advocate in Iraq stated, "Early in the deployment I struggled with the non-existent definition of combat activity. As a result, I frequently called [name omitted] of MNC-I for guidance[,] but [sic]

⁴⁰ *Id.*

⁴¹ DA PAM. 27-162, *supra* note 21, ch. 2.

⁴² 10 U.S.C. § 2734 (2006).

⁴³ DA PAM. 27-162, *supra* note 21, para. 10-2.

⁴⁴ 10 U.S.C. § 2734.

⁴⁵ *Id.*

⁴⁶ Author's Personal Experience, *supra* note 2.

many claims were still in the gray area of combat activity.”⁴⁷ Due to this “gray area,” the definition of combat activity often varies from one FCC to another.⁴⁸

C. Regulatory Provisions Regarding the Combat Exclusion

Although Army regulations offer some additional guidance on what constitutes “combat,” there is still significant room for interpretation. Ultimately, none of the regulations explain how claims involving combat should be analyzed or what information should be considered when adjudicating these types of claims.⁴⁹ Army Regulation (AR) 27-20, *Claims*,⁵⁰ and Department of the Army Pamphlet 27-162, *Claims Procedures*,⁵¹ are the primary Army regulations explaining the procedures for processing claims under the FCA. Chapter 10 of both publications deal specifically with foreign claims. At most, these regulations provide insights on the general nature of claims to be allowed and disallowed. Army Regulation 27-20 defines noncombat activities as “authorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims,”⁵² and may include: practicing the firing of missiles and weapons, training and field exercises, maneuvers that include the operation of aircraft and vehicles, as well as the use and occupancy of real estate without a contract or international agreement.⁵³ The regulation also prohibits payment for activities “incident to combat, whether in time of war or not.”⁵⁴

Both publications also define combat activity. According to AR 27-20, combat activities are “activities resulting directly or indirectly from action by the enemy, or by the Armed Forces of the United States.”⁵⁵

⁴⁷ E-mail from Judge Advocate, 1st Brigade Combat Team, 4th Infantry Division, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008, 22:10 EST) (on file with author).

⁴⁸ E-mail from Judge Advocate, 1st Armored Division, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008, 19:04 EST) (on file with author).

⁴⁹ See AR 27-20, *supra* note 19, DA PAM. 27-162, *supra* note 21.

⁵⁰ AR 27-20, *supra* note 19.

⁵¹ DA PAM. 27-162, *supra* note 21, para. 10-2.

⁵² AR 27-20, *supra* note 19, glossary.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* A third category of operation, that is commonly recognized, is a “not combat operation.” Although not defined by AR 27-20 or DA Pamphlet 27-162, the term “not combat operation” is frequently used within the military to describe those operations that

These definitions, although helpful, fail to precisely define combat activity or provide any type of guidance on how to analyze a claim that appears to be combat or combat related. In practice, these definitions are minimally helpful in distinguishing between combat and noncombat activities.⁵⁶ Because definitions of combat activity are ambiguous and because guidance is lacking on how to analyze claims that involve combat activities, an examination of the way FCCs are interpreting and applying the combat exclusion will provide additional insight on available alternatives.⁵⁷

IV. The Combat Exclusion and its Application

A. Statistics Concerning the Application of the Combat Exclusion

Recently, the American Civil Liberties Union (ACLU) submitted a Freedom of Information Act (FOIA) request for information relating to deaths and injuries of civilians in Iraq and Afghanistan.⁵⁸ In response to the request, the Government released approximately 500 claims that matched the criteria established by the request.⁵⁹ Of those 500 cases—204, or about forty percent were apparently rejected because the injury, death, or property damage had been “directly or indirectly” related to combat.⁶⁰ While, ultimately, some of these claimants may have received some form of condolence payment, such payment was likely limited in amount.⁶¹ Recent examinations of the claims database maintained by the U.S. Army Claims Service (USARCS) yielded similar statistics. According to USARCS, 6036 claims were denied as a result of the

are purely administrative in nature and do not fall into the category of either combat or noncombat operations.

⁵⁶ Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 46, 68 (describing the difficulty of making such determinations).

⁵⁷ The newly created Iraqi Security Agreement addresses the issue of claims, but does not alter the application of the Foreign Claims Act in Iraq. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq art. 21 (Jan. 1, 2009), available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf. The agreement provides that the U.S. forces shall pay just and reasonable compensation in settlement of third party claims arising out of acts, omissions, or negligence of members of the U.S. forces done in the performance of their official duties and incident to the non-combat activities of the U.S. Forces. *Id.*

⁵⁸ See ACLU Claims Database, *supra* note 3.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ MAAWS, *supra* note 16, at C-15.

combat exclusion in Iraq since July of 2003.⁶² As 13,319 foreign claims were submitted in Iraq since July of 2003, this means that approximately forty-five percent of all foreign claims filed in Iraq—nearly half of all claims filed in Iraq—were excluded as combat.⁶³

B. Surveys of Foreign Claims Commissions

Frequent application of the combat exclusion as a basis for denying claims is also supported by information received from FCCs who are currently serving in, or have recently returned from, Iraq and Afghanistan. With the assistance of the Chief of Claims, Multi-National Corps–Iraq (MNC–I), the author contacted several FCCs with recent foreign claims experience. Each of the FCCs was asked to complete a questionnaire containing several questions regarding foreign claims and the combat exclusion. Of the fourteen FCCs that were contacted, nine responded. Because thirteen FCCs were in Iraq at the time of this survey, the nine survey responses represent a broad cross-section of claims experience in Iraq.⁶⁴

The questionnaire asked how frequently the combat exclusion was applied, how the combat exclusion was interpreted, as well as what resources were used to resolve questions about the combat exclusion. The FCCs who responded confirm that the number of claims paid under the FCA was significantly reduced through the application of the combat exclusion.⁶⁵ In fact, one respondent estimated that the combat exclusion was a factor in forty to fifty-five percent of the claims that he adjudicated.⁶⁶ These estimates are further proof that the combat exclusion has a significant impact on the number of claims that are paid. Any provision that potentially excludes nearly half of all claims filed warrants careful examination to ensure that it is being applied consistently and fairly, and that it is being correctly analyzed to maximize the effectiveness of the FCA. Unfortunately, questionnaire

⁶² E-mail from U.S. Army Claims Serv., Fort Meade, Md., Operations and Records, to Major Mike Jones (6 Mar. 2009, 0:14 EST) (on file with author).

⁶³ E-mail from U.S. Army Claims Serv., Fort Meade, Md., Operations and Records, to Major Mike Jones (22 Jan. 2009 14:29 EST) (on file with author).

⁶⁴ *Id.*

⁶⁵ See E-mail Responses to the Foreign Claims Survey (on file with author) [hereinafter Survey Responses].

⁶⁶ E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (19 Sept. 2008) [hereinafter 19 Sept. 2008 e-mail] (on file with author).

responses indicate that consistent application and analysis is not occurring, which may be one of the reasons why the number of claims excluded as combat is so high.⁶⁷

Surveys of several FCCs in Iraq indicate that there are numerous interpretations and applications of the combat exclusion. When asked to explain the meaning of the combat exclusion in their own words, responses varied widely. One FCC described his application of the combat exclusion as follows:

I consider the combat exclusion to apply to all CF offensive operations and to active self-defense against identified threats. Under this definition, I include raids on houses, etc. as constituting offensive operations by CF. I consider escalation of force (EOF) measures to constitute active self-defense against identified threats.⁶⁸

This interpretation of the combat exclusion is very broad because it focuses on the nature of the mission. By comparison, a Foreign Claims Commission adjudicating claims in Baghdad applies a much narrower definition, focusing on actual events, as opposed to the general nature of the operation:

The FCA Combat Exclusion states that the FCA cannot be used for damages/injuries/death resulting from combat operations. When we first got here, we (NCOIC, CJA, and myself) got into a discussion about what that really meant. For example, when you are talking about operations in Sadr City, Iraq, what isn't a combat operation? But we decided that was too broad. So this is how I apply it: If a patrol is traveling down route X and hits a parked car as they are moving through a congested street, then the FCA applies. If a patrol is engaged by an IED and fires at the trigger man's location (after establishing PID of course) and hits a car parked in the vicinity with SAF, then that is not covered

⁶⁷ See Survey Responses, *supra* note 65.

⁶⁸ 19 Sept. 2008 e-mail, *supra* note 66.

under FCA—the damage was caused while responding to some perceived or actual hostile act or intent.⁶⁹

Similarly, another FCC noted:

The combat exclusion automatically precludes the United States from paying claims under the Foreign Claims Act when those claims arose from combat related incidents. Combat related incidents typically include Targeted Missions, Escalation of Force, and React to Contact. This is in contrast to claims that arise from activities that do not involve actual or imminent contact with hostile forces. I look to the unit and details of the incident.⁷⁰

While the above responses indicate some degree of interpretive variation on the application of the combat exclusion, other responses applied more rigid standards. For example, one FCC stated that “[t]he combat exclusion applies any time CF intentionally fire weapons to kill.”⁷¹ On balance, these contrary responses demonstrate that FCCs with similar training, involved in similar operations, have differing interpretations of the same regulation.

The Chief of Client Services for Multi-National Corps–Iraq (MNC–I) is largely responsible for providing oversight, training, and guidance for foreign claims operations in Iraq.⁷² The MNC–I Chief of Client Services also serves as the primary Iraq foreign claims point of contact for USARCS.⁷³ Because of this unique position, the MNC–I Chief of Client Services has a better view of how foreign claims are adjudicated in Iraq than most judge advocates.⁷⁴ He notes that discretionary variances do exist in the interpretation and application of the combat

⁶⁹ E-mail from Judge Advocate, U.S. Army, Baghdad, Iraq, to Major Mike Jones (24 Sept. 2008, 21:44 EST) (on file with author).

⁷⁰ E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (22 Oct. 2008) (on file with author).

⁷¹ E-mail from Judge Advocate, U.S. Army, Iraq, to Major Mike Jones (17 Sept. 2008) (on file with author).

⁷² E-mail from Judge Advocate, Chief of Client Servs., Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008) (on file with author).

⁷³ *Id.*

⁷⁴ *Id.*

exclusion,⁷⁵ especially regarding force escalation procedures that result in the injury of innocent bystanders.⁷⁶

While the various survey responses were largely consistent with statutory definitions of combat and noncombat activities, they still reflected divergent views. Because of these differences, multiple FCCs could analyze the same claim and come to drastically different conclusions; this underscores the necessity of a standardized analytical framework.

V. The Impact of Inconsistent Application of the Combat Exclusion

Unfortunately, the use of the combat exclusion can undermine support of U.S. military efforts from the local population.⁷⁷ 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.⁷⁸ 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 FCCs.⁷⁹ These inconsistencies ultimately result in distrust of the foreign claims system and U.S. forces.⁸⁰ Improper application of the FCA can have broader impacts as well. A 2007 article published in the *New York Times* criticizes the U.S. military for using condolence payments *instead of* compensation under the FCA.⁸¹ The article notes that

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Captain Jeffery S. Palmer, *Claims Encountered During an Operational Contingency*, 42 A.F. L. REV. 227, 237–38 (1997).

⁷⁸ E-mail from Judge Advocate, former Chief of Client Services, Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008 no time available) (on file with author).

⁷⁹ *Id.*

⁸⁰ Author's Personal Experience, *supra* note 2.

⁸¹ Jon Tracy, *Sometimes in War, You Can Put a Price on Life*, N.Y. TIMES, May 16, 2007, http://www.nytimes.com/2007/05/16/opinion/16tracy.html?_r=1&oref=slogin.

Condolence payments are often used to provide some degree of compensation to claimants when an FCC determines that the claim is excluded as combat. E-mail from Judge Advocate, 3d Brigade Combat Team, 4th Infantry Division, U.S. Army, Baghdad, Iraq, to Major Mike Jones (24 Sept. 2008) (on file with author).

The Foreign Claims Act offers full compensation for the loss along the lines for what Americans can receive in civil court; condolence involves nominal payment. But the military has conflated the two, giving condolence even as it has investigated and punished wrongdoing by our troops.⁸²

In other words, condolence payments are being used instead of the FCA, even though the FCA would allow for more compensation. Because the *New York Times* article did not address specific claims, it is impossible to say if the criticisms presented are accurate. However, inclusion of a consistent and well-reasoned analysis of whether the combat exclusion applied would avert similar criticism and negative publicity. Another article, also published in the *New York Times*, includes a quote from the Executive Director of the Campaign for Innocent Victims in Conflict.⁸³ She notes that “the arbitrary nature of how money is dispersed can intensify feelings of ill will on the ground, which, ironically, the compensation payments are designed to mitigate.”⁸⁴

The negative effects of inconsistent analysis and application of the combat exclusion go beyond negative publicity. When the method of analysis and application of the combat exclusion varies significantly between FCCs, claimants may forum shop their claims or submit the same claim to multiple FCCs in the hopes of obtaining a favorable analysis.⁸⁵ Additionally, different interpretations of the combat exclusion may create the perception of inequity, which would arguably increase dissatisfaction among claimants and reduce our ability to spread goodwill. According to one former Chief of Client Services for MNC-I,

Without clear, uniform standard[s], foreign claimants will clearly not understand the process and will doubt the objectiveness of the law. If they interpret that we, the American government, are playing favorites, they will interpret not getting paid as not being a favorite. Thus, this could lead to several individuals having distaste for Americans when they never had any before.

⁸² Tracy, *supra* note 81.

⁸³ David S. Cloud, *Compensation Payments Rising, Especially by Marines*, N.Y. TIMES, June 10, 2008, <http://www.nytimes.com/2006/06/10/world/middleeast/10payments.html?scp=3&sq=%252>.

⁸⁴ *Id.*

⁸⁵ Author's Personal Experience, *supra* note 2.

Moreover, in an area where we are trying to encourage the establishment of the rule of law, it appears to our claimants that our laws are discretionary with no real standard.⁸⁶

This dissatisfaction demonstrates how serious the potential problem is. The lack of consistent analysis and application could result in not just negative publicity and dissatisfied claimants, but widespread dissension among the very people that the foreign claims system is designed to assist. It is important to recognize that the foreign claims system has broader implications than just within Iraq or Afghanistan.⁸⁷ Our ability to quickly and fairly compensate claimants can impact the perception of the military as a whole, both at home and abroad.⁸⁸ Variations will always exist in how FCCs analyze and apply the combat exclusion simply because of differences in their respective areas of operation, but these variations can be minimized through the institution of specialized training and guidance.

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. Specifically, in *Koohi v. United States*, the court recognized the importance of combat exclusions, observing how fear of claims liability should not prevent the Government from exercising bold and imaginative measures to overcome enemy forces.⁸⁹ The court also explained that war produces innumerable innocent victims of harmful conduct, and that it would make little sense to single out, for special compensation, a few of these persons on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.⁹⁰

⁸⁶ E-mail from Judge Advocate, former Chief of Client Servs., Multi-National Corps–Iraq, U.S. Army, Baghdad, Iraq, to Major Mike Jones (3 Oct. 2008, 15:56 EST) (on file with author).

⁸⁷ See Cloud, *supra* note 83; Tracy, *supra* note 81; Paul von Zielbauer, *Civilian Claims on U.S. Suggest the Toll of War*, N.Y. TIMES, Apr. 12, 2007, http://www.nytimes.com/2007/04/12/world/middleeast/12abuse.html?_r=1&scp+ 2&sq=.

⁸⁸ *Id.*

⁸⁹ 976 F.2d 1328, 1334–35 (9th Cir. 1992).

⁹⁰ *Id.*

To the extent practicable, if FCCs apply a standard framework of analysis when examining claims that deal with combat, the claims system will be more consistent and appear less arbitrary. This, in turn, will further the purpose of the FCA because a consistent and well-reasoned claims process will promote and maintain friendly relations more than a system that appears to be lacking in standards and procedures.⁹¹ The analytical framework, however, must still meet the purpose of the FCA and be capable of uniform application by all FCCs. It must also effectively limit the number of claims paid in a manner that does not degenerate the foreign claims process into an automatic process of compensation.

VI. Cases Examining the Meaning of Combat

Judicial interpretations of the combat exclusion are important because they shed light on the key attributes of the proposed framework for analyzing foreign claims involving combat. Before examining this set of cases, it is important to note that they all deal with claims brought under the Federal Tort Claims Act (FTCA),⁹² which is similar to the FCA in that it also contains a type of combat exclusion.⁹³ However, there are some differences between the two acts with regard to the language used to establish the exclusion.⁹⁴ As previously stated, the FCA does not allow claims that “arise from action by an enemy or result directly or indirectly from an act of the armed forces of the United States in combat.”⁹⁵ The FTCA does not allow claims “arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”⁹⁶ This distinction is important because it shows that the two acts, while similar, differ with regard to the scope of the combat exclusion. Despite the differences in language, these cases are still useful because they are one of the few sources of authority, outside of the

⁹¹ Author’s Personal Experience, *supra* note 2.

⁹² The FTCA creates an exception to the Federal Government’s protection of sovereign immunity and allows, with certain exceptions, the Government to be sued in tort as a private individual would be in certain circumstances. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004). The FTCA also gives federal district courts jurisdiction over claims against the United States for injury caused by the negligent or wrongful act of a government employee while acting within the scope of employment. *Id.*

⁹³ 28 U.S.C. § 1346(b) (2006).

⁹⁴ *See id.*; 10 U.S.C. § 2734 (2006).

⁹⁵ 10 U.S.C. § 2734.

⁹⁶ 28 U.S.C. § 1346(b).

regulations, that examine the nuances, meaning, and scope of a combat exclusion.

A. *Johnson v. United States*

Perhaps the leading case in this area is *Johnson v. United States*.⁹⁷ *Johnson* involved an action for damages against the United States for pollution of a clam farm by vessels of the U.S. Navy.⁹⁸ The alleged pollution occurred from December 1945 through 1946, when the Navy, because of force protection concerns over congestion in many of the country's ports, anchored sixteen ammunition cargo vessels in Washington State's Discovery Bay.⁹⁹ The vessels were responsible for supplying ammunition to various combat vessels of the Navy.¹⁰⁰ They had previously been engaged in active logistical support of combat operations in the Pacific Theater.¹⁰¹ Upon the termination of hostilities in 1945, the Navy ordered vessels to Discovery Bay pending reassignment.¹⁰² The vessels were manned and commanded by naval personnel.¹⁰³

The appellants' complaint alleged that these vessels discharged oils, sewage, and other noxious matter into the waters of Discovery Bay, which polluted both the waters and the adjacent tidelands owned by the appellants, thereby damaging their commercial clam farm.¹⁰⁴ As a result of this pollution, the State of Washington prohibited the taking of clams from appellants' lands for sale to the public.¹⁰⁵ The appellants claimed damages totaling \$46,000 for partial permanent injury to the clam farm and loss of the season's profits.¹⁰⁶

In response, the Navy relied upon the combat exclusion of the FTCA, which states that the FTCA does not apply to "[a]ny claim arising out of the combatant activities of the military or naval forces, or Coast

⁹⁷ 170 F.2d 767 (9th Cir. 1948).

⁹⁸ *Id.* at 768.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 769, 770.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Guard, during time of war.”¹⁰⁷ The Navy’s reliance on the combat exclusion of the FTCA forced the court in *Johnson* to examine the meaning of combatant activities. The court determined that

“Combat” connotes physical violence; “combatant,” its derivative, as used here, connotes pertaining to actual hostilities; the phrase “combatant activities,” of somewhat wider scope, and superimposed upon the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection with actual hostilities.¹⁰⁸

This definition is important because the court focuses on the distinction between the term “combat” and how it is different from the term “combatant.” In so doing, the court notes that combat relates to physical violence,¹⁰⁹ a simple concept that is easier to identify than the more amorphous concept of combat. After this distinction, the court goes on to highlight the differences between combat and combatant activities, noting that the physical violence of combat is not the same as the activities necessary and in direct support of that physical violence.¹¹⁰

[T]he act of supplying ammunition to fighting vessels in a combat area during war is undoubtedly a “combatant activity,” but this fact does not make necessary a conclusion that all varied activities having an incidental relation to some activity directly connected with previously ended fighting on active war fronts must, under the terms of the Act, be regarded as and held to be a combatant activity. To so hold might lead to results which need not here be considered. The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a “combatant activity,” but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be cataloged as a “combat activity.”¹¹¹

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 770.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Of primary significance is the definition of combat that the *Johnson* court uses. Here, even though the court focuses primarily on the meaning of combatant activities, as used in the FTCA, this simple explanation and analysis, that “combat connotes physical violence,”¹¹² is extremely useful to FCCs who are responsible for adjudicating foreign claims in Iraq and Afghanistan.

B. *United States v. Skeels*

Another important FTCA case, *United States v. Skeels*, provides further interpretation of the combat exclusion addressed by *Johnson*.¹¹³ Jasper Skeels and several other people were fishing in the Gulf of Mexico on the morning of 24 July 1945.¹¹⁴ While they were fishing, U.S. Army planes were conducting training in the same area.¹¹⁵ Several of the planes were firing their weapons at targets being towed by other planes.¹¹⁶ At some point, a piece of iron pipe fell from one of the planes, or one of the targets, striking Jasper Skeels in the head and killing him.¹¹⁷ The administrator of Skeels’s estate filed a claim under the FTCA for the death of Mr. Skeels.¹¹⁸ Because the United States was still at war with Japan at the time of the incident, the court examined the FTCA’s meaning of the term “combatant activities.”¹¹⁹ The court in *Skeels* noted that combat activities means the actual engaging in physical force.¹²⁰ It explained that

the phrase [combat activities] was used to denote actual conflict, such as where the planes and other instrumentalities were being used, not in practice and training, far removed from the zone of combat, but in bombing enemy occupied territory, forces or vessels, attacking or defending against enemy forces, etc.¹²¹

¹¹² *Id.*

¹¹³ 72 F. Supp. 372 (D. La. 1947).

¹¹⁴ *Id.* at 373.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 373, 374.

¹²⁰ *Id.* at 374.

¹²¹ *Id.*

The *Skeels* Court's interpretation of combat activities is very similar to the *Johnson* court's interpretation,¹²² with both courts applying the ordinary meaning of the words to determine that combat involves physical force or violence directed and devoted to the destruction of the enemy or enemy property. These two cases provide FCCs with both a useful definition of combat activities and an example of how to analyze claims involving combat.

C. *Koohi v. United States*

Koohi v. United States also addresses the meaning of combat with regards to the application of the combat exclusion under the FTCA, as well as the reasons for the existence of a combat exclusion.¹²³ In *Koohi*, the court was presented with another action brought under the FTCA. The action was brought by heirs of deceased airline passengers and crew.¹²⁴ The incident that underlies this suit occurred in July of 1988.¹²⁵ The USS *Vincennes*, a naval cruiser operating in the Persian Gulf equipped with the Aegis air defense system, dispatched a reconnaissance helicopter to investigate reports of Iranian gunboats in the area.¹²⁶ The helicopter was allegedly fired upon by anti-aircraft guns.¹²⁷ In response, the *Vincennes* crossed into Iranian territorial waters and fired upon the gunboats.¹²⁸ Shortly after the engagement, a civilian Iranian Airbus, Iran Air flight 655, took off from a joint commercial-military airport at Bandar Abbas, Iran.¹²⁹ The flight path of Iran Air

¹²² See also *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp 1242, 1255 (E.D.N.Y. 1984) (discussing the application of the combat exclusion of the FTCA to a claim for injury resulting from the chemical defoliant Agent Orange). Although the court primarily focuses on the *Feres* Doctrine, the court also addresses the combat exclusion of the FTCA. *Id.* In its discussion, the court notes that "if a civilian was injured on a battlefield by a grenade that exploded prematurely because the government's specifications for the grenade were improper, that civilian should not be barred by the combatant activities exception from suing." *Id.* The court goes on to note that "if a soldier was aiming a handgrenade at the enemy and, as a result of his negligence, a civilian was injured, the combatant activities exception would apply." *Id.* This simple example provides claims judge advocates with a tangible example of combat that is easily applied. *Id.*

¹²³ 976 F.2d 1328, 1330 (9th Cir. 1992).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

flight 655 brought it in close vicinity to the *Vincennes*.¹³⁰ The crew of the *Vincennes* misidentified the aircraft as an Iranian F-14 and employed its air defense system to shoot it down.¹³¹ All 290 people aboard the plane were killed.¹³²

Because the resulting claims were filed under the FTCA,¹³³ the court in *Koochi* was also forced to address the combat exclusion of the FTCA as part of their opinion.¹³⁴ The *Koochi* Court adopted the *Johnson* Court's definition of combat activities, noting that combat activities involve not only physical violence, but also activities that are both necessary and in direct connection with actual hostilities.¹³⁵ The court also pointed out that "the firing of a missile in perceived self-defense is a quintessential combat activity."¹³⁶ The *Koochi* Court then examined the reasons behind the existence of a combat exclusion. These reasons have already been examined briefly above, but it is important to focus on them again in more detail because they are significant to the FCC adjudication process. First, the court noted that:

[T]ort law is based in part on the theory that the prospect of liability makes the actor more careful. Here, Congress certainly did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our soldiers, sailors, or airmen to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat.¹³⁷

The court then examined the second reason behind the combat exclusion by focusing on the realities of combat:

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ The plaintiffs sought compensation from the United States and several private companies involved in the construction of the Aegis Air Defense System, which was deployed on the *Vincennes*. *Id.* at 1330. The plaintiffs asserted claims against the United States for the negligent operation of the *Vincennes* and claims against the weapons manufacturers for design defects in the Aegis system. *Id.*

¹³⁴ *Id.* at 1333.

¹³⁵ *Id.* at 1333 n.5.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1335.

War produces innumerable innocent victims of harmful conduct—on all sides. It would make little sense to single out for special compensation a few of these persons—usually enemy citizens—on the basis that they have suffered from the negligence of our military forces rather than from the overwhelming and pervasive violence which each side intentionally inflicts on the other.¹³⁸

Finally, the court discussed the punitive aspects of tort law and how these aspects justify the existence of a combat exclusion:

Society believes tortfeasors should suffer for their sins. It is unlikely that there are many Americans who would favor punishing our servicemen for injuring members of the enemy military or civilian population as a result of actions taken in order to preserve their own lives and limbs.¹³⁹

These three principles provide added perspective on the combat exclusion. Examining the reasons for the existence of a combat activities exception helps judge advocates to better understand how the combat exclusion of the FCA should be applied.

The *Koohi* court also addressed the issue of engaging an unintended target, which is a problem that occurs frequently in urban combat settings:

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

¹³⁸ *Id.*

¹³⁹ *Id.*

the act and not the manner of its performance that counts.¹⁴⁰

Essentially the court is saying that whether or not the act was negligent is irrelevant, so long as the circumstances surrounding the act can be defined as combat. While thorough investigation is always important, the FCC need not make a determination of negligence, in circumstances where the combat exclusion applies. The existence of combat itself is determinative in most cases. However, there is an important distinction between combat actions involving negligence and combat actions involving criminal conduct or violations of the law of war.¹⁴¹ The issue of criminal conduct under the Uniform Code of Military Justice (UCMJ) and law of war violations as they relate to foreign claims will be addressed in more detail. For now, it is important to realize that the court's statement, "it is the nature of the act and not the manner of its performance that counts" is valid only if the manner in which the act was performed does not equate to a violation of the UCMJ or the law of war.¹⁴²

VII. A Framework of Analysis to Determine if the Combat Exclusion Applies

Having examined how courts have applied and analyzed combat and combat exclusions, the principles established by the courts in *Johnson*, *Koohi*, and *Skeels* can now be incorporated into a framework for foreign claims adjudication. This framework is designed to assist FCCs with examining and analyzing claims that involve combat activities. Notwithstanding the framework, FCCs must still apply the provisions of AR 27-20 and DA Pamphlet 27-162 to ensure that all other requirements are met prior to paying or settling any foreign claim.¹⁴³

The following analysis consists of four separate prongs. In performing this analysis, FCCs should first thoroughly review each claims packet, fully investigate the claim, and examine all relevant

¹⁴⁰ *Id.* at 1336.

¹⁴¹ *See infra* Part VII.

¹⁴² *Koohi*, 976 F.2d at 1336.

¹⁴³ *See* DA PAM. 27-162, *supra* note 21, ch. 10 (explaining the general procedures for intake, processing, evaluation, and investigation of foreign claims); AR 27-20, *supra* note 19, ch.10.

evidence.¹⁴⁴ Once the investigation is complete, the FCC should then examine each prong and record their determinations for inclusion in the claims packet. Documentation is important because it shows that each claim was thoroughly examined and considered.¹⁴⁵ For the first prong, the FCC must look to see if the claim contains information indicating the occurrence or threat of physical violence. The second prong requires the FCC to examine the context surrounding the occurrence of the physical violence. The third prong focuses on the degree of connectivity (proximate cause) between the acts that gave rise to the claim and the physical violence. For the fourth prong, the FCC must look to see if there is evidence of acts that are contrary to the law. Each prong is described in the text immediately below, while the graphic depiction appears in a flowchart at the Appendix.

A. Prong 1: Physical Violence¹⁴⁶

The first prong evaluates whether the evidence indicates the presence of physical violence, which is the term used in *Johnson* and *Skeels* to explain the meaning of combat.¹⁴⁷ In order to address all possible situations that could result in a foreign claim, physical violence includes threats of physical violence. This prong requires the FCC to examine the claim for evidence of instances of physical violence or what the *Johnson* court referred to as “swinging the sword of battle.”¹⁴⁸ Examples include shooting, use of explosives, ramming or crashing with vehicles, hand-to-hand combat, forcible taking of property, destruction of property, verbally communicating threats, aiming a weapon, etc. The presence of physical violence is a strong indicator that the claim may ultimately be excluded as combat. Conversely, the lack of any evidence of physical violence means the claim does not involve combat and the combat exclusion does not apply.

¹⁴⁴ See DA PAM. 27-162, *supra* note 21, ch. 10.

¹⁴⁵ See ACLU Claims Database, *supra* note 3 (containing numerous claims with little or no explanation as to why a claim was approved or denied resulting in the appearance that a thorough examination process was not performed).

¹⁴⁶ For the purposes of this article, the term physical violence also includes threats of physical violence such as aiming a weapon at an individual, firing a warning shot, verbally communicating a threat, etc.

¹⁴⁷ *Johnson v. United States*, 170 F.2d 770 (9th Cir. 1948).

¹⁴⁸ *Id.*

For example, if a claimant submitted a claim for the death of his livestock due to contamination of his water supply by pollutants improperly disposed of by U.S. forces, it would be an example of a claim that does not contain any evidence of physical violence or threats of physical violence. Accordingly, the combat exclusion would not apply. Alternatively, the traffic control point scenario presented in the introduction of this article does contain evidence of physical violence.¹⁴⁹ In this scenario, Soldiers manning a traffic control point fired at a vehicle that failed to stop when directed. During the initial engagement, the vehicle was disabled and it appears that the driver was injured or killed. The Soldiers intentionally fired at the vehicle in order to disable the vehicle and eliminate the potential threat. The act of shooting constitutes physical violence. An FCC examining this portion of the claim would conclude that there is evidence indicating the presence of physical violence, and would then move to the next prong for further analysis.

B. Prong 2: Context Surrounding the Physical Violence

Context is very important when examining foreign claims. Acts of physical violence may be excluded in one context, but may be compensable in another. Specifically, DA Pamphlet 27-162, *Claims Procedures* states

Claims arising “directly or indirectly” from combat activities of the U.S. armed forces are not payable. Whether damages sustained in areas of armed conflict are attributable to combat activities or noncombat activities depends upon the facts of each case. Damages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy, are certain to be considered as arising from combat activities.¹⁵⁰

In other words, the FCC must determine the context surrounding the act of physical violence to determine if it is related to resisting or attacking an enemy or preparing for immediate combat with an enemy. If the FCC finds that the act of physical violence that gave rise to the claim is related to resisting or attacking an enemy or preparing for immediate combat

¹⁴⁹ See *supra* Part I.

¹⁵⁰ DA PAM. 27-162, *supra* note 21, para. 10-3.

with an enemy, then the regulation definitively states that the claim is excluded as combat, assuming that the act was lawful.¹⁵¹

Referring again to the introductory scenario, one can see how this prong is applied. As discussed above, the act of shooting is an example of physical violence. The evidence in the claims packet indicates that the Soldiers were intentionally firing at a vehicle that failed to stop for a traffic control point. The Soldiers perceived the vehicle as an enemy threat based on its failure to stop. Accordingly, the physical violence of shooting was directly related to resisting a perceived enemy attack, so the analysis continues with the next prong of the framework. It is important to note that while neither DA Pamphlet 27-162 nor AR 27-20 precisely defines what an enemy is, practical application of the regulation to current conflicts involving enemies that are difficult to identify requires the inclusion of perceived enemies in the definition.¹⁵²

Conversely, applying prong two to another portion of the introductory scenario results in a different conclusion. Recall that after the engagement, the Soldiers transported some of the injured passengers to a local hospital. During the movement to the hospital, the Soldiers crashed into an automobile, damaging the door. According to the first prong, crashing is an example of physical violence. However, in this case, the result is different because the context has changed. The act of physical violence occurred during a convoy to a hospital. It did not involve resisting or attacking an enemy or preparing for immediate combat with an enemy. Because of the change in context, one can conclude that, although an act of physical violence occurred, it is not of the nature that would result in application of the combat exclusion and the combat exclusion analysis is complete. The fact that a convoy, operation, or mission occurs in a combat zone, such as Iraq or Afghanistan, does not automatically mean that it is combat as defined by the FCA. Such a broad interpretation of combat runs counter to the purposes of the FCA because it would result in the exclusion of all claims that occur in a combat zone.¹⁵³ Had the drafters of the FCA intended such a result, then they could have easily changed the combat exclusion to a combat zone exclusion or time of war exclusion.¹⁵⁴

¹⁵¹ *Id.*

¹⁵² See generally AR 27-20, *supra* note 19, ch.10; DA PAM. 27-162, *supra* note 21, ch. 10.

¹⁵³ See 10 U.S.C. § 2734 (2006).

¹⁵⁴ *Id.*

C. Prong 3: Proximate Cause

This prong examines the connection between the acts that gave rise to the claim and the physical violence that occurred. Once an FCC is able to identify the presence or threat of physical violence and concludes that the physical violence directly related to resisting or attacking an enemy or preparing for immediate combat with an enemy, then she must examine the relationship between the acts that gave rise to the claim and the physical violence that occurred. This step of the analysis is contemplated by the language of DA Pamphlet 27-162, which states that “[c]laims arising ‘directly or indirectly’ from combat activities of the U.S. armed forces are not payable.”¹⁵⁵ In some instances, this analysis is extremely simple. For example, if a Soldier intentionally fires his weapon at an individual and the bullet strikes the targeted individual, who subsequently files a claim for the injury he received, then there is a direct connection between the physical violence and the actions that gave rise to the claim. In most cases, this will be sufficient information to determine that the claim is excluded as combat (assuming that the act was lawful). However, as the degree of connectivity becomes more tenuous, the analysis becomes more difficult. This portion of the analysis resembles the analysis involved in examining issues of proximate cause. Fortunately, the concept of proximate cause is one that should be familiar to most judge advocates because it is one of the key aspects of determining liability for property loss. Army Regulation 735-5 defines proximate cause as

the cause, which in a natural and continuous sequence of events unbroken by a new cause produced the loss or damage. Without this cause, the loss or damage would not have occurred. It is further defined as the primary moving cause, or the predominate cause, from which the loss or damage followed as a natural, direct, and immediate consequence.¹⁵⁶

This definition can be applied to determine if the physical violence that gave rise to the claim was the proximate cause of the loss, damage, or injury. If it was the proximate cause, then the combat exclusion may apply because there is a sufficient degree of connectivity. This portion

¹⁵⁵ DA PAM. 27-162, *supra* note 21, para. 10-3.

¹⁵⁶ U.S. DEP’T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY 178 (28 Feb. 2005).

of the analysis requires the judge advocate to closely examine the evidence and look for possible intervening causes that could have broken the causal chain. Claims that were submitted as a result of an act or omission by a U.S. Soldier or civilian employee of a U.S. military department, but were not proximately caused by an act of intentional physical violence, will generally be a valid payable claim.¹⁵⁷

Referring again to the introductory scenario, we can see how prong three might be applied. The Soldiers firing at the car that failed to stop for the traffic control point provides a clear example: the Soldiers aimed and fired at the vehicle when it failed to stop and the rounds struck and disabled the vehicle. The firing of the weapons caused the damage in a natural and continuous sequence of events unbroken by a new cause. Accordingly, the combat exclusion may apply and the analysis continues with the next prong. However, if the damage was caused by some intervening cause then the result is different. Hypothetically, assume that the Soldiers fired at the car and missed. However, the driver heard the shots and immediately stopped, exited the vehicle and put his hands up. Shortly after he exited the vehicle, one of the traffic control point signs blew over because the Soldiers forgot to weigh it down, and it dented his car. Here, the proximate cause of the damage is the failure of the Soldiers to properly weigh down the sign. So, even though there is evidence of physical violence related to resisting a perceived enemy, the physical violence was not the proximate cause of the damage. The damage occurred outside the context of resisting or attacking an enemy or preparing for immediate combat with an enemy. Accordingly, the claim would not be excluded as combat and the analysis would end.

D. Prong 4: Criminal Conduct (Acts that are Contrary to the Law or Established Operating Procedures)

Prong four requires examination of whether the act of physical violence that gave rise to the claim was criminal in nature. Now that it has been determined that the claim involves purposeful physical violence that related to resisting or attacking an enemy, or preparing for immediate combat with an enemy and it has been determined that it was the proximate cause of the loss, the focus shifts to the nature of the act. Department of the Army Pamphlet 27-162 notes that “there is no bar to claims arising from off-duty or criminal conduct of U.S. Soldiers or

¹⁵⁷ AR 27-20, *supra* note 19, para. 10-3.

civilian employees.”¹⁵⁸ In other words, if a Soldier commits a criminal act, there is no bar to paying claims that arise from that act. This is true, even if the criminal act involves physical violence that might otherwise be considered combat. Criminal activity that involves physical violence is not the same as combat. Department of the Army Pamphlet 27-162 specifically addresses numerous instances where the combat exclusion applies, but does not extend the scope of the combat exclusion to cover criminal acts, regardless of their nature, that occur during combat operations.¹⁵⁹ Because DA Pamphlet 27-162 specifically recognizes that there is no bar to claims arising from criminal conduct of U.S. Soldiers and does not extend the scope of combat exclusion to exclude such claims, one must conclude that such claims are payable. This interpretation of the language of DA Pamphlet 27-162 is also the only interpretation that is in line with the purpose of the FCA.¹⁶⁰ Accordingly, claims filed in response to the criminal acts of Soldiers or civilian employees of a U.S. military department that occurred during combat operations should not be excluded as combat.

Unfortunately, due to the complex legal environments found in most military operations, it is often difficult to identify what is and is not a criminal act. In most operational environments, acts that are contrary to the law may include acts that are in violation of the UCMJ, in violation of local law, in violation of international law or the law of war, or in violation of international agreements.¹⁶¹ Additionally, in some cases, acts that violate well-established operating procedures may also be categorized as criminal if the operating procedures were issued as part of a lawful or general order.¹⁶²

For the most part, experienced FCCs will have a sufficient understanding of the legal environment to identify criminal acts during the claims adjudication process. However, not all FCCs have sufficient experience or legal training to recognize all acts that are contrary to the law. In situations where this is the case, the FCC should begin by scrutinizing the claims packet for indications that the rules of engagement were not complied with. As a general rule, instances of

¹⁵⁸ DA PAM. 27-162, *supra* note 21, para. 10-3c.

¹⁵⁹ *Id.* para. 10-3b.

¹⁶⁰ See 10 U.S.C. § 2734 (2006).

¹⁶¹ See INT’L. & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK chs. 2, 15 (2006) [hereinafter OPERATIONAL LAW HANDBOOK].

¹⁶² UCMJ art. 92 (2006), OPERATIONAL LAW HANDBOOK, *supra* note 161, at 196.

noncompliance with the rules of engagement are often indicative of a violation of law that requires further investigation because the rules of engagement incorporate principles of international law as well as customary and conventional law principles regarding the right of self-defense.¹⁶³

The rules of engagement are issued by competent military authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with other forces encountered.¹⁶⁴ In other words, the rules of engagement are “the primary tool used to regulate the use of force.”¹⁶⁵ Well-drafted rules of engagement are simply written to ensure that they are understandable, memorable, and applicable.¹⁶⁶ When properly drafted, the rules of engagement should provide clear guidance with regards to what actions to take when confronted with a threat.¹⁶⁷

Any indications that the rules of engagement were not complied with is cause for concern, reporting, and additional investigation.¹⁶⁸ By using instance of noncompliance with the rules of engagement as the basis for reporting possible violations of the law and initiating additional investigations, this framework can be employed by FCCs with limited experience and it is adaptable enough to be applied to future conflicts that involve either more or less restrictive rules of engagement. It is important to note that not all violations of the rules of engagement equate to an illegal act.¹⁶⁹ Foreign Claims Commissions should simply use the

¹⁶³ OPERATIONAL LAW HANDBOOK, *supra* note 161, at 85.

¹⁶⁴ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DICTIONARY OF ASSOCIATED TERMS 476 (12 Apr. 2001).

¹⁶⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 1-02, OPERATIONAL TERMS AND GRAPHICS 1-65 (Sept. 2004) [hereinafter FM 1-02].

¹⁶⁶ OPERATIONAL LAW HANDBOOK, *supra* note 161, at 79.

¹⁶⁷ *Id.*

¹⁶⁸ Department of Defense Directive 2311.01(E) requires that all suspected or alleged violations of the law be reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action. U.S. DEP’T OF DEFENSE, DIR. 2311.01e, DOD LAW OF WAR PROGRAM (9 May 2006) [hereinafter DODD 2311.01e]. Possible violations of the portions of the Rules of Engagement that relate only to fire control measures or other administrative controls generally do not require additional investigation unless otherwise directed. Control measures are defined as directives given graphically or orally by a commander to subordinate commands to assign responsibilities, coordinate fires and maneuver, and control combat operations. FM 1-02, *supra* note 165, at 1-45.

¹⁶⁹ Rules of engagement often incorporate political considerations designed to achieve operational objectives. Violations of these political considerations will not necessarily equate to an illegal act. OPERATIONAL LAW HANDBOOK, *supra* note 161, at 86.

rules of engagement as a starting point for analyzing claims under this prong. When an FCC identifies a possible violation of the rules of engagement, that FCC should consult with attorneys in the military justice section and the international and operational law section to determine if reporting and additional investigation is warranted.

Proper application of this prong should not result in any additional unnecessary investigations, because current policy requires investigation of any violation of the law of war.¹⁷⁰ When an FCC reports an act that is contrary to the law as part of this analysis, that FCC is merely complying with the requirements of DoDD 2311.01(E), which requires reporting and investigation of suspected or alleged violations of the law of war, for which there is credible information.¹⁷¹ However, it is important for the FCC involved to perform some preliminary investigation to ensure that the claimant's allegations do have some merit to avoid needless investigations. If no credible information exists, then no additional investigation should be conducted.¹⁷²

Because this is a somewhat novel concept with regard to foreign claims, an example may be helpful. In Iraq, in June 2005, an AR 15-6 investigation was convened to investigate an engagement between elements of the 3d Infantry Division and a suspected insurgent group.¹⁷³ During the engagements, a platoon was ordered to clear a house in the engagement area.¹⁷⁴ The house was suspected by the Iraqi police of concealing enemy insurgents.¹⁷⁵ According to the investigation, the Iraqi Police informed the U.S. Soldiers that they had taken fire from the rooftop at 2019 hours.¹⁷⁶ The assault on the house by U.S. Soldiers did not commence until 2243 hours.¹⁷⁷ During the one-and-a-half-hour period prior to the assault, no U.S. Soldiers observed direct fire coming from the house and no contact was made with anyone inside.¹⁷⁸ The plan, according to the findings of the AR 15-6 investigating officer, was to crash through the outside gate of the house with a high mobility multi-

¹⁷⁰ DoDD 2311.01e, *supra* note 168.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Recommendations for AR 15-6 Investigation on 3d PLT, A Co, 184 IN for 01 March 05 Manslaughter Allegations, http://www.aclu.org/natsec/foia/pdf/Army15461_15487.pdf (last visited Jan. 9, 2009).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

purpose wheeled vehicle (HMMWV), throw a fragmentation grenade into the courtyard, and then suppress the second story of the house with M240B machine gun fire while members of the platoon cleared the first floor of the house.¹⁷⁹ The possibility of noncombatants in the house was never addressed by the unit, despite the lack of evidence that the house was occupied by insurgents.¹⁸⁰ During the house-clearing operation, one local national male was killed and one local national female was injured.¹⁸¹ Both individuals were unarmed.¹⁸² The AR 15-6 investigating officer found that the unit did not comply with the rules of engagement because it did not positively identify the targets in the house before firing and that the amount of force utilized during the house clearing operation was not necessary and proportionate given the nature of the objective.¹⁸³ Generally speaking, the rules of engagement incorporate the international law principle of distinction by requiring positive identification of a target prior to engaging.¹⁸⁴ The principle of distinction requires that combatants be distinguished from non-combatants.¹⁸⁵ An FCC reviewing this claim would likely question the compliance with the rules of engagement when it became clear that two unarmed local nationals were killed during a house clearing operation involving no contact with any insurgent elements. Anyone with this information would automatically wonder if the targets were positively identified prior to being engaged. This clearing operation is an example of a situation where the FCC, if presented with a claim containing this information, would want to perform additional investigation to determine if the rules of engagement were complied with. If the FCC has credible information that the facts, as described above, are true, then this incident should be reported and investigated as required by DoDD 2311.01e.¹⁸⁶

Now that the fourth prong has been explained, it can be applied to the introductory scenario to complete the analysis of this hypothetical claim. Focusing only on the portion of the claim involving the Soldiers

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Major General William B. Caldwell, Caldwell: Rules of Engagement Not Vague, Feb. 9, 2007, available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=9810&Itemid=128.

¹⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts (Protocol I) art. 48, June 8, 1977.

¹⁸⁶ DoDD 2311.01e, *supra* note 168.

who fired at the car, we can conclude that an act of physical violence occurred and that the act related to resisting an attack from a perceived enemy. Additionally, analysis of prong three indicates that the shooting was the proximate cause of the damage of the car and the deaths and injuries of the passengers. Prong four now requires examination of the nature of the act to determine if the Soldier's acts were criminal. The starting point for this analysis begins with an examination of the claim to determine if the rules of engagement were complied with. The initial engagement appears to comply with the rules of engagement because the Soldiers used force, after following force escalation procedures, to engage and eliminate a perceived threat. Accordingly, there does not appear to be any issue with the initial engagement that would require additional investigation or reporting. Any claims resulting from the initial engagement would be excluded as combat.

Unfortunately, the second engagement is more problematic. According to the claims packet, after the initial engagement, the vehicle rolled to a stop approximately 150 meters from the checkpoint, at which time the Soldiers re-engaged the vehicle firing a total of 200 rounds. An FCC examining this claim would likely conclude that re-engagement of the vehicle after it had stopped violated the rules of engagement because the enemy threat had been eliminated. The driver and the occupants of the vehicle were no longer exhibiting any hostile intent or participating in any hostile acts. Firing 200 additional rounds at the stationary vehicle was probably a disproportionate response. Because of the presence of a suspected violation of the rules of engagement, the FCC should conduct additional investigation to ensure that the information is credible. If the information is credible, then the FCC should consult with attorneys assigned to the military justice section and the international and operational law for advice whether additional investigation and reporting under DoDD 2311.01(E) is appropriate. If additional investigation is performed and the investigating officer determines that the second engagement was a criminal act because it was in violation of the law of war, the UCMJ, or other applicable law, then the combat exclusion should not be applied to any death, injury or loss resulting from that portion of the claim.¹⁸⁷

¹⁸⁷ This conclusion assumes that the conclusion of the investigation officer, assigned to investigate this incident, reaches the same conclusion that the FCC did in this case; that the Soldier's responded disproportionately to the threat when they fired over 200 hundred rounds at the vehicle. See Foreign Claim 05-IF9-T-022-20 Apr. 2006, *supra* note 3.

E. Other Considerations: Interest of the United States and Public Policy Examination

The framework of analysis explained above focuses on the mechanics of the combat exclusion, but other considerations must also be addressed as part of any claims adjudication process. Specifically, FCCs must always consider whether or not payment of the claim is in the best interest of the United States and whether or not payment is supported by public policy.¹⁸⁸ There may be numerous reasons that payment of a claim is not in the best interest of the United States, or is not supported by public policy, but there are a few reasons that relate specifically to the combat exclusion analysis. Foreign Claims Commissions should essentially perform this portion of the analysis twice: first as part of the combat exclusion analysis, and again with a broader focus if it is determined that the combat exclusion does not apply.

Army Regulation 27-20 specifically notes that claims are not payable if the payment is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the governing statute.¹⁸⁹ However, the regulation does not offer further explanation. Despite the lack of clarifying language in the regulations, we can find additional guidance from the discussion in *Koohi v. United States*.¹⁹⁰ Specifically, the court's discussion on the reasons for the existence of a combat exclusion is extremely relevant.¹⁹¹

As previously discussed, the *Koohi* court noted three principal reasons for the combatant activities exception. First, the court pointed out that Congress did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces.¹⁹² Second, the court noted that tort law is based in part on a desire to secure justice.¹⁹³ To single out a few for compensation on the basis that they have suffered from the negligence of our military during combat, as opposed to the overwhelming and pervasive violence which each side intentionally inflicts on the other, is not logical.¹⁹⁴ Finally, the court concludes that

¹⁸⁸ AR 27-20, *supra* note 19, para. 10-4h.

¹⁸⁹ *Id.*

¹⁹⁰ 976 F.2d 1328 (9th Cir. 1992).

¹⁹¹ *Id.* at 1334, 1335.

¹⁹² *Id.*

¹⁹³ *Id.* at 1335.

¹⁹⁴ *Id.*

servicemen should not be punished for injuring members of the enemy military or civilian population as a result of actions taken during combat.¹⁹⁵ Again, it is important to note that the *Koohi* case dealt with the combat activities exception of the FTCA. However, the same justifications that the *Koohi* court used to support the existence of the FTCA's combat activities exclusion also support the existence of the combat exclusion of the FCA.

While it is unlikely that a claim will satisfy all four prongs of the combat exclusion analysis and then fail the interest of the United States/public policy test, it is possible. Circumstances may exist where a FCC determines that a claim should not be excluded as combat, yet payment of a claim is counter to the principles discussed by the court in *Koohi*.¹⁹⁶ In this situation, denial of the claim may be warranted because it is not in the best interests of the United States or counter to public policy.

F. Review of the Framework of Analysis

The framework of analysis described above is not meant to be a formulaic approach to adjudication of foreign claims. Instead, this framework is designed to provide judge advocates with a method to examine the combat elements of a claim that is based on case law and applicable claims regulations. Ultimately, implementation of such a framework should increase consistency with regards to how the combat exclusion is applied and allow judge advocates to better articulate the reasons for why the combat exclusion does or does not apply to a certain claim. Differences in interpretation will continue to exist so long as the statutory and regulatory definitions of combat remain imprecise, but these differences can be minimized.

We know from the court's decision in *Koohi* that there are legitimate reasons for employing a combat exclusion and that, without such an exclusion, we simply could not afford to operate a foreign claims program during any sort of high intensity conflict.¹⁹⁷ In war, innocent people will suffer and private property is frequently damaged and

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1334, 1335.

¹⁹⁷ *Id.* at 1334, 1336.

destroyed.¹⁹⁸ This is an unavoidable consequence of combat operations. Our foreign claims program will always be a compromise between the desire to create good will and the need to limit U.S. financial obligations. Foreign Claims Commissions must ensure that the program is operated in a manner that is consistent with established legal principles and that when a claim is denied it is not done so in an arbitrary and capricious manner that undermines the purpose of the FCA.¹⁹⁹ No claimant will ever be pleased to hear that his claim has been denied, but real problems occur when the claimant feels that he has been treated unfairly.²⁰⁰ This perception of unfairness and arbitrary application is also what attracts negative public attention to our FCA as evidenced by the *New York Times* articles mentioned above.²⁰¹ These articles do not criticize the existence of the combat exclusion; rather they criticize the manner in which it is applied.²⁰² If judge advocates would simply consistently analyze and apply the combat exclusion, the negative public attention and the perceptions of arbitrariness and injustice would be significantly reduced. The legal framework proposed here is not the perfect solution that will solve all the problems associated with the combat exclusion of the FCA, but it will increase effectiveness and provide guidance to judge advocates where traditionally little guidance has existed.

VIII. Conclusion

Despite the creation of CERP, the foreign claims system remains an important fiscal tool for commanders in today's operational environment. Over half a century after its creation, the FCA continues to fulfill the purposes for which it was created. However, the effectiveness of the FCA in any operational environment is dependent on the FCCs that employ it. Arbitrary and inconsistent application of the combat exclusion can undermine the purpose of the FCA and actually create dissension and negative perceptions of U.S. forces. In counterinsurgency operations like Iraq and Afghanistan, any act that unnecessarily damages the credibility and image of U.S. forces can have far reaching negative effects. This is why it is so critical for FCCs to employ some sort of framework to analyze claims involving combat. By focusing the combat

¹⁹⁸ *Id.*

¹⁹⁹ *See supra* Part II.B.

²⁰⁰ Author's Personal Experience, *supra* note 2.

²⁰¹ *See supra* Part V.

²⁰² *See* Cloud, *supra* note 83; Tracy, *supra* note 81.; von Zielbauer, *supra* note 87.

exclusion analysis on the presence of physical violence, the context of physical violence, proximate cause, and lawfulness, FCCs will employ a common approach and reduce instances of inaccurate or improper application of the FCA. Most judge advocates will still experience times when they feel that the exclusion is unfair or unnecessarily strict, but the combat exclusion does place a necessary limitation on the claims paid under the FCA. It is the job of judge advocates to make sure that the combat exclusion is applied fairly and consistently so that the statutory purpose of the FCA is upheld and the effectiveness of the program is maximized by only applying the combat exclusion when appropriate.

Appendix

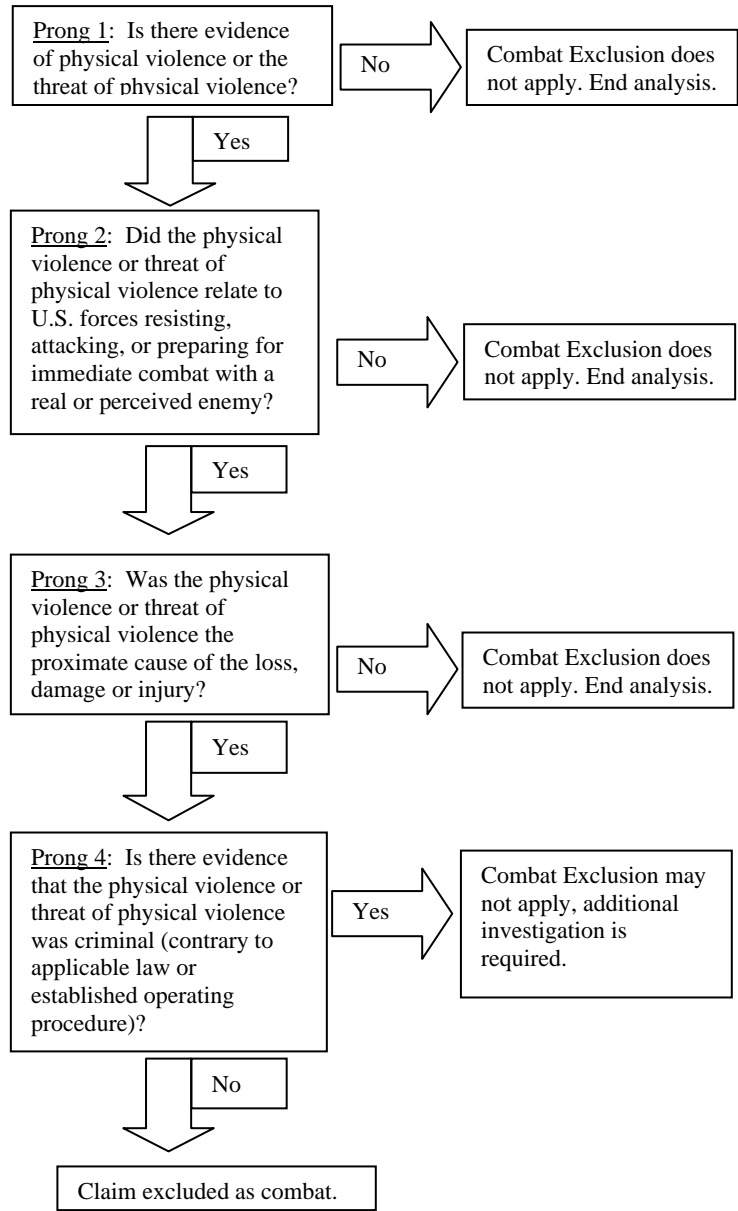


Fig. Combat Exclusion Framework for FCCs