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THE ECONOMIC EFFICIENCY OF THE ARMY'S MANEUVER DAMAGE CLAIMS PROGRAM: COASE, BUT NO CIGAR

MAJOR JERRETT W. DUNLAP, JR.*

It is my belief that the failure of economists to reach correct conclusions about the treatment of harmful effects cannot be ascribed simply to a few slips in analysis. It stems from basic defects in the current approach to problems of welfare economics. What is needed is a change of approach.¹

* Judge Advocate, U.S. Army. Presently assigned as Litigation Attorney, U.S. Army Legal Services Agency, Litigation Division, Arlington, Virginia. LL.M. 2006, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; J.D. 1997, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; B.S. Economics 1994, California Polytechnic State University at San Luis Obispo. Previous assignments include: Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia; Chief, Military and Civil Law Division, 1st Infantry Division, Wuerzburg, Germany, 2004-2005; Chief, Administrative Law, 1st Infantry Division (Forward), Tikrit, Iraq, 2004; Officer-in-Charge, Wuerzburg Law Center, 1st Infantry Division, 2003; Officer-in-Charge, Schweinfurt Law Center, 1st Infantry Division, 2002; Chief, International and Operational Claims, U.S. Army Claims Service, Europe, Office of the Judge Advocate, U.S. Army Europe, Mannheim, Germany, 2000-2002; Trial Counsel and Operational Law Attorney, 172d Infantry Brigade (Separate), U.S. Army Alaska, Fort Richardson, Alaska, 1998-2000; Legal Assistance Attorney, 172d Infantry Brigade (Separate), U.S. Army Alaska, Fort Richardson, Alaska, 1998. Previous publications: Major Jerrett W. Dunlap, Jr., Book Review, *Gettysburg July 1*, 186 MIL. L. REV. 195 (2005); Lieutenant Colonel Jody M. Prescott & Captain Jerry Dunlap, *Law of War and Rules of Engagement Training for the Objective Force: A Proposed Methodology for Training Role-Players*, ARMY LAW., Sept. 2000, at 43. Member of the California bar. This research article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course. The author expresses special thanks to Major Jennifer Crawford for her kind assistance with editing.

¹ Ronald Coase, *The Problem of Social Cost*, 60 J.L. & ECON. 1, 21 (1960). Professor Ronald Coase received the Nobel Prize in Economic Sciences in 1991 "for his discovery and clarification of the significance of transaction costs and property rights for the

I. Introduction

In November 2002, a column of tracked vehicles from 1st Armored Division plunged off the paved roads and into the plowed fields in the countryside near Baumholder, Germany. The tracks sent mud flying into the air as they conducted battle drills across the German landscape. The unit commanders recognized that the training value of the maneuver exercise was enhanced by the unfamiliar terrain.² The cost of conducting the maneuver, however, was less certain. While the unit commanders were aware of the fuel and maintenance costs that would be incurred, they were not responsible for paying for the maneuver damage caused by the exercise.

The U.S. Army Claims Service, Europe (USACEUR) employs a civilian engineer, Mr. Craig Walmsley, to coordinate and investigate maneuver damage claims. During the preparation for a cavalry squadron training maneuver in Germany, Mr. Walmsley contacted the commander to discuss possible steps to reduce the maneuver damage caused by the tracked vehicles.³ Mr. Walmsley advised that the vehicles would cause dramatically less damage if the squadron were to replace their worn track pads with new track pads.⁴ In response, the squadron commander replaced the track pads because of the relatively minor replacement cost compared to the high maneuver damage costs the tracked vehicles likely would have caused otherwise.⁵

institutional structure and functioning of the economy.” The Bank of Sweden Nobel Prize in Economic Sciences in Memory of Alfred Nobel 1991, http://nobelprize.org/nobel_prizes/economics/laureates/1991/ (last visited Mar. 3, 2006).

² See Baumholder Training Area (BTA) / Lager Aulenbach, Germany, <http://www.globalsecurity.org/military/facility/baumholder-ta.htm> (last visited Aug. 15, 2007) (discussing maneuver training exercises in the Baumholder Training Area).

³ Telephone Interview with Aletha Friedel, Chief, European Torts Branch, U.S. Army Claims Service, Europe, in Mannheim, Germany (Jan. 28, 2006) [hereinafter Friedel Interview].

⁴ *Id.* Track pads are the rubberized part of a tracked vehicle’s metal track, which makes contact with the ground or road. If the rubberized track pad is not present, the metal will cause more damage to the ground or road. See generally Red River Army Depot, Rubber Products Operations, <https://www.redriver.army.mil/Rubber/RRADRubberProducts.htm> (last visited Feb. 15, 2006) (discussing track shoes, track pads, and the replacement process).

⁵ *Id.*

Although this example had a positive outcome, it shows a flaw in the current overseas maneuver damage claims process—commanders are not necessarily aware of the costs their maneuvers create. Commanders do not take such damage into consideration when planning their maneuvers because they do not pay for it. A more efficient result occurred in this case because Mr. Walmsley found a reasonable commander willing to spend unit funds in order to save another part of the Army from spending even more.⁶ Unfortunately, whether during an overseas training maneuver or a deployed operational maneuver, commanders do not always consider all the costs of their maneuvers.⁷ Regardless of whether the failure to take the costs into consideration is the result of a lack of information or is intentional, the result is often an inefficient allocation of resources.

This article proposes to shift the source of funding for overseas maneuver damage claims from the U.S. Army Claims Service (USARCS) to the unit responsible for causing the damage. As will be discussed, the underlying Law and Economics theory, relying heavily on the Coase Theorem,⁸ supports the proposed change. Next, the statutory mechanisms for paying overseas maneuver damage claims will be outlined. Historic trends and Army doctrine related to maneuvers will be examined. Finally, the Law and Economics theory will be applied to the overseas maneuver damage claims mechanisms. Ultimately, this article submits that if overseas maneuver damage claims were to be paid with funds directly from the Operations and Maintenance (O&M)⁹ budget of the maneuvering unit, rather than from USARCS funds, commanders would have to take those costs into consideration, resulting in a more efficient outcome.

⁶ Currently, funds to pay for maneuver damages come from the U.S. Army Claims Service, not from the unit that caused the damage. *See* discussion *infra* Part III.D.

⁷ *Id.*

⁸ *See* discussion *infra* Part II.A.2.

⁹ The annual Operations and Maintenance (O&M) appropriation is the primary source of funding for a maneuver unit to undertake training and operations. *See, e.g.*, 10 U.S.C. § 116 (2005) (establishing annual O&M reporting requirements for the recommended number of training days for Army Combat Battalions by the Secretary of Defense).

II. Law and Economics Analysis and the Coase Theorem

Law and Economics¹⁰ is a well-established economic discipline that continues to generate substantial interest from both economists and legal practitioners.¹¹ Scholarship in this area has expanded beyond the study of fields with obvious economic components, such as antitrust law, to such far-reaching legal fields as criminal law, family law and constitutional law.¹² Law and Economics employs economic analysis of the law for three purposes: first, to predict the effects of the law; second, to evaluate the economic efficiency of the law; and third, to determine what legal rules will be implemented due to voter preferences.¹³ These objectives show the potential value that Law and Economics analysis holds for policy makers. They will have the tools to draft better law if they are able to predict the law's effects, its efficiency, and voters' preferences. At the center of the Law and Economics universe is the widely-recognized Coase Theorem.¹⁴ The Coase Theorem has been so far-reaching that Richard Posner calls it "basic to the whole economic analysis of law."¹⁵ Coase's groundbreaking article, *The Problem of Social Cost*,¹⁶ is at or near the top of the most highly cited articles by the legal community.¹⁷ The Law and Economics community has widely embraced the Coasian approach to dealing with actions that have harmful effects.¹⁸

¹⁰ See generally Thomas R. Ireland, *The Interface Between Law and Economics and Forensic Economics*, 7 J. LEGAL ECON. 60, 63 (1997) ("[L]aw and economics can be defined as the analysis of the impact of law on the behavior of individuals, and thus on the allocation of resources.").

¹¹ *Id.* at 60.

¹² John E. Noyes, *An Introduction to Law and Economics*, 59 N.Y.U. L. REV. 410, 410 (1984) (reviewing A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983)).

¹³ See Ireland, *supra* note 10, at 63 (citing NEW PALGRAVE DICTIONARY OF ECONOMICS 3:144 (1987)).

¹⁴ See Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 397 (1997) ("[I]f there is anything that can be described as the canon of 'law and economics,' the Coase Theorem is at the heart of it.").

¹⁵ RICHARD A. POSNER, OVERCOMING LAW 406 (1995), *quoted in* Farber, *supra* note 14, at 399.

¹⁶ Coase, *supra* note 1, at 1.

¹⁷ Farber, *supra* note 14, at 399; Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1189 n.5 (1989) (outlining the broad impact of Coase's article).

¹⁸ Farber, *supra* note 14, at 400. *But cf.* Daniel H. Cole, *Taking Coase Seriously: Neil Komisar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 261 (2004) ("[F]ew legal scholars [have] taken seriously Ronald Coase's call for comparative institutional analyses to comprehend and resolve problems of social cost."). This author attempts to answer

A. Overview of the Coase Theorem

1. *The Pigouvian Approach to Welfare Economics*

An understanding of the Coase Theorem begins with Arthur C. Pigou's *The Economics of Welfare*.¹⁹ Pigou was the chair of Political Economy at Cambridge when he wrote *The Economics of Welfare*.²⁰ Consistent with his predecessors at Cambridge, Pigou espoused economic theories that intended to maximize societal welfare through legal or governmental mechanisms such as taxes.²¹

A hypothetical example will illustrate Pigou's approach to welfare economics²² and the effect of tort liability rules.²³ In this example, pollution from a cement factory injures the property of a neighboring landowner.²⁴ The amount of damages to the landowner is \$2000. If the tort liability rules hold the cement factory owner liable for the damages to the landowner, then the factory owner will only produce cement if her profits exceed \$2000.²⁵ Any profit less than \$2000 would result in a net loss to the factory owner after compensating the landowner. However, if the cement owner has profits in excess of \$2000, then it will be profitable to produce the cement and pay the landowner for the pollution damages. Therefore, according to Pigou, establishment of tort liability rules by the government will lead to an economically efficient result.²⁶

Professor Coase's call by undertaking a comparative institutional analysis of the overseas maneuver damage claims system.

¹⁹ ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

²⁰ A. W. Brian Simpson, *Coase v. Pigou Reexamined*, 25 J. LEGAL STUD. 53, 63 (1996).

²¹ *See id.* at 64.

²² Welfare economics is defined as:

the branch of study which endeavors to formulate propositions by which we can say that the social welfare in one economic situation is higher or lower than in another," or equivalently as a means "by which we may rank, on the scale of better or worse, alternative economic situations open to society.

Louis Kaplow & Steven Shavell, *The Perils of Welfare Economics: Reviewing Fairness Versus Welfare*, 97 NW. U. L. REV. 351, 353 (2002) (quoting Y.K. NG, *WELFARE ECONOMICS* 2 (1979)).

²³ Farber, *supra* note 14, at 400.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

This example highlights several key economic principles related to welfare economics. First, in economic theory, a “perfectly functioning market” produces an optimal number of goods at a corresponding price.²⁷ Under the Pigouvian approach, the pollution case is an example of an imperfectly functioning market because the social benefit of producing the good is not optimal relative to social costs.²⁸ Economists today refer to this kind of market behavior as an externality.²⁹ The pollution generated by the cement factory, which injures the landowner, is a negative externality³⁰ because the factory owner’s activity imposes a cost on the landowner for which the market economy’s pricing system does not charge the factory owner.³¹ In other words, the cost is external to the pricing system.³² Generally, Pigou viewed government-imposed tort liability rules, or some form of tax on the producer of the negative externality, as necessary to force the factory owner to internalize the

²⁷ The term “optimal” is defined as “the quantity (and corresponding price) at which the social cost of producing one more unit of a good exceeds the social benefit of that unit.” Richard Morrison, *Price Fixing Among Elite Colleges and Universities*, 59 U. CHI. L. REV. 807, 828 (1992) (citing ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 279 (1989)). The Pigouvian approach theorized that government intervention was necessary in the case of an externality to ensure the market produced at an efficient level. See Coase, *supra* note 1, at 12.

²⁸ Coase, *supra* note 1, at 12.

²⁹ The term externality has been defined as “a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent.” ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45 (1988).

³⁰ Externalities may be positive or negative. The polluting factory owner causing harm to a neighboring landowner is a classic example of a negative externality. See *supra* note 24 and accompanying text. An example of a positive externality would be when a homeowner paints his house, causing an increase of the value in the other homes in the neighborhood.

³¹ John F. Duffy, *Intellectual Property Isolationism and the Average Cost Thesis*, 83 TEX. L. REV. 1077, 1081 (2005). See generally George J. Stigler, *Economic Theory: Price*, BRITANNICA (15th ed. 1998), available at http://www.britannica.com/nobel/macro/5001_98_11.html (discussing this Nobel Prize winning economist’s views of the theory related to a market economy’s pricing system) (last visited Feb. 24, 2006).

The price system, as it exists in western Europe and the Americas, is a means of organizing economic activity. It does this primarily by coordinating the decisions of consumers, producers, and owners of productive resources. Millions of economic agents who have no direct communication with each other are led by the price system to supply each other’s wants. In a modern economy the price system enables a consumer to buy a product he has never previously purchased, produced by a firm of whose existence he is unaware, which is operating with funds partially obtained from his own savings.

Id.

³² Duffy, *supra* note 31, at 1081.

pollution costs in order to remedy the market inefficiencies caused by a negative externality.³³ It is this result that Coase attacks.

2. *The Coasian Alternative*

In *The Problem of Social Cost*, Coase refers to the pollution example described above and concludes that Pigou's "suggested courses of action are inappropriate, in that they lead to results which are not necessarily, or even usually, desirable."³⁴ Coase demonstrated that Pigou failed to consider an alternative to forced cost internalization that would prevent the predicted market inefficiencies,³⁵ that is, the prospect that the landowner and the factory owner may bargain with each other for an economically efficient outcome even without tort liability or another forced internalization.³⁶

Coase demonstrated his position by using a hypothetical case involving a rancher who owns cattle that have a tendency to stray into a neighbor's crops.³⁷ The hypothetical involving the landowner and polluting factory owner also demonstrates his point. Let us assume there is no tort liability and the factory owner's profits will be less than the \$2000 in damages that the pollution causes to the landowner. Pigou would argue that only government intervention would force the factory owner to internalize the costs and make an economically efficient production decision.³⁸ But what would stop the landowner from offering to pay the cement factory owner to not pollute? Using Coase's analysis, if the cement factory owner's profits were \$1000 and the landowner's damages were \$2000, then the landowner could offer the cement factory owner \$1500 to not pollute.³⁹ This would result in an economically efficient outcome that is advantageous to both parties, without requiring government intervention.⁴⁰

Coase's hypothetical demonstrates an important outcome called the Coase Theorem. It provides that regardless of any tort liability rule in

³³ See *id.* at 1081-82.

³⁴ Coase, *supra* note 1, at 1.

³⁵ Farber, *supra* note 14, at 400-01.

³⁶ *Id.* at 401.

³⁷ Coase, *supra* note 1, at 2-8.

³⁸ See *supra* note 33 and accompanying text.

³⁹ Farber, *supra* note 14, at 401.

⁴⁰ *Id.*

effect, if the parties to a potential agreement are able to bargain without costs related to bargaining, they will reach an agreement that results in “an increase in economic efficiency,”⁴¹ if such an outcome is possible.⁴² This has also been expressed as follows:

Given perfect knowledge about all alternatives to any problem, and assuming transaction costs are zero, disputants will always rearrange their rights, liabilities, and entitlements in a manner which produces a net gain in their combined well-being.⁴³

The Coase Theorem lies at the center of Coase’s criticism of Pigou.

Coase stated his Theorem not for the sake of the Theorem itself, but as support for his larger contention that the traditional Pigouvian approach to negative externalities should be reexamined.⁴⁴ The purpose of Coase’s illustration was to establish the following thesis:⁴⁵

If we are to discuss the problem in terms of causation, both parties cause the damage. If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating system that, as has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.⁴⁶

⁴¹ Richard S. Markovits, *On the Relevance of Economic Efficiency Conclusions*, 29 FLA. ST. U. L. REV. 1, 2-3 (2001) (stating three different definitions of “an increase in economic efficiency” are used by economists. First, a Pareto-superior outcome is one that “makes somebody better off while making nobody worse.” Second, a “potentially Pareto-superior” outcome is one that if it occurred with a zero transaction cost transfer of resources, it would result in a Pareto-superior outcome. Third, a “monetized” outcome results in an increase in economic efficiency “if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims.”).

⁴² Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1, 1 (1998).

⁴³ *Id.* at 4.

⁴⁴ Farber, *supra* note 14, at 418-21.

⁴⁵ *Id.*

⁴⁶ RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 13 (1988), *quoted in* Farber, *supra* note 14, at 417-18.

Coase's illustration included two important assumptions. First, transaction costs are assumed to be zero.⁴⁷ Second, perfect information is assumed to be available to the participants.⁴⁸ Although the perfect information assumption is not as widely discussed with regard to the Coase Theorem,⁴⁹ the zero transaction costs assumption has generated substantial discussion in academic circles.⁵⁰

Coase recognized the assumption of zero transaction costs was not realistic.⁵¹ He used the zero transaction cost assumption to establish three points.⁵² The first point illustrated the "reciprocal nature" of a negative externality situation.⁵³ Coase looked at the action of both the tortfeasor and the "victim" in response to various incentives.⁵⁴ The second purpose for the zero transaction cost assumption was as a tool to analyze institutional behavior.⁵⁵ This allowed the comparison of a world

⁴⁷ Swygert & Yanes, *supra* note 42, at 4. Swygert and Yanes refer to several definitions of transaction costs to illustrate the concept of transaction costs, which may be difficult to grasp. *Id.* at 21-22. These definitions of transaction costs are:

1. Costs that occur "when trading partners attempt to identify and contact one another (identification costs), when contracts are negotiated (negotiation costs), and when the terms of the contracts are verified and enforced."
2. The costs of bringing bargainers together, maintaining and revising the agreement, and the capital required to effect the agreement.
3. The costs "like those of getting large numbers of people together to bargain, and costs of excluding free loaders."
4. The three classes of "search and information costs, bargaining and decision costs, policing and enforcement costs . . . [which] reduce to a single one . . . [the] resources losses due to lack of information."

Id. (footnotes omitted).

⁴⁸ *Id.* at 4.

⁴⁹ Joseph Farrell, *Information and the Coase Theorem*, 1 J. ECON. PERSP. 113, 117-21 (1987). One possible reason that the perfect information assumption has generated less attention may be the view that perfect information is directly related to the zero transaction cost assumption. See Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 304 (1992) (stating "an assumption of zero transaction costs implies that information is perfect.").

⁵⁰ See, e.g., Farber, *supra* note 14, at 404-05 ("[A] 'transaction cost' is something more than a label for failure to reach a bargain. Instead, it seems to refer to measurable costs of entering into transactions.").

⁵¹ Coase, *supra* note 1, at 7.

⁵² Farber, *supra* note 14, at 418.

⁵³ *Id.*

⁵⁴ *Id.* If transaction costs were present in Coase's hypothetical, there is no guarantee that the parties would reach an agreement. The transaction costs may have prevented the parties from reaching agreement. *Id.*

⁵⁵ *Id.*

where all parties could agree on an outcome that happens to be economically efficient, with the world of transaction costs.⁵⁶ The third point was to show that government intervention is not the only option to address a negative externality.⁵⁷ The last point directly attacked the Pigouvian approach to externalities which stressed government intervention.⁵⁸

Coase described the problem encountered in addressing negative externalities.

The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.⁵⁹

Coase offered three alternative courses of action for dealing with negative externalities when transaction costs are enough to prevent a transaction that would have occurred in a zero transaction cost world.⁶⁰ First, a single firm could purchase the entities involved, such as a polluting firm purchasing the real estate of those injured by the pollution.⁶¹ The polluter could then internalize the costs and reach an economically efficient result.⁶² In the second option, the government acts as a “super-firm” and forces cost internalization through administrative regulation of an industry.⁶³ The government requires the industry to employ specific production methods or limits the geographic area where the industry may operate.⁶⁴ The third option is to do nothing, thereby avoiding all the administrative costs resulting from options one and two.⁶⁵ These courses of action represent the available options for addressing negative externalities.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Simpson, *supra* note 20, at 64.

⁵⁹ Coase, *supra* note 1, at 11.

⁶⁰ Farber, *supra* note 14, at 419.

⁶¹ Coase, *supra* note 1, at 8, *construed in* Farber, *supra* note 14, at 419.

⁶² *Id.*

⁶³ *Id.* at 9.

⁶⁴ *Id.*

⁶⁵ *Id.* at 10.

The choice of a course of action requires “a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.”⁶⁶ Courts, or other government actors, are often required to decide how resources are to be used in cases of negative externalities.⁶⁷ Coase argues that a “better approach would seem to be to start our analysis with a situation approximating that which actually exists, to examine the effects of a proposed policy change and to attempt to decide whether the new situation would be, in total, better or worse than the original one.”⁶⁸ Coase’s desired outcome is “[t]hat institutional and organizational structure is best that, under the circumstances, minimizes on transaction costs in order to maximize the social product (or social welfare).”⁶⁹

B. The Coase Theorem and Government Generated Negative Externalities

The Coasian comparative institutional analysis described above does not specifically address a case in which the government is the actor producing the negative externality. Does the analysis change if the government produces the negative externality? Under the Coase Theorem, does an increase in economic efficiency result for government produced negative externalities?⁷⁰ To make this determination, the analysis must compare the social benefit derived from the government production with any social harm caused by the negative externality.⁷¹ The following discussion compares social benefits and costs to determine whether an increase in economic efficiency results for government produced negative externalities.

⁶⁶ COASE, *supra* note 46, at 18.

⁶⁷ *See id.* at 27.

⁶⁸ *Id.* at 43, *quoted in* Farber, *supra* note 14, at 420.

⁶⁹ Cole, *supra* note 18, at 262.

⁷⁰ *See supra* note 41 and accompanying text.

⁷¹ *See supra* notes 27-28 and accompanying text.

1. Public Goods and National Defense

The social benefit derived from maneuvers⁷² is national defense. Undertaking this analysis relies on an additional economic concept, namely the concept of a public good.⁷³ Like other externalities,⁷⁴ a public good is an instance where the market is not functioning perfectly.⁷⁵ The market provides a less than optimal quantity of a public good.⁷⁶ The unique characteristics of a public good, namely being “both nonrival and nonexclusive,” account for this underproduction.⁷⁷ A nonrival good is one that, once produced for the initial consumer, costs nothing to provide to an additional consumer.⁷⁸ A good is nonexclusive if the producer cannot exclude it from other consumers after providing it to the initial consumer.⁷⁹ In other words, the benefits of a nonexclusive good cannot be limited to the purchaser.⁸⁰ National defense is the archetypical example of a public good, because once made available to one consumer, his neighbors automatically enjoy the protection provided at no expense to them.⁸¹

For example, assume Bill Gates is in the market to purchase a missile defense system. The system costs a total of \$10 billion, but he will only gain a personal benefit of \$5 billion from the missile defense system. If he were to purchase the system, he could not stop his neighbors from enjoying its protection for a benefit of \$15 billion, which they would

⁷² U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 4-4 (14 June 2001) [hereinafter FM 3-0] (“Maneuver is the employment of forces, through movement combined with fire or fire potential, to achieve a position of advantage with respect to the enemy to accomplish the mission. Maneuver is the means by which commanders concentrate combat power to achieve surprise, shock, momentum, and dominance.”).

⁷³ Public goods are distinguished from other goods by their unique characteristics. Public goods are defined by two characteristics, namely, being nonrival and nonexclusive. Morrison, *supra* note 27, at 828; *see also infra* notes 76-80 and accompanying text.

⁷⁴ *See supra* notes 29-30 and accompanying text.

⁷⁵ Morrison, *supra* note 27, at 828; *see also* Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 IOWA J. CORP. L. 519, 519-20 (2002) (discussing neoclassical and Coasian markets).

⁷⁶ Morrison, *supra* note 27, at 828.

⁷⁷ *Id.*

⁷⁸ *Id.* For example, a banana, a private good, is rival because it can only be consumed by the initial consumer. In contrast, a radio broadcast is nonrival, because additional consumers can tune in without adding any cost to the initial consumer.

⁷⁹ *Id.* A banana is exclusive because its benefits can be limited to the purchaser. A fireworks display would be an example of a good that cannot be excluded, at least in the local area.

⁸⁰ *Id.*

⁸¹ *See id.*

reap without cost. The total social welfare, or social benefit, of the missile defense system would be \$20 billion, with a resulting surplus in social welfare of \$10 billion.⁸² Under these facts, Mr. Gates would not purchase the missile defense system for himself because its \$10 billion price tag is more than his \$5 billion personal benefit. He could purchase the system and attempt to sell the right to missile defense protection to individuals in an effort to pay for the cost in excess of his personal benefit. However, no rational⁸³ consumer would pay for the protection once Mr. Gates had purchased it because the consumer would enjoy the protection due to its nonexclusive nature.⁸⁴ The consumer exhibiting this behavior related to a nonexclusive good is called a “free-rider.”⁸⁵ The free-rider problem stands as a barrier to bargaining in the public good market.⁸⁶ The free-rider problem caused by the non-exclusive nature of the good “imposes substantial transaction costs.”⁸⁷

Returning to the hypothetical, an additional option would be for the consumers, to include Mr. Gates, to pool their resources to purchase the missile defense system. A rational consumer, armed with perfect information and free from transaction costs external to the free-rider problem, would desire to achieve the surplus social benefits from the missile defense system.⁸⁸ Furthermore, any outcome that results in an agreement to pay for the missile defense system would be Pareto efficient,⁸⁹ as it would realize the social benefit surplus.⁹⁰ However, if the possibility exists to enjoy the benefits of the missile defense system without incurring any personal costs, the consumer would opt out of the agreement, hoping to enjoy the benefit while the other consumers incur the costs.⁹¹ Thus, the free-rider appeal will again stand as a barrier to

⁸² *Id.*; see also Hovenkamp, *supra* note 75, at 522 (discussing surplus social welfare of public goods).

⁸³ See generally Hovenkamp, *supra* note 49, at 293 (discussing the importance of the rationality assumption in law and economics).

⁸⁴ Morrison, *supra* note 27, at 828.

⁸⁵ Francesco Parisi, *The Market for Votes: Coasian Bargaining in an Arrowian Setting*, 6 GEO. MASON. L. REV. 745, 754 (1998).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *supra* note 82 and accompanying text.

⁸⁹ See *supra* note 41 (defining Pareto efficiency).

⁹⁰ See Hovenkamp, *supra* note 75, at 524 (discussing the role of transaction costs on stability in Coasian markets).

⁹¹ The assumption of zero transaction costs external to the free-rider problem may actually lead to instability that prevents consumers from reaching an agreement. *Id.* (“If transacting is costless, the costs of one new proposal that increases the proponents’ wealth (zero) are always equal to or less than anticipated gains (zero or something more).”)

participation.⁹² In this hypothetical example, no one would purchase the system because the \$10 billion cost exceeds what any individual would willingly pay. The result would be an underproduction in national defense and a loss of \$10 billion in surplus social benefit.⁹³ This illustrates the problem of underproduction of public goods. Economists have argued that government production is required to overcome the market's underproduction of public goods, specifically national defense.⁹⁴ Accordingly, the market's failure to produce sufficient national defense justifies government production of this public good.⁹⁵ By increasing the production of national defense over the level produced by the market, the U.S. government attempts to realize a surplus in social welfare.⁹⁶

2. *Classifying Government Generated Negative Externalities: Tort versus Taking*

Law and Economics theory helps examine procedures for addressing social harm caused by government-generated negative externalities.⁹⁷ The government generates negative externalities in myriad ways including through the "takings triangle" of eminent domain, taxes, and exercise of the police power.⁹⁸ A tort is another form of government-generated negative externality.⁹⁹ The legal system in the United States does not require compensation in all cases of government-generated negative externalities.¹⁰⁰ Various legal rules determine which negative externalities are compensable and which are not. For example, the negative externalities generated by taxes and the exercise of the police power are not compensable because the Constitution authorizes those

But once transacting is costly, then the cost of a further proposal may exceed anticipated gains and equilibrium may eventually be reached.").

⁹² See *supra* notes 84-86 and accompanying text.

⁹³ See Morrison, *supra* note 27, at 828-29.

⁹⁴ *Id.* at 829; see also Hovenkamp, *supra* note 75, at 522 ("[G]overnment intervention may be warranted in Coasian markets with large numbers of players, provided that the government can do better than private bargainers.").

⁹⁵ See *supra* notes 76-81 and accompanying text.

⁹⁶ See *supra* notes 82, 90 and accompanying text.

⁹⁷ See, e.g., Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 284 n.20 (2001) (analyzing government takings as a generator of externalities, both positive and negative).

⁹⁸ *Id.* at 284.

⁹⁹ *Id.* at 284 n.20.

¹⁰⁰ *Id.* at 284.

forms of government action.¹⁰¹ The Constitution also authorizes the government to exercise its eminent domain power, but requires compensation for the taking.¹⁰² Furthermore, given various waivers of sovereign immunity,¹⁰³ the government must provide compensation for the negative externalities generated by its torts.¹⁰⁴ An overview of the Law and Economics rationale behind government takings and government-caused torts provides useful background in the discussion of proper procedures for addressing government-generated negative externalities.

a. Government Takings

A taking of property occurs “when government action directly interferes with or substantially disturbs the owner’s use and enjoyment of the property.”¹⁰⁵ One approach to addressing government-generated negative externalities is to provide compensation for a government taking.¹⁰⁶ Scholars and courts have grappled with establishing appropriate rules for compensating for government takings under the Fifth Amendment’s Takings Clause.¹⁰⁷ The government’s compensation mechanisms are often inherently inefficient because of their high transaction costs.¹⁰⁸ Some individuals will not seek compensation because the cost of recovery is too high compared to the probability of receiving compensation.¹⁰⁹ The nature of government compensation rules creates inefficiencies and failed compensation efforts.¹¹⁰ Additional factors that lead to inefficiencies include a lack of government information regarding the social costs of the negative externalities they generate, or the identity

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See, e.g.*, Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005) (containing partial waivers of sovereign immunity).

¹⁰⁴ Bell & Parchomovsky, *supra* note 97, at 284 n.20.

¹⁰⁵ BLACK’S LAW DICTIONARY 1454 (6th ed. 1990) [hereinafter BLACK’S] (citing *Brothers v. United States*, 594 F.2d 740, 741 (9th Cir. 1979)).

¹⁰⁶ *Id.* at 280.

¹⁰⁷ Bell & Parchomovsky, *supra* note 97, at 278 (discussing the difficulty in establishing standards for regulatory takings).

¹⁰⁸ *Id.* at 280, 299. The cost of litigating a taking is an example of these high transaction costs.

¹⁰⁹ *See id.* at 290.

¹¹⁰ *Id.*

of those harmed.¹¹¹ The outcomes are inefficient because they allow the government to externalize costs that result in “inaccurate assessments of the cost effectiveness and desirability of government policies.”¹¹²

A taking is efficient only when the net social benefits exceed the net social costs.¹¹³ By requiring compensation, the government must internalize “the cost of its action to private property owners—a cost it could otherwise ignore.”¹¹⁴ A “fiscal illusion” occurs when the government is not required to internalize the social costs of its negative externalities because it “operates under the illusion that its actions are costless.”¹¹⁵ The inefficiencies stemming from takings compensation procedures also appear in other mechanisms designed to address government-generated negative externalities such as torts.

b. Government Torts

A tort is “[a] private or civil wrong or injury, including action for bad faith breach of contract, for which the court will provide a remedy in the form of an action for damages.”¹¹⁶ The primary Coasian justification for tort law is negligence liability.¹¹⁷ According to this view,

[l]iability is to be assessed only for harms resulting from those actions for which the social costs exceed the social benefits. This promise of liability is understood to inform the actor of the costs that will be charged him in the event of harm, so that he is able to assess these, discounted by the probability of their eventuation, against the cost of precautions to be taken against them.¹¹⁸

Noted Law and Economics scholar Guido Calabresi eventually accepted the application of the Coase Theorem’s reciprocity assumption

¹¹¹ *Id.* at 281.

¹¹² *Id.* at 280.

¹¹³ *Id.* at 290.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 291 n.53.

¹¹⁶ BLACK’S, *supra* note 105, at 1489 (citing *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1368 (Nev. 1987)).

¹¹⁷ Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U. L. REV. 919, 931 (1994).

¹¹⁸ *Id.*

as a justification for tort liability theory.¹¹⁹ Calabresi also accepted Coase's conclusion that, in the absence of transaction costs and with perfect information, the original assignment of legal responsibility for social costs from a negative externality is irrelevant to the final, efficient outcome.¹²⁰ Calabresi used these underlying principles from the Coase Theorem as grounds for a normative argument on how tort systems should operate.¹²¹ Calabresi applied this Law and Economics analysis to tort law with the primary purpose of "reduc[ing] the sum of the costs of accidents and the costs of avoiding accidents."¹²²

Recognizing that the zero transaction costs and perfect information assumptions are rarely, if ever, present, Guido Calabresi and Douglas Melamed advocated the employment of the following principles in establishing property entitlement rules for torts.¹²³ First, economic efficiency requires a system that awards property entitlements based on knowledgeable choices regarding social benefits and costs, and any related transaction costs.¹²⁴ Second, the transaction costs should be assigned to the party who is in the best position to make a cost-benefit analysis.¹²⁵ Third, costs should be assigned to the party who can most efficiently reduce them.¹²⁶ Fourth, if it is unclear who that party is, the costs should be assigned to the party that enjoys the lowest transaction costs for correcting an "error in entitlements."¹²⁷ Fifth, and finally, a choice may need to be made between the efficiency of market transactions or "collective fiat."¹²⁸ This approach to analyzing a tort liability system where transaction costs are present will not guarantee

¹¹⁹ Donald H. Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought*, 56 S. CAL. L. REV. 711, 722 (1983). Although Calabresi's tort theories are based in part on the Coase Theorem, some scholars have distinguished Calabresi's approach with the Coasian approach. *See, e.g.*, Weston, *supra* note 117, at 926-42 (noting their common assumptions and background, but distinguishing their approach to tort theory).

¹²⁰ Gjerdingen, *supra* note 119, at 722; *see supra* notes 42-46 and accompanying text.

¹²¹ Gjerdingen, *supra* note 119, at 722.

¹²² *Id.* (quoting GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970)).

¹²³ Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096-97 (1972), *construed in* Gjerdingen, *supra* note 119, at 722-23.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

Pareto optimality,¹²⁹ but it will maximize the efficiency of a tort liability system.¹³⁰

Calabresi used the above criteria to support his argument in favor of strict products liability.¹³¹ Subsequent neoclassical Law and Economics scholars, such as Richard Posner, challenged this result.¹³² Nevertheless, the criteria, employing principles of Coasian Law and Economics analysis, are still a valid mechanism for analyzing a system designed to address inefficiencies resulting from government generated negative externalities.¹³³ They also match many concerns of scholars who have analyzed takings law through a Law and Economics framework.¹³⁴

III. Mechanisms for Compensating Overseas Maneuver Damage

Having outlined the principal Law and Economics theories for addressing government-generated negative externalities, this article now explores the existing statutory mechanisms for addressing overseas maneuver damages. There are four primary statutory mechanisms for the payment of damages caused during maneuvers:¹³⁵ the Federal Tort Claims Act (FTCA);¹³⁶ the Foreign Claims Act (FCA);¹³⁷ the Military Claims Act (MCA);¹³⁸ and the International Agreements Claims Act

¹²⁹ See *supra* note 41 (defining economic efficiency).

¹³⁰ Calabresi & Melamed, *supra* note 123, at 1096.

¹³¹ James R. Hackney, Jr., *Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory*, 15 *LAW & HIST. REV.* 275, 307-16 (1997).

¹³² *Id.* at 317-21.

¹³³ See *supra* notes 119-21 and accompanying text.

¹³⁴ See *supra* Part II.B.2.a.

¹³⁵ Article 139 of the Uniform Code of Military Justice also allows for the payment of claims for intentional damage cause by a service member. UCMJ art. 139 (2005). Under Article 139, the individual service member responsible for intentionally causing the damage pays the claim. *Id.*; see also Colonel R. Peter Masterton, *Managing a Claims Office*, *ARMY LAW.*, Sept. 2005, at 46, 63. This result is consistent with the responsible service member internalizing the social costs caused by the negative externality of their conduct. See *supra* notes 59-62 and accompanying text. Nevertheless, a further discussion of Article 139 claims is outside the scope of this topic because Article 139 claims relate to damages caused by the intentional conduct of a service member and not a decision of a commander. Similarly, the Non-Scope Claims Act is also beyond the scope of this article because it is based on activities that occur outside the scope of duty. Non-Scope Claims Act, 10 U.S.C. § 2737 (2005).

¹³⁶ Federal Tort Claims Act, 10 U.S.C. § 1346(b) (2005).

¹³⁷ Foreign Claims Act, 10 U.S.C. § 2734 (2005).

¹³⁸ Military Claims Act, 10 U.S.C. § 2733 (2005).

(IACA).¹³⁹ The FTCA does not apply outside the United States, making it inapplicable to foreign maneuver damage claims.¹⁴⁰ The armed service assigned single-service claims responsibility for the country where the incident occurred processes claims filed under the FCA, the MCA, and the IACA.¹⁴¹

A. The Foreign Claims Act

The first form of legislation used to provide compensation for negative externalities that result from Army overseas maneuvers is the FCA.¹⁴²

1. *Origin and History of the Foreign Claims Act*

On 27 May 1941, President Roosevelt declared the Nazi aggression in Europe a national emergency.¹⁴³ Shortly thereafter, on 1 July 1941, Iceland formally invited the United States to send U.S. forces to its shores.¹⁴⁴ After the invitation, the Secretary of the Navy asked Congress for a statutory waiver of sovereign immunity and a mechanism for the payment of claims that resulted from the deployment of Marines to Iceland.¹⁴⁵ Congress passed the FCA on 2 January 1942, shortly after the beginning of World War II.¹⁴⁶ The statute was retroactive to President Roosevelt's 27 May 1941 national emergency declaration and was intended to only apply for the duration of the national emergency.¹⁴⁷

¹³⁹ International Agreements Claims Act, 10 U.S.C. § 2734a (2005).

¹⁴⁰ 10 U.S.C. § 1346.

¹⁴¹ U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 1-20 (1 July 2003) [hereinafter AR 27-20].

¹⁴² 10 U.S.C. § 2734.

¹⁴³ Proclamation No. 2487, 55 Stat. 1647 (1941), *cited in* U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-1 (8 Aug. 2003) [hereinafter DA PAM. 27-162].

¹⁴⁴ Message from the Prime Minister of Iceland to the President of the United States, U.S.-Ice., July 1, 1941, E.A.S. No. 232, *cited in* DA PAM. 27-162, *supra* note 143, para. 10.1.

¹⁴⁵ DA PAM. 27-162, *supra* note 143, para. 10-1.

¹⁴⁶ Foreign Claims Act, Pub. L. No. 77-393, 55 Stat. 880 (1941) (codified as amended at 10 U.S.C. § 2734).

¹⁴⁷ *Id.*

Congress extended the FCA multiple times, however, until it became a permanent statutory waiver of sovereign immunity in 1956.¹⁴⁸

The purpose of the FCA was to promote “friendly relations” between host nations and U.S. forces.¹⁴⁹ The FCA initially authorized the compensation of a friendly inhabitant of a friendly foreign state.¹⁵⁰ Compensation was limited to \$1000 and contained a one-year statute of limitations.¹⁵¹ Congress amended the FCA in 1943 and increased the compensation to \$5000.¹⁵² A 1956 amendment expanded FCA application to maritime claims.¹⁵³ Prior to the 1956 amendment, only claims that arose in a foreign country were valid.¹⁵⁴ The same amendment broadened the definition of a proper claimant from an inhabitant of the country where the claim arose to any person who permanently resided outside the United States.¹⁵⁵ In 1984, Congress again increased the amount payable; this time to \$100,000.¹⁵⁶ The FCA remains an important tool for commanders in any deployed environment, as well as when on maneuvers or in garrison overseas.¹⁵⁷

¹⁴⁸ Foreign Claims Act, Pub. L. No. 84-769, 70 Stat. 703 (1956) (codified as amended at 10 U.S.C. § 2734).

¹⁴⁹ 10 U.S.C. § 2734; Scott J. Borrowman, *Sosa v. Alvarez-Machain and Abu Ghraib—Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 B.Y.U. L. REV. 371, 376.

¹⁵⁰ 55 Stat. at 880 (codified as amended at 10 U.S.C. § 2734).

¹⁵¹ *Id.*

¹⁵² Foreign Claims Act, Pub. L. No. 78-393, 57 Stat. 66 (1943) (codified as amended at 10 U.S.C. § 2734).

¹⁵³ 70 Stat. at 703. However, the authority to settle a maritime claim under the FCA has been withheld to the Commander, U.S. Army Claims Service. AR 27-20, *supra* note 141, para. 10-2(c).

¹⁵⁴ 55 Stat. at 880; 57 Stat. at 66; DA PAM. 27-162, *supra* note 143, para. 10-1.

¹⁵⁵ 70 Stat. at 703; *see also* DA PAM. 27-162, *supra* note 143, para. 10-2(a) (providing detailed guidance on eligible claimants).

¹⁵⁶ Foreign Claims Act, Pub. L. No. 98-564, 98 Stat. 2918 (1984) (codified as amended at 10 U.S.C. § 2734).

¹⁵⁷ *See* Captain Karin Tackaberry, *Center for Law & Military Operations (CLAMO) Note from the Field, Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, ARMY LAW., Feb. 2004, at 39 (describing compensation in Operation Iraqi Freedom using the Foreign Claims Act); *see also*, Masterton, *supra* note 135, at 62 (explaining the application of the FCA to in garrison tort claims); Major Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, ARMY LAW., June 1998, at 1 (describing compensation under the Dayton Status of Forces Agreement using the FCA).

2. *Chapter 10, AR 27-20 and Chapter 10, DA Pam. 27-162*

Army procedures for processing claims under the FCA are contained in *AR 27-20*¹⁵⁸ and *DA Pam. 27-162*.¹⁵⁹ The USARCS, the proponent of the claims regulation and claims pamphlet, provides detailed guidance to claims personnel through both publications. Each chapter in these two claims publications deals with the same topic. For example, chapter two of both publications provides extensive general guidance on investigating and processing tort and tort related claims.¹⁶⁰ Chapter ten deals specifically with the FCA, causing many Army claims personnel to refer to claims processed under the FCA as “chapter ten claims.” Chapter ten outlines the statutory authority and history of the FCA,¹⁶¹ its scope in terms of proper claimants,¹⁶² claims that are and are not payable, as well as the applicable law.¹⁶³

The FCA allows the payment of claims for property damage, personal injury, and death caused by Soldiers or civilian employees when the death, injury, or damage resulted from the Soldier’s or civilian employee’s wrongful act or omission.¹⁶⁴ The FCA does not require the act or omission to be within the scope of the Soldier’s or civilian employee’s employment.¹⁶⁵ Claims for property damage, personal injury, or death are also payable when they are the result of a “noncombat activity.”¹⁶⁶ The Army claims regulation 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. Examples are practice firing of missiles and weapons, training and field exercises, maneuvers that include the operation of aircraft and vehicles, use and occupancy of real estate, and

¹⁵⁸ *AR 27-20*, *supra* note 141.

¹⁵⁹ *DA PAM. 27-162*, *supra* note 143.

¹⁶⁰ *AR 27-20*, *supra* note 141, at ch. 10; *DA PAM. 27-162*, *supra* note 143, at ch. 10.

¹⁶¹ *See supra* notes 143-57 and accompanying text.

¹⁶² *See supra* note 155 and accompanying text.

¹⁶³ *AR 27-20*, *supra* note 141, at ch. 10, sec. 1; *DA PAM. 27-162*, *supra* note 143, at ch. 10, sec. 1.

¹⁶⁴ Foreign Claims Act, 10 U.S.C. § 2734 (2005).

¹⁶⁵ *Id.* *But see* *DA PAM. 27-162*, *supra* note 143, para. 10-3 (explaining the scope of employment rules for non-U.S. citizen employees who are locally hired).

¹⁶⁶ 10 U.S.C. § 2734.

movement of combat or other vehicles designed especially for military use. Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances.¹⁶⁷

Claims for noncombat activities only require causation. Wrongfulness or negligence on the part of the Soldier or civilian employee is not necessary.¹⁶⁸ The FCA does not allow for the payment of claims caused incident to combat activities.¹⁶⁹ Claims under the FCA are adjudicated using the law and custom of the state where the claim arose.¹⁷⁰ This can be one of the most difficult aspects in applying the Foreign Claims Act, as claims personnel are usually not experts in the local law.

The FCA assigns authority to pay claims to one- or three-member Foreign Claims Commissions (FCCs).¹⁷¹ Judge advocates or civilian claims attorneys normally constitute FCCs.¹⁷² A one-member FCC can approve and deny claims up to \$15,000.¹⁷³ A three-member FCC can approve claims up to \$50,000 and may deny a claim in any amount.¹⁷⁴ The Judge Advocate General, the Assistant Judge Advocate General, and the Commander, USARCS, may approve or deny claims up to \$100,000.¹⁷⁵ Claims in excess of \$100,000 may only be approved by the

¹⁶⁷ AR 27-20, *supra* note 141, at glossary.

¹⁶⁸ 10 U.S.C. § 2734; AR 27-20, *supra* note 141, para. 3-3.

¹⁶⁹ 10 U.S.C. § 2734. The FCA provides:

A claim may be allowed under subsection (a) 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.

Id.

¹⁷⁰ *Id.*; AR 27-20, *supra* note 141, para. 10-5.

¹⁷¹ 10 U.S.C. § 2734.

¹⁷² AR 27-20, *supra* note 141, para. 10-8.

¹⁷³ *Id.* para. 10-9.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Secretary of the Army or his designee.¹⁷⁶ U.S. Army claims funds pay all claims up to \$100,000.¹⁷⁷

Foreign Claims Commissions are responsible for investigating, adjudicating, negotiating, and settling foreign claims.¹⁷⁸ Although FCCs may ask for assistance in the investigation from units and organizations in the area of operations, they are not required to coordinate their activities with the command responsible for the act or omission at the heart of a claim.¹⁷⁹ The FCC is also independent of the command in adjudicating the claim.¹⁸⁰

The appointment of a unit claims officer is one aspect of the Foreign Claims process in which the command is involved.¹⁸¹ Unit claims officers are important assets for FCCs because the unit claims officers assist with the investigative process.¹⁸² This is especially true when the FCC has difficulties investigating claims due to the logistical limitations which often arise in a deployed environment.¹⁸³ While the unit claims officer is a part of the command that is the source of the claim-causing activity, he does not adjudicate the claim.¹⁸⁴ These procedures limit the required level of command involvement.

B. The Military Claims Act

The MCA is the second form of legislation used to provide compensation for negative externalities that result from overseas Army maneuvers.¹⁸⁵

¹⁷⁶ 10 U.S.C. § 2734.

¹⁷⁷ *Id.*; see also AR 27-20, *supra* note 141, para. 10-9 (providing that any amount in excess of the first \$100,000 will be reported to the Treasury Department for payment); *infra* note 266 and accompanying text.

¹⁷⁸ AR 27-20, *supra* note 141, para. 10-6.

¹⁷⁹ See *id.* para. 10-6.

¹⁸⁰ *Id.* para. 10-9.

¹⁸¹ *Id.* paras. 2-1 to 2-4.

¹⁸² *Id.* para. 10-9.

¹⁸³ See Tackaberry, *supra* note 157, at 40.

¹⁸⁴ AR 27-20, *supra* note 141, para. 10-9.

¹⁸⁵ Military Claims Act, 10 U.S.C. § 2733 (2005).

1. Origin and History of the Military Claims Act

On 3 July 1943, approximately six months after passing the FCA,¹⁸⁶ Congress enacted the MCA.¹⁸⁷ Like the FCA,¹⁸⁸ the MCA applied retroactively to President Roosevelt's 27 May 1941 proclamation¹⁸⁹ that declared an unlimited national emergency.¹⁹⁰ Congress designed the MCA as a companion statute to the FCA and provided a mechanism for compensating injuries and property damage caused by the large number of servicemembers stationed throughout the United States during World War II.¹⁹¹ The MCA applies to those injured by a Soldier's or civilian employee's negligence or other wrongful acts or omissions or as a result of noncombat activities.¹⁹² Unlike the FCA,¹⁹³ the MCA requires the conduct to be within the scope of duty to be compensable.¹⁹⁴ The MCA replaced the previous federal statutory system of compensation.¹⁹⁵ The limited waiver of sovereign immunity created by Congress is an administrative remedy ineligible for judicial review.¹⁹⁶

Although Congress's primary purpose for the MCA was to compensate claimants in the United States,¹⁹⁷ the MCA has always provided jurisdiction over incidents both at home and abroad.¹⁹⁸ The MCA remained the primary method for compensating those injured by a Soldier's negligence or other wrongful acts in the United States until Congress implemented the FTCA as a part of the Legislative Reorganization Act of 1946.¹⁹⁹ The FTCA became the primary source for compensation of such wrongful acts within the United States, but it

¹⁸⁶ See *supra* notes 143-46 and accompanying text.

¹⁸⁷ Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.

¹⁸⁸ See *supra* note 147 and accompanying text.

¹⁸⁹ Proclamation No. 2487, 55 Stat. 1647 (1941).

¹⁹⁰ 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.

¹⁹¹ See *id.*

¹⁹² *Id.*; see also note 167 and accompanying text.

¹⁹³ See *supra* note 165 and accompanying text.

¹⁹⁴ 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733).

¹⁹⁵ *Id.* (repealing Act of August 24, 1912, 37 Stat. 586, and Act of June 23, 1910, 36 Stat. 630, 676), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.

¹⁹⁶ *Id.*; DA PAM. 27-162, *supra* note 143, para. 3-1.

¹⁹⁷ DA PAM. 27-162, *supra* note 143, para. 3-1.

¹⁹⁸ 57 Stat. at 372 (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 143, para. 3-2.

¹⁹⁹ Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 842 (codified as amended as the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2005)).

did not repeal the MCA.²⁰⁰ The MCA remained applicable to overseas claims not covered by the FCA and to noncombat activities in the United States, because the FTCA does not apply overseas and does not cover noncombat activities.²⁰¹ Today, the majority of claimants under the MCA are overseas military Family members or other U.S. residents who are not covered by the FCA or a Status of Forces Agreement, or claimants in the United States who file claims resulting from noncombat activities.²⁰²

2. *Army Regulations Governing the MCA*

Under the MCA, settlement authority—meaning the authority to pay or deny a claim—rests at varying levels depending on the amount of the claim and the size of the settlement.²⁰³ A staff judge advocate may settle a claim under the MCA up to \$25,000 and may make a final offer or deny a claim for \$25,000 or less.²⁰⁴ Claims for more than \$25,000 that cannot be settled for \$25,000 or less are forwarded to the Commander, USARCS who has settlement authority up to \$25,000 but may deny a claim in any amount.²⁰⁵ The Judge Advocate General or The Assistant Judge Advocate General may deny a claim under the MCA in any amount and may settle a claim for up to \$100,000.²⁰⁶ The Secretary of the Army or his designee, to include the Army General Counsel or another designee, may settle claims in excess of \$100,000.²⁰⁷ As with the FCA,²⁰⁸ claims officials may investigate and adjudicate a claim under the MCA without consultation with the unit that is responsible for the conduct that resulted in the claim.²⁰⁹

²⁰⁰ §§ 401-24, 60 Stat. at 842 (codified as amended as 28 U.S.C. §§ 2671-80).

²⁰¹ Military Claims Act, 10 U.S.C. § 2733 (2005); Federal Tort Claims Act, 28 U.S.C. §§ 2671-80; *see also* note 155, 167, 192 and accompanying text.

²⁰² DA PAM. 27-162, *supra* note 143, para. 3-2(c).

²⁰³ AR 27-20, *supra* note 141, para. 3-6.

²⁰⁴ 10 U.S.C. § 2733(g); AR 27-20, *supra* note 141, para. 3-6.

²⁰⁵ AR 27-20, *supra* note 141, para. 3-6.

²⁰⁶ 10 U.S.C. § 2733; AR 27-20, *supra* note 141, para. 3-6.

²⁰⁷ 10 U.S.C. § 2733(a); AR 27-20, *supra* note 141, para. 3-6.

²⁰⁸ *See supra* notes 178-84 and accompanying text (detailing the role of FCCs in overseas maneuver damage claims).

²⁰⁹ AR 27-20, *supra* note 141, para. 3-6. Other than producing a scope of duty statement, the commander of the Soldier or civilian employee responsible for causing the damage is not required to be consulted in the adjudication of the claim. *See* DA PAM. 27-162, *supra* note 143, para. 2-34.

The MCA initially limited payments to \$500 per claim for medical, hospital, or burial expenses.²¹⁰ Originally, the maximum increased to \$1,000 during times of war.²¹¹ Over time, however, Congress increased the maximum until it eventually abolished it altogether.²¹² Historically, USARCS paid the first \$100,000 for a claim and submitted the amount in excess of \$100,000 to Congress for an additional appropriation.²¹³ Currently, a claimant is paid with the first \$100,000 coming from USARCS²¹⁴ and any excess amount comes from the Judgment Fund.²¹⁵

C. The International Agreements Claims Act

The third and final primary piece of legislation used to provide compensation for negative externalities that result from Army maneuvers is the IACA.²¹⁶

1. Origin and History of the International Agreements Claims Act

The member states signed the North Atlantic Treaty Status of Forces Agreement (NATO SOFA) in London on 19 June 1951.²¹⁷ The Senate advised ratification on 15 July 1953, which the President accomplished the same month.²¹⁸ The treaty entered into force on 23 August 1953.²¹⁹

²¹⁰ Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733).

²¹¹ *Id.*

²¹² Military Claims Act, Pub. L. No. 79-67, 59 Stat. 225 (1945); Military Claims Act, Pub. L. No. 79-466, 60 Stat. 332 (1946); Military Claims Act, Pub. L. No. 82-450, 66 Stat. 334 (1952) (codified at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.

²¹³ Act of 10 August 1956, ch. 1041, § 1, 70A Stat. 153 (1956) (codified as amended at 10 U.S.C. § 2733), *cited in* DA PAM. 27-162, *supra* note 143, para. 3-1.

²¹⁴ Military Claims Act, Pub. L. No. 98-564, 98 Stat. 2919 (1984) (codified as amended at 10 U.S.C. § 2733); DA PAM. 27-162, *supra* note 143, para. 3-1.

²¹⁵ 31 U.S.C. § 1304 (2005). The Judgment Fund is a permanent appropriation by Congress to fund judgments against the United States. Used extensively by the Department of Justice to pay judgments in federal court, the Judgment Fund is designed to fund judgments authorized under other statutes, such as the FTCA, FCA, and the MCA. *See* Trout v. Garrett, 891 F.2d 332, 335 (D.C. Cir. 1989); *see also infra* notes 266-68 and accompanying text.

²¹⁶ International Agreements Claims Act, 10 U.S.C. § 2734a (2005).

²¹⁷ North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

²¹⁸ *Id.* at 1792.

²¹⁹ *Id.*

The original signatories of the NATO SOFA were: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, the United Kingdom, and the United States.²²⁰ In 1954, Congress passed and the President signed the IACA which, while not specific to the NATO SOFA, allowed for implementation of the NATO SOFA's claims provisions.²²¹

The general language of the overseas provision of the IACA applies to agreements between the United States and other nations if the agreements provide for "settlement or adjudication and cost sharing of claims against the United States."²²² In addition to the cost sharing requirement, the claims must arise from acts or omissions of military and civilian employees acting within the scope of their duties while in the host nation's territory and for which the United States is responsible under the host nation law.²²³ As with the FCA,²²⁴ claims under the IACA may not result from combat activities.²²⁵ When an international agreement provides for a claims mechanism that meets these requirements, the IACA allows the Department of Defense (DOD) to reimburse the host nation for the pro rata share stated in the agreement.²²⁶ The IACA, while originally used to implement the NATO SOFA claims provisions, eventually became the authority for the payment of claims under several SOFAs,²²⁷ to include the U.S. SOFAs with Iceland,²²⁸ Japan,²²⁹ Korea,²³⁰ and Australia.²³¹ The NATO SOFA is an appropriate

²²⁰ *Id.* at 1822-25.

²²¹ International Agreements Claims Act, Pub. L. No. 87-651, 76 Stat. 512 (1962) (codified as amended at 10 U.S.C. § 2734a-b). Section 2734a applies to claims arising overseas, whereas section 2734b applies to claims arising within the United States. 10 U.S.C. § 2734a-b.

²²² 10 U.S.C. § 1034a.

²²³ *Id.*

²²⁴ *See supra* note 169 and accompanying text (detailing the FCA's combat exception).

²²⁵ 10 U.S.C. § 1034a (stating "[A] claim arising out of an act of an enemy of the United States or arising, directly or indirectly, from an act of the armed forces, or a member thereof, while engaged in combat may not be considered or paid under this section.>").

²²⁶ *Id.*

²²⁷ DA PAM. 27-162, *supra* note 143, para. 7-1.

²²⁸ Annex on the status of United States personnel and property, May 8, 1951, U.S.-Ice., 2 U.S.T. 1533.

²²⁹ Treaty of Mutual Cooperation and Security, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652.

²³⁰ Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of the United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677.

model to describe how the IACA functions, because Congress designed the IACA as implementing legislation for the NATO SOFA.²³²

2. *The Claims Provisions of the NATO SOFA*

Article VIII of the NATO SOFA deals with claims.²³³ The Army claims regulation provides for the payment of claims under Article VIII “arising from any act or omission of [S]oldiers or members of the civilian component of the U.S. Armed Services done in the performance of official duty or arising from any other act or omission or occurrence for which the U.S. Armed Services are responsible.”²³⁴ Article VIII breaks claims into three areas: intergovernmental claims; third-party scope claims; and third-party non-scope claims.²³⁵ An intergovernmental claim is a claim that arises from one NATO member state against another NATO member state.²³⁶ Intergovernmental claims must have a NATO connection to fall under Article VIII.²³⁷ These intergovernmental claims are largely waived.²³⁸ An intergovernmental claim for damage to military property or personnel is waived.²³⁹ An intergovernmental claim for damage to non-military property is limited to \$1,400.²⁴⁰

The second category of Article VIII claims are third-party scope claims.²⁴¹ Individuals or entities, to include state or local governments, which are not NATO member states are third parties under the NATO SOFA.²⁴² Article VIII, paragraph five establishes the procedures under which a third party may file a claim for damage arising from a service member’s or civilian employee’s duty-related act or omission.²⁴³ These “scope claims” arise within the scope of duty of the service member or

²³¹ Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, U.S.-Austl., 14 U.S.T. 506.

²³² See *supra* note 221 and accompanying text.

²³³ NATO SOFA, *supra* note 217, art. VIII.

²³⁴ AR 27-20, *supra* note 141, para. 7-10.

²³⁵ NATO SOFA, *supra* note 217, art. VIII.

²³⁶ *Id.*

²³⁷ *Id.*, construed in DA PAM. 27-162, *supra* note 143, para. 7-2.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*, construed in DA PAM. 27-162, *supra* note 143, para. 7-2.

²⁴³ NATO SOFA, *supra* note 217, art. VIII(5).

civilian employee.²⁴⁴ The sending state²⁴⁵ must determine whether the incident was within the scope of duty, although local law determines legal responsibility.²⁴⁶ If the sending state determines that the service member's or civilian employee's act or omission was outside the scope of duty, then the sending state categorizes the claim as a third-party non-scope claim.²⁴⁷ An FCC adjudicates and pays third-party non-scope claims as *ex gratia* claims²⁴⁸ under the FCA.²⁴⁹

Employing the same procedures used as if the host nation's forces had caused the injury,²⁵⁰ third-parties file scope claims with the NATO host nation,²⁵¹ also called the receiving state.²⁵² For example, instead of filing with an Army claims office, a German national would file a claim with German authorities for damage inflicted by U.S. forces.²⁵³ The German authorities would conduct an initial investigation to help determine which unit was involved and would then forward the claim to the U.S. Army Claims Service, Europe (USACSEUR).²⁵⁴ The U.S. Army Claims Service, Europe, would then conduct its own investigation by contacting the unit and gathering information needed to make a determination of whether the incident was within the scope of duty.²⁵⁵ If the USACSEUR determined the incident was within the scope of duty,

²⁴⁴ See DA PAM. 27-162, *supra* note 143, para. 7-2.

²⁴⁵ The NATO member that has deployed forces to a foreign country is called the "sending state." *Id.* para. 7-1.

²⁴⁶ NATO SOFA, *supra* note 217, art. VIII, construed in DA PAM. 27-162, *supra* note 143, para. 7-2.

²⁴⁷ *Id.*

²⁴⁸ *Id.*; see also AR 27-20, *supra* note 141, at glossary, sec. II.a ("Ex Gratia: 'As a matter of grace.'" In the case of *ex gratia* claims under the NATO SOFA, Article VIII, paragraph six, a claim considered by the grace of the sovereign or sending State without statutory obligation (under the Foreign Claims Act) to do so.").

²⁴⁹ DA PAM. 27-162, *supra* note 143, para. 7-2; see *supra* Part III.A.2. *Ex gratia* claims fall outside the scope of this topic, as they do not arise within the scope of duty and are not a negative externality within a commander's control.

²⁵⁰ NATO SOFA, *supra* note 217, art. VIII, construed in DA PAM. 27-162, *supra* note 143, para. 7-2.

²⁵¹ Although claims are properly filed with the receiving state, they may also be filed against the service member or civilian employee directly under local law. DA PAM. 27-162, *supra* note 143, para. 7-2. Although the service member or civilian employee may be subject to personal judgment, they are immune from enforcement proceedings for any judgment that arose out of the performance of official duties. *Id.*

²⁵² *Id.* para. 7-1.

²⁵³ DA PAM. 27-162, *supra* note 143, para. 7-2; Major David J. Fletcher, *The Lifecycle of a NATO SOFA Claim*, ARMY LAW., Sept. 1990, at 44, 46-47.

²⁵⁴ See Fletcher, *supra* note 253, at 46-47.

²⁵⁵ See *id.*

they would issue a scope certificate for that claim to the German authorities.²⁵⁶ The German authorities would then adjudicate the claim under German law and pay the claimant.²⁵⁷ The adjudication by the receiving state is considered an exclusive remedy by U.S. courts.²⁵⁸ After payment is made, USACSEUR reimburses the German government under the provisions of the NATO SOFA, usually seventy-five percent of the amount paid.²⁵⁹

As this example demonstrates, the involvement of the responsible command is even more limited than under the FCA²⁶⁰ and the MCA.²⁶¹ Here, the command involvement is limited to providing input on whether the service member acted within the scope of duty.²⁶² The command does not even make the scope of duty decision. Rather, the receiving state conducts final adjudication and payment. After issuing a scope certificate, the United States' involvement is only to reimburse the receiving state.²⁶³

D. Funding Overseas Maneuver Damage Claims

The statutory provisions for the payment of overseas maneuver damage establish varying procedures for the payment of claims when the Army has been assigned single-service claims responsibility.²⁶⁴ The procedures for the payment of claims under the FCA require the Army to assign FCCs to adjudicate and pay claims.²⁶⁵ U.S. Army claims funds pay up to \$100,000 for FCA claims, with any overage coming from the

²⁵⁶ *See id.*

²⁵⁷ NATO SOFA, *supra* note 217, art. VIII; *see also* DA PAM. 27-162, *supra* note 143, para. 7-2 (describing procedures for claims adjudication under the NATO SOFA); Fletcher, *supra* note 253, at 47 (describing the adjudication of a NATO SOFA claim in Germany.)

²⁵⁸ Dancy v. Dep't of Army, 897 F. Supp. 612, 614 (D.D.C. 1995); Aaskov v. Aldridge, 695 F. Supp. 595, 597 (D.D.C. 1988), *cited in* AR 27-20, *supra* note 141, para. 7-11.

²⁵⁹ NATO SOFA, *supra* note 217, art. VIII; *see also* Fletcher, *supra* note 253, at 46-47 (describing the payment of NATO SOFA claims in Germany).

²⁶⁰ *See supra* notes 179-84 and accompanying text.

²⁶¹ *See supra* notes 208-09 and accompanying text.

²⁶² *See supra* note 255 and accompanying text.

²⁶³ Fletcher, *supra* note 253, at 47. The exception to this general rule is the "scope exceptional" claim. *Id.* A scope exceptional claim is a reservation by USACSEUR of the right to remain involved in the adjudication of the claim, which usually occurs in high value claims, such as environmental damage claims. Friedel Interview, *supra* note 3.

²⁶⁴ AR 27-20, *supra* note 141, para. 2-62.

²⁶⁵ *See supra* notes 171-74 and accompanying text.

Judgment Fund.²⁶⁶ Similarly, for MCA²⁶⁷ claims, USARCS pays the first \$100,000 and the Judgment Fund covers any excess.²⁶⁸ Essentially, the same funds pay claims under the FCA, the MCA, and the IACA.²⁶⁹

The USARCS established procedures for the payment of foreign tort claims.²⁷⁰ These procedures include the maintenance of a fund from which foreign tort claims are paid, called the claims open allotment.²⁷¹ Each year, the DOD's congressional appropriation allots funds to the Department of the Army Operating Agency Twenty-two.²⁷² In turn, Operating Agency Twenty-two provides USARCS with open allotment funds each month. The USARCS uses the funds to pay claims.²⁷³ The USARCS then establishes a claims expenditure allowance for every claims approval authority.²⁷⁴ Claims personnel use the claims expenditure allowance to generate monthly reports, track the number of claims paid, and the amount available to be paid.²⁷⁵

The USARCS uses the data from the monthly reports to determine the amount needed for each fiscal year's claims open allotment.²⁷⁶ In addition to historical data, these estimates consider "projected Army strength, the number of expected permanent change of station moves, planned major maneuvers, exercises, and deployments, base and unit realignment, and other information from field claims offices."²⁷⁷ In essence, data flows from field claims offices through the Department of the Army, to the DOD, and then to Congress, to determine the size of the appropriation required. However, nothing in the statutes and procedures requires the maneuver units to consider the cost of maneuver related claims in planning their maneuvers.

²⁶⁶ AR 27-20, *supra* note 141, para. 10-9; DA PAM. 27-162, *supra* note 143, para. 2-100; *see supra* note 177 and accompanying text (describing funding sources for the FCA).

²⁶⁷ DA PAM. 27-162, *supra* note 143, para. 3-1.

²⁶⁸ 31 U.S.C. § 1304 (2005).

²⁶⁹ DA PAM. 27-162, *supra* note 143, para. 2-100.

²⁷⁰ *Id.* para. 13-11.

²⁷¹ *Id.*

²⁷² *See, e.g.*, Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2682-83 (2005) (providing the Army Operations and Maintenance appropriation for fiscal year 2006); *see also* DA PAM. 27-162, *supra* note 143, para. 13-11 (describing Operating Agency Twenty-two's role in funding claims).

²⁷³ DA PAM. 27-162, *supra* note 143, para. 13-11.

²⁷⁴ *Id.* Similar to a bank account, the Claims Expenditure Allowance is the amount of funds allocated by USARCS to an individual claims approval authority to pay claims.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

IV. Army Maneuver Training Exercises and Operations

After discussing the statutory mechanisms and procedures providing compensation for damages caused during maneuvers, the next step is to explore the historic trends and doctrine concerning Army maneuver training and operations.

A. Trends in Overseas Maneuver Training Exercises and Operations

During the Cold War, the Army conducted numerous training exercises including massive exercises directed by the Chairman, Joint Chiefs of Staff, as well as smaller unit-level exercises.²⁷⁸ During the mid-1980s, over 1,000 maneuvers were conducted by U.S. forces on private and public land in Germany each year.²⁷⁹ The largest exercise during that period was traditionally Team Spirit, a Republic of Korea-U.S. Combined Forces Command exercise that involved over 200,000 forces, 60,000 of which were U.S. forces.²⁸⁰

Beginning in 1968, another major exercise, REFORGER,²⁸¹ took place each year in Germany.²⁸² The 1986 REFORGER involved the deployment of over 17,000 forces based in the continental United States to Germany for a field training exercise with European-based forces.²⁸³ Despite the immensity of the 1986 REFORGER, planners nevertheless took the costs and public outcry from maneuver damage into consideration in determining the size and nature of the exercise.²⁸⁴

In recent years, actual maneuver in the field-training phases of REFORGER has been scaled back due to environmental considerations. Adverse weather often

²⁷⁸ CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1980 (1983), at 52, available at <http://www.army.mil/cmh/books/DAHSUM/1980/ch03.htm#b4>.

²⁷⁹ Major Horst G. Greczmiel, *Maneuver Damage Claims May Never Be the Same*, ARMY LAW., May 1988, at 60.

²⁸⁰ CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1986, at 36-37 (1995) [hereinafter HISTORICAL SUMMARY: FY 1986], available at <http://www.army.mil/cmh/books/DAHSUM/1986/ch03.htm>.

²⁸¹ REFORGER stands for Return the Forces to Germany. Fletcher, *supra* note 253, at 44 n.1.

²⁸² HISTORICAL SUMMARY: FY 1986, *supra* note 280, at 36-37.

²⁸³ *Id.*

²⁸⁴ *Id.*

makes the potential costs of maneuver damage claims unacceptable. To prepare for REFORGER 86, a combined U.S.-Federal Republic of Germany team traveled to the United States and provided damage prevention training. Field commanders made decisions during the exercise to scale down the scope of activities and reduce movements of heavy vehicles. This sensitivity to the host nation's needs has paid dividends in the reduction of claims costs, but also has reduced training opportunities.²⁸⁵

During the mid-1980s, annual reimbursement of the German government for maneuver-related claims averaged between seventy-five and eighty-five million Deutschmark,²⁸⁶ or between thirty and thirty-five million dollars.²⁸⁷ As the U.S. dollar weakened in currency exchange markets, these costs increased dramatically.²⁸⁸ High maneuver damage costs attracted the attention of the General Accounting Office and other agencies, resulting in pressure to reduce costs.²⁸⁹

As the Cold War ended, the drawdown of the U.S. forces and the change in focus of Army doctrine resulted in a decrease in the size and number of training exercises.²⁹⁰ Although the number of Chairman, Joint Chiefs of Staff-directed exercises continued to increase, the focus of these exercises changed.²⁹¹ In 1993, for example, REFORGER changed focus to simulate a deployment of forces in support of a combined operation inspired by the fighting in Bosnia-Herzegovina.²⁹² That last

²⁸⁵ *Id.*

²⁸⁶ Greczmiel, *supra* note 279, at 60.

²⁸⁷ Based on an exchange rate of 0.4076 U.S. dollars per German mark, the exchange rate for the first day of REFORGER '86, 21 January 1986. FXHistory, Historical Exchange rate, <http://www.oanda.com/convert/fxhistory> (last visited Aug. 27, 2007).

²⁸⁸ Greczmiel, *supra* note 279, at 60. For example, the strength of the U.S. dollar on 21 January 1988 had declined to 0.6028 U.S. dollars per German mark. *See* FXHistory, Historical Exchange rate, <http://www.oanda.com/convert/fxhistory> (last visited Aug. 27, 2007). At that exchange rate, 85 million German marks were valued at \$51,238,000.

²⁸⁹ Greczmiel, *supra* note 279, at 60.

²⁹⁰ *See* CENTER FOR ARMY HIST., DEPARTMENT OF THE ARMY HISTORICAL SUMMARY: FY 1993 (2002), at 7 (describing the objective to reduce Army forces by thirty-two percent by FY97), available at <http://www.army.mil/cmh/books/DAHSUM/1993/ch02.htm#n1>.

²⁹¹ *See id.* at 49 (stating that the Army participated in approximately fifty Chairman, Joint Chiefs of Staff sponsored exercises in FY 93).

²⁹² *See id.* at 50.

REFORGER exercise²⁹³ proved prophetic regarding the increase in contingency operations for U.S. forces.

Overseas maneuver damage claims played an important role as U.S. forces deployed in support of numerous contingency operations during the 1990s.²⁹⁴ By 1998, U.S. FCCs had paid over \$1,500,000 in claims in Bosnia-Herzegovina and Croatia.²⁹⁵ In fact, U.S. forces deployed on over twenty-five contingency operations between 1990 and 1998 alone.²⁹⁶ The increase in contingency operations following the end of the Cold War and Operation Desert Shield /Desert Storm also resulted in a change in training practices and increased focus on employing role-players at Army training centers.²⁹⁷

While the U.S. was increasing its contingency operations, NATO began an eastward expansion. First, the Partnership for Peace expanded the number of combined training exercises in Eastern Europe in which the Army participated.²⁹⁸ As NATO added new member states, U.S. forces began to train with its new NATO allies in several training exercises.²⁹⁹ Although this shift revived the number of training exercises conducted outside training areas, they in no way compared with the size of the massive Cold War era training exercises.³⁰⁰

²⁹³ See *id.*

²⁹⁴ See Masterton, *supra* note 135, at 68.

²⁹⁵ Prescott, *supra* note 157, at 8.

²⁹⁶ Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112, 113 (1998).

²⁹⁷ Lieutenant Colonel Jody M. Prescott & Captain Jerry Dunlap, *Law of War and Rules of Engagement Training for the Objective Force: A Proposed Methodology for Training Role-Players*, ARMY LAW., Sept. 2000, at 43.

²⁹⁸ See generally Partnership for Peace, <http://www.nato.int/issues/pfp/index.html> (last visited Mar. 25, 2006) (describing the purpose and development of the Partnership for Peace).

²⁹⁹ For example, Victory Strike is a large annual V Corps aviation training exercise conducted both on and off Polish training areas. GlobalSecurity.Org, Victory Strike, <http://www.globalsecurity.org/military/ops/victory-strike.htm> (last visited Mar. 25, 2006).

³⁰⁰ Friedel Interview, *supra* note 3. The following figures from USASEUR for fiscal year 2005 demonstrate the current level of claims paid under the FCA, MCA, and IACA in USACSEUR's area of responsibility: FCA \$369,000; MCA \$281,000; IACA \$6,300,000. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 07:17 EST) (on file with author).

The Global War on Terrorism caused the most recent and perhaps most dramatic shift in maneuver damage. The deployment of forces to Afghanistan and Iraq has resulted in a dramatic increase in the number of maneuver damage claims paid.³⁰¹ As a result, the number of training exercises substantially decreased, but the number of deployment-related maneuver damage claims increased.³⁰²

B. Maneuver Training Doctrine and Objectives

As the previous discussion detailed, the Army traditionally provided combat training to Soldiers and maneuver units through field training exercises.³⁰³ As the Army's training doctrine developed, it attempted "to ensure affordable training in the future" by emphasizing technology to promote a "synthetic environment consisting of live, virtual, and constructive simulation."³⁰⁴ Army training programs must therefore:

- (1) Provide environmentally sensitive, accessible, cost-effective training that provides the necessary fidelity.
- (2) Replicate actual operational conditions so [S]oldiers can operate in the synthetic environment as they could expect to operate under wartime conditions.
- (3) Ensure leaders have needed technical and tactical skills and knowledge.
- (4) Support the Army as it executes operations at the tactical, operational, and strategic levels.
- (5) Support training for contingency missions.³⁰⁵

Given this desired situation, Army officials made a call for "continuing research into unit training strategies [to provide] an empirical basis for developing unit training strategies for the Army. Validated training

³⁰¹ See Tackaberry, *supra* note 157, at 39. As of 22 February 2006, 19,086 claims had been filed in Iraq since the beginning of Operation Iraqi Freedom. Of those, 13,574 had been paid, for a total of \$20,491,467. E-mail from Joanne Roe, Budget Analyst, U.S. Army Claims Service, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 7, 2006, 13:01 EST) (on file with author).

³⁰² Friedel Interview, *supra* note 3.

³⁰³ U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND EDUCATION para. 1-20 (4 Sept. 2003) [hereinafter AR 350-1 (2003)], *updated by* U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT (13 Jan. 2006) [hereinafter AR 350-1 (2006)].

³⁰⁴ *Id.*

³⁰⁵ *Id.*

methods determine optimal mixes of [training aids, devices, simulators, simulations], live fire, and field maneuver exercises.”³⁰⁶ Simulation based training became the standard for brigade, division and corps training because of increased operational tempo, costs, safety concerns and concerns over environmental damage caused by maneuver training.³⁰⁷

Army training doctrine continues to focus on developing the optimal mix of training platforms while “[e]xploiting emerging technology to offset restrictions imposed upon live and weapons training because of safety considerations, environmental sensitivities, and higher training costs.”³⁰⁸ Army doctrine directs commanders to reach the optimal mix of training methods and locations while considering, among other factors, the costs, safety and environmental impacts of their maneuvers. These safety and environmental factors are negative externalities because they are costs imposed on others which result from the unit’s maneuver training.³⁰⁹

V. Law and Economics Analysis of Overseas Maneuver Damage Claims

After outlining the Law and Economics principles regarding the efficient treatment of negative externalities, and the mechanisms and doctrine related to maneuver damage, this article now examines how these two areas can combine to improve the efficiency of the maneuver damage claims process.

A. Application of the Coase Theorem to Overseas Maneuver Damage Claims

Recall that the thesis of Professor Coase’s *The Problem of Social Cost* is that optimum resource allocation can be obtained in an economic activity affected by a negative externality by requiring the involved parties “to take the harmful effect (the nuisance) into account in deciding on their course of action.”³¹⁰ The decision is “whether the gain from preventing the harm is greater than the loss which would be suffered

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ AR 350-1 (2006), *supra* note 303, para. 1-8.

³⁰⁹ *See supra* notes 29-32 and accompanying text.

³¹⁰ COASE, *supra* note 46, at 13.

elsewhere as a result of stopping the action which produces the harm.”³¹¹ The available courses of action are: one of the parties internalizes the cost by purchasing the entities involved; the government forces cost internalization; or nothing.³¹² Military planners must make this decision to optimize resource allocation with regard to maneuvers.

1. Social Benefits: Determining the Social Benefit of Maneuvers

Maneuver in both a training and operational environment is a key component of combat readiness which directly contributes to national defense.³¹³ Commanders are responsible for ensuring the combat readiness of their units through training.³¹⁴ Once deployed, commanders are responsible for defeating the enemy by effectively employing the elements of combat power. They accomplish this through maneuver.³¹⁵ National defense is a public good, subject to underproduction by the market without government intervention.³¹⁶ With the authority and responsibility they hold, commanders occupy an ideal position to measure the benefits a particular maneuver will have on accomplishing their mission.³¹⁷ This is true whether the maneuver is part of a training exercise or an operation.³¹⁸ Commanders are in the best position to measure how a particular maneuver will contribute to national security, because they have the authority to direct the use of the resources in their unit.³¹⁹

³¹¹ Coase, *supra* note 1, at 11; *see supra* note 59 and accompanying text.

³¹² Coase, *supra* note 1, at 8-10; *see supra* notes 61-65 and accompanying text.

³¹³ FM 3-0, *supra* note 72, paras. 1-1 to 1-4.

³¹⁴ *Id.* para. 3-35.

³¹⁵ *Id.* para. 3-14 (listing the elements of combat power as “maneuver, firepower, leadership, protection, and information”).

³¹⁶ *See supra* Part II.B.1.

³¹⁷ *See* U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-1(b) (15 July 1999).

³¹⁸ *See id.*

³¹⁹ Of course a commander does not have unfettered discretion in directing how to expend resources in their unit. Directives from higher headquarters, budget restraints, and other factors may limit a commander’s discretion. *See supra* note 290 and accompanying text.

2. *Social Costs: Classifying Negative Externalities Resulting from Overseas Maneuvers*

The negative externalities resulting from both training and operational maneuvers do not fit neatly into a classification as either a tort or a taking.³²⁰ At first glance, the nature of the negative externality resembles a tort.³²¹ For example, if while on maneuvers, an M1A2 Abrams main battle tank causes damage to a farmer's field, the resulting negative externality shares many elements with the tort of trespass.³²² Nevertheless, the entry onto the farmer's field is not unlawful because some form of legal authorization exists.³²³ The underlying legal authorization makes this particular hypothetical maneuver-related negative externality more analogous to a government taking than a tort.³²⁴ However, if while on maneuver, the M1A2 tank negligently crushes a parked car due to the driver's inattention, the resulting negative externality would not enjoy the same legal authorization and may be classified a tort.³²⁵ The statutory mechanisms for overseas maneuver damage claims apply to both takings-like and tort-like government action.³²⁶ Accordingly, the Law and Economics analysis applied to both government takings and tort rules applies to the statutory mechanisms for compensating overseas maneuver damages.

³²⁰ See *supra* Part II.B.2.

³²¹ See *supra* note 116 and accompanying text.

³²² See BLACK'S, *supra* note 105, at 1502 ("Any unauthorized intrusion or invasion of private premises or land of another.") (citations omitted).

³²³ The form of legal authorization varies depending on the context of the maneuver. For example, a training maneuver in Germany is authorized by a Maneuver Right granted by the German government. See Greczmiel, *supra* note 279, at 60. When maneuvers conducted in Poland did not have a legal mechanism for a government granted Maneuver Right, planners obtained contracts for individual Maneuver Rights from the property owners. Friedel Interview, *supra* note 3. Maneuvers conducted in Afghanistan and Iraq are conducted based on authorizations from United Nations Resolutions. S.C. Res. 1623, ¶ 2, U.N. Doc. S/RES/1623 (Sept. 13, 2005). S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004).

³²⁴ See *supra* Part II.B.2.a.

³²⁵ Bell & Parchomovsky, *supra* note 97, at 284 n.20 ("[I]t cannot be said that there is a government 'power' to commit torts.").

³²⁶ See, e.g., *supra* notes 164-68 (demonstrating that claims under the FCA are payable for both government negligence and non-combat activities, where no government negligence is required).

3. *Applying the Calabresi and Melamed Factors to the Overseas Maneuver Damage Claims Process*

As noted above, scholars have criticized government takings compensation mechanisms for inefficiencies.³²⁷ The culprit is the government's lack of information regarding the social costs of the negative externalities. Without accurate information, the government will suffer from fiscal illusion and will underestimate the social costs of its actions.³²⁸ Calabresi and Melamed's factors for evaluating the efficiency of a tort compensation scheme address the same concerns.³²⁹ Their factors value a system that provides compensation based on informed choices regarding social benefits and costs, and transaction costs.³³⁰ The transaction costs should fall on the party who can best make a cost-benefit analysis regarding social costs and social benefits and the one who also can reduce transaction costs.³³¹

Changing the funding source for maneuver damage claims from USARCS to the Operations and Maintenance (O&M) funds of the responsible commander will maximize the efficiency of the overseas maneuver damage claims process.³³² Applying Calabresi and Melamed's five principles supports this conclusion.³³³ First, a command-funded maneuver damage claims process would be efficient because the commander would then be in the best position to make knowledgeable choices regarding social benefits³³⁴ and costs,³³⁵ including any related transaction costs.³³⁶ Second, the commander would be in the best position to make a cost-benefit analysis because he is armed with the best

³²⁷ See *supra* notes 107-12 and accompanying text (describing the inefficiencies present in takings compensation schemes).

³²⁸ See *supra* notes 114-15 and accompanying text (detailing the fiscal illusion pneumonia).

³²⁹ See *supra* notes 123-28 and accompanying text (listing Calabresi's and Melamed's factors).

³³⁰ Calabresi & Melamed, *supra* note 123, at 1096-97; see *supra* note 124 and accompanying text.

³³¹ Calabresi & Melamed, *supra* note 123, at 1096-97; see *supra* notes 125-27 and accompanying text.

³³² See Calabresi & Melamed, *supra* note 123, at 1096.

³³³ See *supra* notes 123-28 and accompanying text (detailing Calabresi's and Melamed's factors).

³³⁴ See *supra* Part V.A.1 (describing the social benefits to National Security derived from maneuvers).

³³⁵ See *supra* Part V.A.2 (describing the costs generated by maneuvers).

³³⁶ See Calabresi & Melamed, *supra* note 123, at 1096; see also *supra* notes 315-20 and accompanying text (discussing command responsibility and authority).

information regarding the benefits derived by his unit from the maneuver.³³⁷ Third, as the commander is in control of costs,³³⁸ he would be the party who could most efficiently reduce them.³³⁹

The fourth and fifth principles do not need to be applied because the commander is clearly in the best position to reduce costs.³⁴⁰ For purposes of illustration, however, applying the fourth and fifth principles emphasizes that the commander is the appropriate party to ensure the most efficient outcome. Looking at the fourth, as the commander determines how a maneuver is to be conducted, he will have the lowest transaction costs for correcting an “error in entitlements.”³⁴¹ Turning finally to the fifth, as the preceding factors point to the commander, a choice does not need to be made between the efficiency of market transactions and “collective fiat.”³⁴² Commanders are uniquely situated to balance the social benefits generated by their actions with the social costs of their actions. If commanders were required to internalize the negative externality costs, they would be in the best position to ensure resources were used in an optimal manner.³⁴³ This result is consistent with Professor Coase’s second option, namely that the government forces cost internalization, uniquely, onto itself.³⁴⁴

B. The Inefficiencies Encouraged by the Current Overseas Maneuver Damage Claims Process

1. Failure to Internalize Maneuver Damage Costs May Result in an Inefficient Allocation of Resources

The current overseas maneuver damage claims process suffers many of the same inefficiencies that affect takings and tort compensation schemes.³⁴⁵ Under current procedures, commanders are not directly

³³⁷ See *supra* Part IV.A.1-2.

³³⁸ See *supra* notes 315-20 and accompanying text (outlining a commander’s authority and responsibilities).

³³⁹ See Calabresi & Melamed, *supra* note 123, at 1096-97.

³⁴⁰ See *id.* at 1097.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ COASE, *supra* note 46, at 13.

³⁴⁴ Coase, *supra* note 1, at 8-10; see *supra* notes 63-64 and accompanying text (describing Professor Coase’s options for internalizing negative externalities).

³⁴⁵ See *supra* Part II.B.2.

involved in the maneuver damage claims process.³⁴⁶ Funds to pay maneuver damage claims come from USARCS or the Judgment Fund, not from a unit's O&M funds.³⁴⁷ Because maneuver unit commanders are not required to pay for maneuver damage claims, they are not forced to internalize those costs, which may lead to an inefficient allocation of resources.³⁴⁸

A hypothetical example illustrates how the current system may result in an inefficient outcome.³⁴⁹ Assume that a maneuver will produce a benefit of \$100,000 through increased national defense.³⁵⁰ Now assume that two options exist for executing the maneuver. Option A takes the unit through a farmer's field. Option B is a more direct route through a forested area. Option B has the advantage of being more direct, which would save the commander \$1000 in reduced fuel and vehicle maintenance compared to traveling through the farmer's field. Option A would cost the unit \$51,000 for personnel, fuel, and maintenance, and would cause \$40,000 in damage to a farmer's field. Option B would cost the unit \$50,000 for personnel, fuel, and maintenance, and would cause \$60,000 in damage to a forested area. Based on these factors alone, the commander would choose option B because he only considers his costs. The surplus benefit to the commander is \$50,000 for option B, which exceeds the surplus benefit of \$49,000 for option A.³⁵¹ Option B, however, creates an inefficient allocation of resources because its total

³⁴⁶ See *supra* notes 179-84, 208-09, 260-63 and accompanying text.

³⁴⁷ See *supra* Part III.D (detailing the current procedures for funding overseas maneuver damage claims).

³⁴⁸ See *supra* notes 311-13 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

³⁴⁹ See *supra* notes 311-13 and accompanying text.

³⁵⁰ See *supra* Part II.B.1 (explaining the social benefit derived from national defense). Many benefits related to national defense are not easily quantifiable, especially in monetary terms. Nevertheless, commanders are frequently required to make decisions involving monetary and nonmonetary variables. For example, a commander balances monetary and nonmonetary variables when he determines whether the cost of purchasing ballistic goggles for his Soldiers is too great in relation to the expected reduction in injuries that would be suffered if purchased. Similarly, a commander must balance the national security benefits from attempting to capture a terrorist (the social benefit) with the risk of casualties and the monetary cost of undertaking the operation (the social cost). While the commander may not be able to easily quantify the benefits and the costs, especially in monetary terms, he is nevertheless expected to make these decisions.

³⁵¹ See *supra* note 82 and accompanying text (describing the hypothetical social benefit derived from a hypothetical missile defense system).

cost of \$110,000 exceeds the \$100,000 benefit of the maneuver.³⁵² The unit's costs of \$50,000, combined with the \$60,000 that would be paid by USARCS for the maneuver damage claim,³⁵³ results in \$110,000 in total costs from the maneuver.³⁵⁴

One could argue that even though commanders are not required to internalize the costs of the negative externalities caused by their maneuvers, they may still voluntarily take those costs into consideration when they make maneuver decisions.³⁵⁵ After all, Army doctrine requires commanders to “[p]rovide environmentally sensitive, accessible, cost-effective training.”³⁵⁶ Additionally, the payment of overseas maneuver damage claims often acts as a force multiplier for deployed commanders³⁵⁷ by promoting friendly relations with a local population.³⁵⁸ For instance, the commander's inefficient choice of Option B³⁵⁹ in the hypothetical above might change if the commander voluntarily considered external costs. If the commander placed more than \$1000 in value on following the guidance to provide “environmentally sensitive” training,³⁶⁰ then the commander would choose the efficient Option A.

Although a commander may voluntarily consider the costs of negative externalities, no mechanism ensures he will. As the cost of the “environmentally sensitive” option increases, the commander's incentive to minimize costs makes it less likely that he will choose that option.³⁶¹ This illustration indicates that a commander is not required to internalize the negative externalities of maneuvers and, although at times an efficient outcome may occur, the current structure for overseas maneuver damage claims does not produce an incentive for commanders to reach

³⁵² See *supra* note 41 and accompanying text (defining economic efficiency in resource allocation).

³⁵³ See *supra* Part III.D (detailing the funding of overseas maneuver damage claims).

³⁵⁴ The \$60,000 in damage to the forested area and the \$50,000 in direct costs to the unit total \$110,000.

³⁵⁵ See Bell & Parchomovsky, *supra* note 97, at 291.

³⁵⁶ AR 350-1 (2003), *supra* note 303, para. 1-20. The example of Mr. Walmsley and the Cavalry squadron commander in the introduction also provides some support to this contention. See *supra* Part I.

³⁵⁷ See generally Tackaberry, *supra* note 157, at 39 (describing the benefits of using the FCA in efforts to rebuild Iraq).

³⁵⁸ See *supra* note 149 and accompanying text (outlining the purpose of the FCA).

³⁵⁹ See *supra* note 352 and accompanying text.

³⁶⁰ AR 350-1 (2003), *supra* note 303, para. 1-20.

³⁶¹ See *supra* notes 309-10 and accompanying text (detailing Army guidance to provide “environmentally sensitive” and “cost-effective” training).

this efficient outcome.³⁶² Scholars have replied to arguments that the government will voluntarily internalize negative externalities by characterizing such arguments as Pollyanna-ish and unreliable at best.³⁶³

Recently, this author conducted a nonscientific survey of company commanders from a mechanized brigade combat team stationed overseas.³⁶⁴ The survey attempted to obtain anecdotal evidence regarding the impact of potential environmental and other maneuver damages on a commander's decision-making process. After identifying that Army doctrine requires commanders to "[p]rovide environmentally sensitive, accessible, cost-effective training,"³⁶⁵ the survey posed two questions.³⁶⁶ First, "To what degree does potential harm to the environment or other damage caused by maneuvers impact your decisions on planning and executing maneuver training?"³⁶⁷ The commanders were asked to choose one of four potential responses: "1- Most important factor in planning and executing maneuver training; 2- Significant factor in planning and executing maneuver training. 3- Minor factor in planning and executing maneuver training. 4- Not a factor in planning and executing maneuver training."³⁶⁸ All of the respondents indicated potential environmental harm or other damage caused by training maneuvers was a minor factor in planning and executing maneuver training.³⁶⁹

The second survey question related to operational maneuvers instead of training maneuvers.³⁷⁰ The question was: "To what degree does potential harm to the environment or other damage caused by operations impact your decisions on planning and executing operations?"³⁷¹ The

³⁶² See *supra* note 41 and accompanying text (defining economic efficiency).

³⁶³ Bell & Parchomovsky, *supra* note 97, at 291.

³⁶⁴ In an effort to encourage candid responses, the commanders were informed that their names and units would remain confidential. E-mail from MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, to company commanders (Feb. 25, 2006, 06:52 PM EST) [hereinafter E-mail from MAJ Jerrett W. Dunlap, Jr.] (on file with author).

³⁶⁵ AR 350-1 (2003), *supra* note 303, para. 1-20.

³⁶⁶ E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 364.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ E-mails from company commanders to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Feb. 25-27, 2006) [hereinafter E-mails from company commanders] (on file with author).

³⁷⁰ E-mail from MAJ Jerrett W. Dunlap, Jr., *supra* note 364.

³⁷¹ *Id.*

commanders were again asked to choose one of four potential responses: “1- Most important factor in planning and executing an operation; 2- Significant factor in planning and executing an operation; 3- Minor factor in planning and executing an operation; 4- Not a factor in planning and executing an operation.”³⁷² The vast majority of respondents indicated that potential harm to the environment or other damage caused by operations was a minor factor in planning and executing operations, with one respondent indicating it was not a factor at all.³⁷³ Unsolicited comments from some of the commanders indicate that they found host nation environmental regulations so restrictive as to override any consideration of actual environmental damage.³⁷⁴ In essence, the only environmental factors considered by the commanders were the environmental restrictions, not the negative externality caused by the maneuver.³⁷⁵ This survey, although by no means a scientific sampling of commanders, lends anecdotal support to the contention that commanders do not consider damages caused during training maneuvers or operations to be a significant factor during planning or execution.³⁷⁶

Although Army doctrine requires commanders to consider costs, safety, and environmental considerations,³⁷⁷ only the costs paid from the commander’s O&M budget must be internalized. Furthermore, arguing that commanders may voluntarily consider external costs only points to some possible incentives for commanders to consider the costs of the negative externalities produced by their maneuvers.³⁷⁸ Policy driven incentives, however, have no mechanism to force cost internalization. A rational³⁷⁹ commander will only voluntarily consider the costs of the negative externalities if it is in his best interest.

³⁷² *Id.*

³⁷³ E-mails from company commanders, *supra* note 369.

³⁷⁴ *Id.*

³⁷⁵ *See id.*

³⁷⁶ *See supra* note 349 and accompanying text (arguing that the failure of unit commanders to pay for maneuver damage claims leads to inefficient resource allocation).

³⁷⁷ *See supra* note 306 and accompanying text (detailing Army training guidance).

³⁷⁸ *See supra* note 356 and accompanying text.

³⁷⁹ *See generally* Hovenkamp, *supra* note 49, at 293 (discussing the importance of the rationality assumption in law and economics).

2. *The Current Overseas Maneuver Damage Claims Process Promotes Imperfect Information*

Army policy alone does nothing to remedy the lack of information commanders may have regarding the extent of the negative externality costs caused by their maneuvers.³⁸⁰ Commanders lack information because they are not directly involved in the compensation process and would have to expend additional resources to become involved.³⁸¹ Transaction costs under the current procedure for the adjudication of maneuver damage claims are high because a third party, either an FCC,³⁸² U.S. Army claims personnel,³⁸³ or a sending state's claims office,³⁸⁴ is responsible for adjudicating and paying for maneuver damages. Therefore, even if a commander would otherwise be inclined to take the costs of the negative externalities into consideration when making maneuver-related decisions, the commander would still be subject to fiscal illusion problems due to the lack of information regarding those costs.³⁸⁵ By requiring the commander responsible for the negative externality-causing maneuver to pay for the costs, he will be forced to internalize not only the costs of the negative externality, but also will have an incentive to gain more information on how he can lower those costs. The information gained will encourage more efficient decisions and resource allocations, whether applied to maneuvers during a training exercise or during an operation.³⁸⁶

³⁸⁰ See *supra* notes 114-15 and accompanying text (explaining the “fiscal illusion” created when the government fails to internalize costs related to government generated negative externalities).

³⁸¹ It should be noted that imperfect information would still exist in a command funded overseas maneuver damage claims system. However, the proposed system should create incentives to improve information flow. See *infra* note 387 and accompanying text.

³⁸² See *supra* note 171 and accompanying text (describing claims approval authority under the FCA).

³⁸³ See *supra* notes 203-07 and accompanying text (describing claims approval authority under the MCA).

³⁸⁴ See *supra* notes 257-59 and accompanying text (describing claims approval authority under the NATO SOFA).

³⁸⁵ See *supra* notes 114-15 and accompanying text (explaining fiscal illusion).

³⁸⁶ See *supra* notes 311-13 and accompanying text (summarizing Professor Coase's views on addressing negative externalities).

C. The Advantages of a Command-Funded Overseas Maneuver Damage Claims Process

Empirical evidence supports the contention that commanders who pay the costs of maneuver damage claims, thereby internalizing those costs, do factor those costs into their decisions regarding maneuvers.³⁸⁷ The high costs of maneuver damage claims from REFORGER exercises in the mid-1980's resulted in a reevaluation of maneuver training and ultimately efforts to reduce the costs.³⁸⁸ The proposed changes were not made at the lower level commands, even though they were the direct participants and most familiar with the exercise.³⁸⁹ High-level Army officials decided to reform REFORGER because USARCS paid the funds at the Department of Army level.³⁹⁰ The fact that the push for reform came from the bill payer—the Department of the Army level or higher—supports the contention that optimum resource allocation will only occur at the level where negative externalities are internalized.³⁹¹ By shifting the source of funding to the unit responsible for determining how to conduct the maneuver, the negative externalities will fall on the commander in the best position to allocate resources.³⁹²

1. The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Training and Unit Readiness

A potential criticism of this proposed change in funding is that it would result in a decrease in training that would, in turn, damage unit readiness. Optimal resource allocation, however, will actually result in more, not fewer, resources available for training.³⁹³ Returning to the original hypothetical example, recall that if USARCS paid for the maneuver damage claims, the commander would choose the inefficient option B.³⁹⁴ However, if the \$60,000 were diverted from USARCS to the unit's O&M funds, and the unit were required to pay for their

³⁸⁷ See *supra* note 333 and accompanying text (arguing that requiring responsible commanders to use Operations and Maintenance funds to pay for maneuver damage claims will maximize the efficiency of maneuver related resource allocations).

³⁸⁸ See *supra* notes 284-86 and accompanying text.

³⁸⁹ See *id.*

³⁹⁰ See *supra* Part III.D.

³⁹¹ See *supra* note 333 and accompanying text.

³⁹² See *supra* notes 339-44 and accompanying text.

³⁹³ See *supra* note 41 and accompanying text.

³⁹⁴ See *supra* note 352 and accompanying text (describing why the commander would choose option B).

maneuver damage claims, the result would be different. Under option B, the unit would have \$50,000 in unit costs and \$60,000 in costs for maneuver damage claims,³⁹⁵ for a total of \$110,000 for the maneuver. The commander would not choose option B because the total costs exceed the \$100,000 national security benefit.³⁹⁶ The commander would choose option A, with \$91,000 in total costs from the maneuver (\$51,000 in direct unit costs and \$40,000 in maneuver damage claims costs).³⁹⁷ As the \$100,000 benefit to national security exceeds the \$91,000 in total costs, option A results in a surplus of \$9,000 and is therefore optimal.³⁹⁸ This choice also results in the unit having \$19,000 more than it would have had to expend on training under the current system.³⁹⁹ By choosing the more efficient option A, the unit commander will have more funds to expend on training and unit readiness.

This illustration assumes that the commander knows the actual costs of the negative externalities that will be caused by his unit's maneuver prior to its execution.⁴⁰⁰ A commander, however, cannot predict the future. The best a commander could do would be to estimate the costs of the negative externalities based on past experience and available intelligence. His imperfect estimate would not necessarily result in an efficient allocation of resources.⁴⁰¹ Nevertheless, the current system suffers from this same lack of information regarding the actual costs of negative externalities.⁴⁰² The USARCS has the same difficulty accurately predicting the amount of maneuver damage claims. Each year, USARCS estimates the amount of maneuver damage claims based on available information regarding planned exercises and past experience.⁴⁰³ Under the proposed change, the unit commander would have a distinct advantage over USARCS's current ability to prepare this estimate. The unit commander has a more intimate knowledge of the maneuver. The commander plans and executes the maneuver, whereas USARCS, at best, will receive a report on the exercise, which will not

³⁹⁵ See *supra* note 351-52 and accompanying text.

³⁹⁶ See *supra* note 351 and accompanying text.

³⁹⁷ See *supra* notes 351-52 and accompanying text.

³⁹⁸ See *supra* note 41 and accompanying text (defining economic efficiency).

³⁹⁹ The unit would have its initial \$50,000 from unit O&M funds, plus the additional \$60,000 diverted from USARCS, totaling \$110,000. After expending \$91,000 for direct costs and maneuver damage claims, the unit would have \$19,000 remaining.

⁴⁰⁰ See *supra* notes 398-99 and accompanying text.

⁴⁰¹ See *supra* notes 129-30 and accompanying text (describing how results may increase economic efficiency without guaranteeing an optimal resource allocation).

⁴⁰² See *supra* Part V.B.2.

⁴⁰³ See *supra* notes 276-77 and accompanying text.

provide the same level of detailed information.⁴⁰⁴ Although a commander does not have perfect information, he would have better information than USARCS and could make a better estimate of the maneuver-related negative externalities.

It should be noted that by internalizing the negative externality costs, a commander will not necessarily always lower the amount, scale, or size of maneuvers. Under the current system, a commander may overestimate the costs of the maneuver-related negative externalities due to his lack of information regarding those costs.⁴⁰⁵ This possibility is made more likely with the Army's policy on minimizing environmental damages and costs.⁴⁰⁶ If a commander overestimated the costs of a negative externality, the result could be fewer maneuvers than optimal, which would also be inefficient.⁴⁰⁷ Returning to the original hypothetical maneuver under the current system helps illustrate this point.⁴⁰⁸ Assume that the maneuver would still produce a \$100,000 benefit through increased national security.⁴⁰⁹ Option A still costs \$51,000 in direct expenses to the unit and \$40,000 in damages external to the unit.⁴¹⁰ Option B still costs \$50,000 in direct costs to the unit, with \$60,000 in damages external to the unit.⁴¹¹ In this illustration, assume the commander places a high priority on avoiding environmental damage.⁴¹² The commander may consider the guidance to provide "environmentally sensitive"⁴¹³ training to be absolute and prohibit him from conducting the training under either option A or option B. The nation would lose the potential surplus national security benefits under this outcome. However, if the commander were required to pay the costs of the damage caused by his unit's maneuver, he would be forced to take the actual

⁴⁰⁴ *See id.*

⁴⁰⁵ *See supra* Part V.B.2 (detailing how the current system promotes imperfect information).

⁴⁰⁶ *See supra* note 306 and accompanying text (detailing Army training guidance regarding environmental sensitivity).

⁴⁰⁷ *See supra* note 41 and accompanying text (defining economic efficiency).

⁴⁰⁸ *See supra* notes 351-56 and accompanying text.

⁴⁰⁹ *See supra* note 351 and accompanying text.

⁴¹⁰ *See supra* notes 351-52 and accompanying text.

⁴¹¹ *See id.*

⁴¹² *See supra* notes 360-61 and accompanying text (describing how a commander's consideration of Army guidance may affect his choices regarding maneuver planning and execution).

⁴¹³ *See supra* note 306 and accompanying text (detailing Army guidance regarding training).

costs into consideration.⁴¹⁴ The commander would have an incentive to develop a more accurate estimate of costs because he would not know the actual costs of the damage while planning the maneuver. Accordingly, the proposed system gives a commander an incentive to gain better information.⁴¹⁵ By internalizing the costs of the negative externality generated by the unit's maneuver, the commander would make a determination based on better information, not based on vague directives or imperfect information that may cause fiscal illusion.⁴¹⁶

2. *The Impact of a Command-Funded Overseas Maneuver Damage Claims Process on Combat Operations*

A similar criticism could be made that requiring commanders to pay for the maneuver damage claims caused during operations would make a commander less aggressive in combat operations. However, the same analysis applies to an operational setting as to a training exercise.⁴¹⁷ The commander would still balance the advantage to be gained from a particular course of action with the costs of that course of action.⁴¹⁸ During an operation, the relative benefits to national security will probably be higher in comparison to maneuver damage costs than they would be in a training exercise.⁴¹⁹ Nevertheless, the commander would still be in a better position to choose an efficient course of action under this proposal because he could make a better-informed decision.⁴²⁰ The proposed change in funding source from USARCS to the maneuver unit would have no detrimental effect on overall training, unit readiness, or operational performance. Fewer funds would be expended on less than optimal maneuvers or operations because commanders would have an

⁴¹⁴ See *supra* notes 46, 311 and accompanying text (describing Professor Coase's view on addressing negative externalities).

⁴¹⁵ See *supra* Part V.B.2 (explaining how the current system promotes imperfect information).

⁴¹⁶ See *supra* notes 410-14 and accompanying text.

⁴¹⁷ See *supra* Part V.C.1 (describing the impact of a command-funded claims process on training).

⁴¹⁸ See *supra* notes 415-17 and accompanying text.

⁴¹⁹ Furthermore, as combat-related claims filed by those who do not ordinarily reside in the United States are not payable, a commander would pay relatively fewer claims during combat operations. Foreign Claims Act, 10 U.S.C. § 2734 (2005); International Agreements Claims Act, 10 U.S.C. § 2734a (2005); see *supra* notes 169, 225 and accompanying text (describing the FCA's and IACA's combat exception rule).

⁴²⁰ See *supra* Part V.C.1.

incentive to use the Army's funds more efficiently.⁴²¹ This would make more funds available for efficient training and operations. Under the proposed system, a commander would enjoy the same freedom to determine what training is best for his unit.⁴²² He would also be free to determine how to undertake an operation. Ultimately, this change would allow commanders to be better informed on actual social costs and social benefits, thereby making more efficient decisions.

The factors discussed in the preceding paragraphs support a shift in the funding source of overseas maneuver damage claims from USARCS to the responsible unit. The Coase Theorem and Professor Coase's analysis support this result.⁴²³ Professor Coase stated that both parties involved in a negative externality must consider harmful effects in order to reach "optimum allocation of resources."⁴²⁴ Damages are not fully taken into account by the responsible unit under the current overseas maneuver damage claims system because the costs are paid by USARCS, not the responsible unit.⁴²⁵ Transaction costs would be lower under the proposed system, because the responsible unit commander has the majority of the information related to his unit's maneuvers.⁴²⁶ The proposed shift in funding the payment of overseas maneuver damage claims from USARCS to the responsible unit would force cost internalization on the responsible unit commander, which Professor Coase identified as an acceptable course of action to reach an optimum allocation of resources.⁴²⁷

D. Required Regulatory and Procedural Changes

Specific regulatory and procedural changes are required to implement the proposal that commanders pay overseas maneuver damage claims from unit funds. The current statutory structure allows

⁴²¹ See *supra* notes 395-400 and accompanying text (hypothetical demonstrating incentives for more efficient resources allocation under the proposed command-funded overseas maneuver damage claims process).

⁴²² See *supra* notes 318-20 and accompanying text (detailing a commander's authority and responsibilities).

⁴²³ See *supra* Part II.A.2 (detailing the Coase Theorem).

⁴²⁴ See *supra* note 46 and accompanying text.

⁴²⁵ See *supra* Part III.D (detailing the funding of overseas maneuver damage claims).

⁴²⁶ See *supra* Part V.B.2 (discussing how the current overseas maneuver damage claims system promotes imperfect information by commanders).

⁴²⁷ See *supra* notes 61-64 (describing the three alternative courses of action for dealing with negative externalities when transaction costs are present).

for the adjudication of overseas maneuver damage claims by FCCs for FCA claims,⁴²⁸ U.S. Army claims offices for MCA claims,⁴²⁹ and sending states' claims offices for IACA claims.⁴³⁰ The statutory structure can remain the same because the statutes only grant authority to adjudicate claims. They do not require USARCS or any other agency to fund the payments.⁴³¹ A regulatory reallocation by Department of Army Operating Agency Twenty-two of funds from USARCS to maneuver units is all that is required to implement the funding change.⁴³² Instead of allocating the funds to USARCS each month to pay the claims,⁴³³ the funds would be allocated to the O&M accounts of the maneuver units at the beginning of each fiscal year. Commanders would be required to incorporate anticipated claims into their annual planning and budget process.⁴³⁴ By requiring commanders to balance the anticipated benefit of the maneuver with the anticipated social costs, including maneuver damages, the Army can achieve its desired cost savings.⁴³⁵

Under the current system, USARCS considers numerous factors in estimating the amount of funds that will be required to pay for maneuver damage claims.⁴³⁶ If this proposal were to be implemented, USARCS's expertise in paying maneuver damage claims would ensure it remains a valuable resource in determining the aggregate amount of estimated maneuver damage claims.⁴³⁷ When planning a particular maneuver under the proposal, a commander would have an incentive to work with claims personnel to estimate the amount of maneuver damage from a

⁴²⁸ See *supra* note 171 and accompanying text (describing claims approval authority under the FCA).

⁴²⁹ See *supra* notes 203-07 and accompanying text (describing claims approval authority under the MCA).

⁴³⁰ See *supra* notes 256-59 and accompanying text (describing claims approval authority under the NATO SOFA).

⁴³¹ See International Agreements Claims Act, 10 U.S.C. § 2734a (2005); Military Claims Act, 10 U.S.C. § 2733 (2005); Foreign Claims Act, 10 U.S.C. § 2734 (2005).

⁴³² See *supra* Part III.D (describing the current funding of overseas maneuver damage claims).

⁴³³ See *supra* notes 272-73 and accompanying text (describing the current process for allocating funds for overseas maneuver damage claims from Operating Agency Twenty-two to USARCS).

⁴³⁴ See *supra* notes 415-16 and accompanying text (hypothetical describing the incentives to gain information on maneuver related negative externalities).

⁴³⁵ See *supra* notes 311-13 and accompanying text (describing Professor Coase's view on addressing negative externalities).

⁴³⁶ DA PAM. 27-162, *supra* note 143, para. 13-11.

⁴³⁷ See *supra* Part III.D (describing the procedures for the payment of overseas maneuver damage claims).

particular course of action,⁴³⁸ as he would recognize claims personnel⁴³⁹ as the subject matter experts responsible for adjudicating maneuver damage claims. The commander would want to minimize maneuver damage costs because he would be the bill payer.⁴⁴⁰

The shift in responsibility for paying maneuver damage claims has the result of switching the motive to work together and share information. Under the current system, as illustrated by the example of Mr. Walmsley and the cavalry squadron commander, the incentive to share information and cooperate to lower maneuver damage costs fell on the bill-payer, USARCS.⁴⁴¹ Under this proposal, the incentive to share information and cooperate to lower maneuver damage costs would transfer to the unit commander. The obvious advantage of this change is that it shifts the incentive to cooperate to the party in control of how the negative externalities are generated.⁴⁴² Mr. Walmsley and other similarly-situated claims personnel have an incentive to lower maneuver damage costs because it is their job.⁴⁴³ Under the proposal, that incentive would be shared. This new incentive to work more closely with claims personnel would ensure that commanders have greater information which would reduce or eliminate the occurrence of fiscal illusion⁴⁴⁴ and result in a more efficient allocation of resources.⁴⁴⁵

Under the proposal, the Department of the Army would determine the amount of funds allocated to maneuver units each year based on input from USARCS.⁴⁴⁶ The Department of the Army would use the USARCS factors from the current system to estimate an aggregate amount necessary for overseas maneuver damage claims.⁴⁴⁷ The factors include historical data, as well as “projected Army strength . . . planned major maneuvers, exercises, and deployments . . . and other information from field claims offices.”⁴⁴⁸ Customarily, under the Army Planning,

⁴³⁸ See *supra* notes 402-05 and accompanying text.

⁴³⁹ See *supra* Part III (describing the overseas maneuver damage claims process).

⁴⁴⁰ See *supra* note 392 and accompanying text (arguing that, based on experiences from REFORGER, bill-payers are more likely to take efforts to minimize overseas maneuver damage costs).

⁴⁴¹ See *supra* Part I.

⁴⁴² See *supra* Part V.A.3.

⁴⁴³ See *supra* note 3 and accompanying text.

⁴⁴⁴ See *supra* notes 114-15 and accompanying text (describing fiscal illusion).

⁴⁴⁵ See *supra* note 41 and accompanying text (defining economic efficiency).

⁴⁴⁶ See *supra* Part III.D.

⁴⁴⁷ DA PAM. 27-162, *supra* note 143, para. 13-1.

⁴⁴⁸ *Id.*

Programming, Budgeting, and Execution Process, Operations and Maintenance funds are budgeted based on input from major commands (MACOM) and their major subordinate commands.⁴⁴⁹ The MACOMs would then distribute the funds to their maneuver units. The amount of funds an individual unit would receive would be based on numerous factors, to include type of unit, location, planned operations and exercises, and historic data regarding past maneuver damage claims.⁴⁵⁰ As noted above, USARCS, together with the MACOMs, would help track and disseminate this information.⁴⁵¹ The MACOMs and major subordinate commands would be responsible for allocating these funds to their tenant units. Ideally, similarly-situated units would receive the same amount of funds. Once allocated, the funds would be available for the payment of maneuver damage claims or, if not expended for maneuver damage claims, for any other authorized purpose considered appropriate by the unit commander.

Although a wily unit commander could manipulate the proposed system to pad his Operations and Maintenance account by overestimating the amount of maneuver damage claims and using the excess amount for other purposes, such a scenario is unlikely because of continued oversight from higher headquarters. The amount of funds shifted to maneuver units for the payment of overseas maneuver damage claims would be determined from the top down.⁴⁵² The individual units would have input on the amount of O&M funds that they receive, but ultimately the amount received would be determined by the unit's headquarters.⁴⁵³ Although a commander could overestimate his planned expenses and thereby receive more funds than he would spend, the same risk exists for other aspects of the Operations and Maintenance budgeting process.⁴⁵⁴

If the funds were fenced funds—only available for the payment of maneuver damage claims—the commander would lose the incentive to use the funds efficiently, because he would be unable to use them for

⁴⁴⁹ See generally U.S. ARMY WAR COLLEGE, *HOW THE ARMY RUNS* ch. 9 (2005) (outlining the Army Planning, Programming, Budgeting, and Execution Process).

⁴⁵⁰ See DA PAM. 27-162, *supra* note 143, para. 13-11.

⁴⁵¹ See *supra* notes 276-77 and accompanying text (outlining the current process for estimating and funding overseas maneuver damage claims).

⁴⁵² See *supra* notes 447-52 and accompanying text (detailing the proposed method for funding overseas maneuver damage claims).

⁴⁵³ See *supra* notes 447-52 and accompanying text.

⁴⁵⁴ See *id.*

other purposes to directly benefit his mission.⁴⁵⁵ In fact, if the funds were fenced, there may be an incentive to spend all the budgeted funds to ensure that he would receive the same amount during the next fiscal year.⁴⁵⁶ As the amount of funds allocated is based on historic data,⁴⁵⁷ a commander could ensure the data shows a continuing requirement for maneuver damage claims funds by spending them during the fiscal year.⁴⁵⁸ In a system where funds are limited to a specific time period, there is occasionally an incentive to expend the funds on a lower priority item before they expire because the funds cannot be saved for a higher priority expense during the following fiscal year.⁴⁵⁹ This phenomenon is often related to so-called “end of year money.”⁴⁶⁰ Although the proposed change may suffer from this phenomenon, it would only be exacerbated if the funds were limited to maneuver damage claims payments. In the fenced-funds scenario, the commander has no other option than to use the funds for maneuver damage claims payments, which eliminates the incentive to choose more efficient resource allocation choices.⁴⁶¹ While the proposed system may suffer from inefficiencies, they pale in comparison to the inefficiencies of the current system.

Note that under this proposal, commanders would not be responsible for adjudicating the maneuver damage claims. Adjudication would remain the responsibility of claims personnel authorized to adjudicate claims under the provisions of the FCA, MCA, and IACA.⁴⁶² A commander adjudicating proper compensation might have a strong incentive to award little or no relief because he would be able to use the funds for competing unit interests. An FCC, or other claims person responsible for adjudicating a claim, has no inherent incentive to award a less than appropriate amount because claims personnel cannot use the funds for their own benefit.⁴⁶³

⁴⁵⁵ See *supra* Part V.C (describing the advantages of the proposed command-funded overseas maneuver damage claims process).

⁴⁵⁶ See *supra* note 449 and accompanying text.

⁴⁵⁷ DA PAM. 27-162, *supra* note 143, para. 13-11.

⁴⁵⁸ Interview with Major Michael L. Norris, Professor, Contract and Fiscal Law Department, The Judge Advocate General’s Legal Center and School, Charlottesville, Va. (Mar. 3, 2006) [hereinafter Major Norris Interview].

⁴⁵⁹ *Id.*

⁴⁶⁰ The problem of the “end of year money” phenomena is beyond the scope of this article. However, it presents a potential incentive for inefficient government spending.

⁴⁶¹ See *supra* Part V.C.

⁴⁶² See *supra* Part III (detailing the current overseas maneuver damage claims process).

⁴⁶³ See *supra* Part III.

Might a commander's poor use of his O&M funds result in a claimant not being paid? Under the proposal, a commander who does not have sufficient funds for maneuver-related claims would be required to find the funds from another source. Available options would include requesting additional funds from the unit's higher headquarters or eliminating other planned expenses.⁴⁶⁴ A commander's ability to program funds would be another factor to be considered in his officer evaluation report, just as it is for other O&M expenditures. If a commander is unable to properly budget his funds and the readiness of his unit suffers, his superior officers will take necessary action to remedy this shortcoming.⁴⁶⁵ An advantage of this proposed system is that it would result in command attention on maneuver damage throughout the chain of command because there is the potential for the expense to affect the budget throughout the command.⁴⁶⁶ Furthermore, claims of over \$100,000 would be submitted to the Judgment Fund.⁴⁶⁷ The Judgment Fund would act as a cap to protect units from catastrophic damages. Although there is some risk that the proposed change could result in a delayed payment to a claimant, delays already occur under the current system at the beginning and end of the fiscal year.⁴⁶⁸

VI. Conclusion

The Coase Theorem's "frictionless" world without transaction costs⁴⁶⁹ is indeed foreign territory for the combat arms commander, who trains to fight in a world occupied by the "friction of war."⁴⁷⁰ Nevertheless, the positive economic analysis of systems designed to

⁴⁶⁴ Major Norris Interview, *supra* note 458.

⁴⁶⁵ Available actions include counseling, a negative officer evaluation report, or even relief for cause.

⁴⁶⁶ See *supra* note 450-52 and accompanying text (describing the proposed method of estimating and funding overseas maneuver damage claims through command channels).

⁴⁶⁷ See *supra* notes 266-68 and accompanying text (describing the maximum amount of Army funds used to pay overseas maneuver damage claims and the role of the Judgment fund).

⁴⁶⁸ E-mail from Aletha Friedel, Chief, European Torts Branch, U.S. Army Claims Service, Europe, to MAJ Jerrett W. Dunlap, Jr., Student, 54th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army (Mar. 8, 2006, 04:09 EST) (on file with author).

⁴⁶⁹ Weston, *supra* note 117, at 932.

⁴⁷⁰ See CARL VON CLAUSEWITZ, ON WAR 122 (Michael Howard & Peter Paret eds. and trans., 1976).

address negative externalities advocated by Professor Coase⁴⁷¹ has direct application to the compensation scheme designed to address negative externalities that result from maneuvers in the Army.⁴⁷² The statutory structures of the FCA,⁴⁷³ MCA,⁴⁷⁴ and IACA⁴⁷⁵ are designed to remedy market inefficiencies related to negative externalities caused by overseas maneuvers, by requiring the Army to internalize the costs of those negative externalities.⁴⁷⁶ However, the costs are not truly internalized by the units responsible for causing the negative externalities because the costs of compensating the damage are paid by USARCS, a separate part of the Army.⁴⁷⁷ If the Army were to implement this proposed change by requiring a maneuver unit to pay for its overseas maneuver damage claims, the costs of the maneuver-related negative externalities would be internalized.⁴⁷⁸ Furthermore, a unit commander is uniquely situated to determine the advantage gained from a particular maneuver.⁴⁷⁹ By making him aware of all maneuver related costs, he will make the most efficient decision regarding maneuvers,⁴⁸⁰ resulting in a more efficient overall resource allocation and making more funds available for those maneuver units.⁴⁸¹ As the introductory example with Mr. Walmsley and the cavalry squadron commander demonstrates, if commanders are aware of the costs caused by their maneuvers, the Army will use its funds more efficiently, will minimize inefficient actions,⁴⁸² and will create an increase in overall social welfare.⁴⁸³ As Professor Coase stated, “[w]hat is needed is a change of approach.”⁴⁸⁴

⁴⁷¹ Coase, *supra* note 1, at 21.

⁴⁷² See *supra* Part V.A.2.

⁴⁷³ Foreign Claims Act, 10 U.S.C. § 2733 (2005); see also *supra* Part III.A (detailing the FCA).

⁴⁷⁴ Military Claims Act, 10 U.S.C. § 2734 (2005); see also *supra* Part III.B (detailing the MCA).

⁴⁷⁵ International Agreements Claims Act, 10 U.S.C. § 2734(a) (2005); see also *supra* Part III.C (detailing the MCA and NATO SOFA, *supra* note 217, art. VIII).

⁴⁷⁶ See *supra* Part V.A.2.

⁴⁷⁷ See *supra* Part III.D (describing the current method of funding of overseas maneuver damage claims).

⁴⁷⁸ See *supra* Part II.B and V.A.5 (describing law and economic theory regarding internalization of negative externalities and how the proposed system would result in maneuver damage cost internalization).

⁴⁷⁹ See *supra* note 318 and accompanying text (describing the authority and responsibilities of commanders).

⁴⁸⁰ See *supra* Part V.C.

⁴⁸¹ See *supra* Part V.C.1.

⁴⁸² See *supra* Part I.

⁴⁸³ See *supra* note 22 (defining welfare economics).

⁴⁸⁴ Coase, *supra* note 1, at 21; see *supra* note 1 and accompanying text.

Appendix A

Proposed Changes to Army Regulation 27-20, Claims*

Section II Responsibilities

1-9. The Commander, USARCS

The Commander, USARCS, will—

- a.* Supervise and inspect U.S. Army claims activities worldwide.
- b.* Formulate and implement claims policies and uniform standards for claims office operations.
- c.* Investigate, process and settle claims beyond field office monetary authority and consider appeals and requests for reconsideration on claims denied by the field offices.
- d.* Supervise the investigation, processing, and settlement of claims against, and in favor of, the United States under the statutes and regulations listed in paragraph 1-4, and pursuant to other appropriate statutes, regulations, and authorizations.
- e.* Designate ACOs, CPOs, and claims attorneys within DA and DOD components other than the Departments of the Navy and Air Force.
- f.* Designate continental United States (CONUS) geographic areas of claims responsibility.
- g.* Recommend action to be taken by the SA or the U.S. Attorney General, as appropriate, on claims in excess of \$200,000 or the threshold amount then current under the FTCA, on claims in excess of \$100,000 or the threshold amount then current under the FCA, the MCA, and the NGCA, and on other claims that have been appealed to the SA.
- h.* Operate the “receiving State office” for claims cognizable under Article VIII of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA), as implemented by 10 USC 2734b (see chap 7).
- i.* Settle claims of the U.S. Postal Service for reimbursement under 39 USC 411 (see DOD Manual 4525.6-M).
- j.* Settle claims against carriers, warehouse firms, insurers, and other third parties for loss of, or damage to, personal property of DA or DOD

* Proposed changes are listed in bold. Headers are also in bold, but have not been modified from the original.

soldiers or civilians incurred while the goods are in storage or in transit at Government expense (chap 11).

k. Formulate and recommend legislation for Congressional enactment of new statutes and the amendment of existing statutes considered essential for the orderly and expeditious administrative settlement of noncontractual claims.

l. Perform post-settlement review of claims.

m. Prepare, justify, and defend estimates of budgetary requirements and administer the Army claims budget. **Coordinate with major Army commands (MACOMS) to determine supplemental budgetary requirements for the payment of maneuver claims from the Operations and Maintenance (O&M) funds of maneuvering units.**

n. Maintain permanent records of claims for which TJAG is responsible.

o. Assist in developing disaster and maneuver claims plans designed to implement the responsibilities set forth in paragraph 1-11*k*.

1-16. Commanders of major Army commands

Commanders of major Army commands (MACOM), through their SJAs, will—

a. Assist USARCS in monitoring ACOs and CPOs under their respective commands for compliance with the responsibilities assigned in paragraphs 1-11 and 1-12.

b. Assist claims personnel in obtaining qualified expert and technical advice from command units and organizations on a nonreimbursable basis (although the requesting office may be required to provide TDY funding).

c. Assist TJAG, through the Commander, USARCS, in implementing the functions set forth in paragraph 1-9.

d. Coordinate with the ACO within whose jurisdiction a maneuver is scheduled, to ensure the prompt investigation and settlement of any claims arising from it.

e. **Coordinate with USARCS for the preparation, justification, and defense of estimates of supplemental budgetary requirements for the payment of maneuver claims from the O&M funds of maneuvering units. Distribute supplemental O&M funds to maneuvering units for the payment of maneuver damage claims by the maneuvering unit. Ensure subordinate maneuver units track the expenditure of O&M funds for maneuver damage claims and coordinate through their servicing ACO.**

Section III Operations, Policies, and Guidance

1–17. Operations of claims components

(4) *Special claims processing offices.*

(a) *Designation and authority.* The Commander, USARCS, the chief of a command claims service, or the head of an ACO may designate special CPOs within his or her command for specific, short-term purposes (for example, maneuvers, civil disturbances and emergencies). These special CPOs may be delegated the approval authority necessary to effect the purpose of their creation, but in no case will this delegation exceed the maximum monetary approval authority set forth in other chapters of this publication for regular CPOs. All claims will be processed under the claims expenditure allowance and claims command and office code of the authority who established the office or under a code assigned by USARCS. The existence of any special CPO must be reported to the Commander, USARCS, and the chief of a command claims service, as appropriate.

(b) *Maneuver damage and claims office jurisdiction.* A special CPO is the proper organization to process and approve maneuver damage claims, except when a foreign government is responsible for adjudication pursuant to an international agreement (see chap 7). Personnel from the maneuvering command should be used to investigate claims and, at the ACO's discretion, may be assigned to the special CPO. **The maneuvering command is responsible for budgeting for the payment of maneuver damage claims from the unit's O&M funds. Commanders should carefully plan and execute maneuvers in an effort to balance the advantages of the maneuver with estimated maneuver damage claims. Commanders should coordinate with the ACO or special CPO in developing an estimate of maneuver damage claims.** The ACO will process claims filed after the maneuver terminates. The special CPO will investigate claims arising while units are traveling to or from the maneuver within the jurisdiction of other ACOs, and forward such claims for action to the ACO in whose area the claims arose. **The ACO will notify the resource manager of all approved claims to ensure unit funds are available for the payment of maneuver damage claims. Claims for maneuver damage not arising on private land that the Army has used under a permit will be paid from O&M funds specifically budgeted by the maneuver for the payment of maneuver damage claims.** Claims for damage to real or personal property arising on private land that the Army has used under a permit may be paid from funds specifically budgeted by the maneuver for such purposes in accordance with AR 405–15.

Section X

Payment Procedures

2-63. Sources of funds

a. To determine whether to pay a claim from Army or USACE funds or the Judgment Fund, a separate amount must be stated on each claimant's settlement agreement. A joint amount is not acceptable. A claim for injury to a spouse or a child is a separate claim from one for loss of consortium or services by a spouse or parent. The monetary limits of \$2,500 set forth in chapter 4 and \$100,000 set forth in chapters 3, 6, and 10, apply to each separate claim

b. A chapter 4, 5, or 7, section II, claim for \$2,500 or less is paid from Army funds or, if arising from civil works, from USACE funds. The Department of Treasury pays any settlement exceeding \$2,500 in its entirety, from the Judgment Fund.

c. The first \$100,000 of a claim settled under chapters 3, 6, or 10 is paid from Army funds. Any amount over \$100,000 is paid out of the Judgment Fund.

d. If not over \$500,000, a claim arising under chapter 8 is paid from Army or civil works funds as appropriate. A claim exceeding \$500,000 is paid entirely by a deficiency appropriation.

e. AAFES or NAFI claims are paid from nonappropriated funds, except when such claims are subject to apportionment between appropriated and nonappropriated funds. (See DA Pam 27-162, para 2-100i(2).)

***f.* The first \$100,000 of a maneuver damage claim under chapter 3, section III of chapter 7, or chapter 10 is paid from O&M funds from the maneuvering unit. Any amount over \$100,000 is paid out of the Judgment Fund.**

Section II

Monthly Claims Reporting System

13-7. General

a. A monthly status report of recovery actions and claims against the United States is prepared by the automation software in the Personnel Claims Management Program and the Tort and Special Claims Management Program. Use of the USARCS Claims Automation Program is explained in DA Pam 27-162, chapter 13, and software instructions, as well as periodic updates provided by the USARCS Information Management Office.

b. The data contained in the USARCS Claims Automation Program and the automated monthly claims office status reports provides useful

information for claims officers, heads of area claims offices, JAs and SJAs responsible for OCONUS command claims services, and the Commander, USARCS. The system provides a uniform method of assignment of claim file numbers, which permits easy identification and retrieval of individual claim files, identifies delays in claims processing, and permits worldwide management control of all claims against the Government. The automated monthly reports forwarded to USARCS from the databases are used to prepare claims budgetary status reports and periodic budget estimates to the Defense Finance Accounting Service (DFAS) and the Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Claims office personnel will ensure that automated claims records are complete and accurate. **Maneuver damage claims paid from the O&M funds of the maneuvering unit will be tracked and reported using the USARCS Claims Automation Program. These reports will be used to assist MACOMS in preparing maneuver budget estimates.**

c. This section does not apply to the reporting of reimbursement obligations to foreign countries pursuant to the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA) or other similar treaties or agreements.

d. The Commander, USARCS, will furnish software and documentation relating to the Personnel Claims Management Program, the Affirmative Claims Management Program, the Affirmative Potentials Program, and the Tort and Special Claims Management Program, with updated versions as required. These are the only programs authorized for recording and reporting claims in the Army Claims System. Local modification of these programs is not authorized.

13–8. Reporting requirements

In accordance with paragraph 13–7, each CONUS area claims office and OCONUS claims processing office with approval authority must submit a monthly claims data upload to USARCS. OCONUS area claims offices and foreign claims commissions with a supervising command claims service will submit monthly claims data uploads through their respective command claims service to USARCS.

a. The monthly data upload for each claims office (except USACE claims offices) consists of electronically transmitted automation data for tort claims and/or personnel claims. **The report will also track maneuver damage claims adjudicated by claims offices and paid with the maneuvering units O&M funds.** A copy of the two-page SJA report from the tort claims program is submitted directly to the Tort Claims Division, USARCS. For USACE claims offices that do not

process personnel or affirmative claims, the monthly data upload will consist only of tort claims data.

b. The tort claims monthly data upload will be prepared by each claims office by the close of business of the last business day of the month. The personnel claims monthly data upload will be prepared by each claims office on the first working day of the month. The data upload will be forwarded to USARCS (or to the appropriate OCONUS command claims service in accordance with local directives) on the first working day of the month.

c. Claims offices are not required to send a monthly data upload for any of the two claims management programs if there are no data changes from the previous monthly data upload for that program. However, claims offices must send a written negative report so that USARCS can account for each claims office on a monthly basis. A short letter, memorandum, or electronic message will suffice.

Section III

Management of Claims Expenditure Allowance

13–10. Reserved

This section is reserved for future use.

13–11. General

Each claims settlement or approval authority who has been furnished a Claims Expenditure Allowance (CEA) by the USARCS budget office is responsible for managing that CEA. Sound fiscal management includes knowing at all times how much of the CEA has been obligated, its remaining balance, and assessing each month whether the balance will cover claims obligation needs in the local office for the remainder of the current fiscal year. **Claims offices responsible for adjudicating maneuver damage claims should assist the maneuvering unit in estimating and tracking the expenditure of the unit's O&M funds for maneuver damage claims. The claims office should assist the maneuvering unit in applying the same sound fiscal management that is required for a CEA.**

Appendix B

Proposed Changes to DA Pam 27-162, Claims Procedures

Section X Payment Procedures

2-100. Fund sources

a. Military Claims Act.

1. Maneuver damage claims. Amounts less than \$100,000 are paid from the O&M funds of the maneuvering unit responsible for causing the maneuver damage. Amounts over \$100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim, not to each incident within the maneuver.

2. All other claims. Amounts less than \$100,000 are paid from Army Claims funds and amounts over \$100,000 are paid by the Department of the Treasury Financial Management Service from the Judgment Fund (see figure 2-64, extract from 31 USC 1304). This monetary limit applies to each claim, not to each claims incident. For example, one incident may give rise to a claim for personal injury and a claim by the injured party's spouse for loss of consortium. These are considered two separate claims even though they arise from one incident. The limit applies also to claims filed jointly. Thus, settlement of a joint claim must specify the settlement amount for each claimant.

b. Federal Tort Claims Act. FTCA settlements of \$2,500 or less are paid from Army funds on all claims except civil works claims, which are paid from civil works funds at the USACE District level. FMS pays all settlements above \$2,500 on all FTCA claims, including civil works claims, from the Judgment Fund. This monetary limit applies to each claim, not each claims incident. For example, a subrogee's claim for \$3,000, which includes the subrogor's paid and fully subrogated \$500 deductible, constitutes one claim and is payable by the FMS. If the insurer is merely acting as its insured's collection agent, however, and has not paid the deductible, both claims are payable from Army funds.

c. Non-Scope Claims Act. Claims brought pursuant to this statute are payable from Army funds, even though the aggregate payment for all claims resulting from one incident exceeds \$2,500.

d. NATO Status of Forces Agreement. NATO Status of Forces Agreement (SOFA) claims arising in the United States are paid in the

same manner as FTCA or MCA claims, 10 USC 2734b. After paying these claims, USARCS seeks reimbursement from the sending State for its 75 percent share in accordance with the treaty's terms. **Reimbursements for maneuver damage claims arising overseas are paid from the O&M funds of the maneuvering unit, up to the first \$100,000, as under the MCA.**

e. Army Maritime Claims Settlement Act.

(1) Claims against the United States brought pursuant to this statute are paid from Army funds except where the claim arises out of civil works activities, in which case the claim is paid from civil works funds for amounts not to exceed \$500,000. The Secretary of the Army certifies settlements greater than \$500,000 in their entirety to Congress for payment.

(2) An AMCSA claim in favor of the United States is paid into the U.S. Treasury upon settlement but a claim arising from a civil works activity is paid into USACE operating funds at the USACE district level.

f. Foreign Claims Act. FCA claims payments are funded from the same source as are MCA claims. The methods for issuing these payments differ, however, as discussed in subparagraph *o* below. **FCA claims for maneuver damages are funded from the O&M funds of the maneuvering unit, up to the first \$100,000, as under the MCA.**

g. Claims under Foreign Claims Act. The check will be drawn on the currency of the country in which payment is to be made in accordance with AR 27-20, paragraph 10-9, at the Foreign Currency Fluctuation Account exchange rate in effect on the date of approval action. If a payee requests payment in U.S. currency, or the currency of a country other than that of the payee's country of residence, obtain permission from the Commander, USARCS. Where payment must be approved at USARCS or a higher authority, USARCS will complete and sign the voucher and forward it to the original commission for local payment.

2-101. Payment documents

a. General. For tort claims paid from Army funds, submit the following documents to the appropriate DFAS:

(1) For all claims, a DA Form 7500 signed by a properly designated settlement or approval authority certifying payment. Figure 2-53 provides a suggested format for such a payment report. The DA Form 7500 serves as a settlement agreement and will be signed by the claimant unless a separate agreement is needed. A separate DA Form 7500 will be completed for each claimant, except in a structured settlement where the payee is the broker on behalf of all claimants. The proper accounting classification must be entered on the DA Form 7500 except for claims

paid by NAF, AAFES, or USACE. **Overseas maneuver damage claims will be coordinated with the resource manager of the responsible maneuvering unit, to obtain the proper accounting classification.**

(2) Two copies of a settlement agreement when a separate settlement agreement is used in lieu of DA Form 7500. If a separate agreement is used, the claimant's attorney's signature may appear as acknowledgment of the settlement; the claimant's attorney may not sign as a party to the settlement.

(3) Two copies of the claim, usually a SF Form 95 (figures 2-6a and b), and proof of authority to sign (guardianship decree, attorney's representation agreement, documents authorizing a corporate officer or a representative of the estate to sign, as appropriate).

(4) Two copies of an action (figure 2-51) or a Small Claims Certificate (DA Form 1668), as appropriate.

(5) When the claim will be paid electronically to the DFAS via STANFINS, transmit the information listed in subparagraph (b) below. Then mail DA Form 7500 to DFAS and retain the documents listed above in the claim file. It is suggested that claims officers meet with their DFAS point of contact and review the payment report to ensure acceptance by DFAS.

b. Tort Claim Payment Report (figure 2-53).

(1) Block 1. Enter identification number of your servicing DFAS office.

(2) Block 2. Date document forwarded to DFAS for payment.

(3) Block 3. Name of claims office approving payment.

(4) Block 4. Number assigned by USARCS to a claims office with payment authority.

(5) Block 5. Mailing address of claims office approving payment of claim.

(6) Block 6. Self-explanatory.

(7) Block 7. Self-explanatory.

(8) Block 8. Total amount claimed by claimant.

(9) Block 9. Insert appropriate accounting citation.

(a) Accounting citation. Charging an approved claim against a particular accounting citation creates an obligation against the claims appropriation for the current fiscal year. Accordingly, the payment report will bear the correct account code for both the appropriation charged and the current fiscal year, regardless of the date the claim accrued or was filed. Confusion sometimes arises at the end of a fiscal year. For example, an approved claim is certified for payment on 28 September, but it is obvious that the payment will not actually be processed until the next fiscal year, beginning 1 October. At the time the check is issued, the

accounting code will not be advanced to the next fiscal year. Only the accounting code for the fiscal year in which the funds were obligated and the claim was certified for payment (the payment report was signed) should be charged. **For overseas maneuver damage claims, coordinate with the resource manager of the responsible maneuvering unit, to obtain the proper accounting citation, as funds come from the O&M funds of the responsible unit.**

(b) Accounting codes. Each fiscal year, the AR 37-100 series publishes separate payment and refund codes for claims payments made pursuant to each chapter of AR 27-20. All elements of the accounting code for each type of claim, except the third digit, remain constant (unless otherwise notified by fiscal authorities)— the third digit represents the second digit of the fiscal year. For example, in the payment of an FY 03 FTCA claim, the FTCA payment code would appear as 2132020 22-0203 P436099.21-4200 FAJA S99999.

(10) Block 10. Name of claimant receiving payment.

(11) Block 11. Address of recipient of claims settlement check.

(12) Block 12. Enter Social Security number of payee or tax identification number if payee is a structured settlement, broker, or business other than an individual claimant.

(13) Block 13. Amount approved for payment to claimant.

(14) Block 14. Enter either "PA"(advance payment) or "PF"(final payment.)

(15) Block 15. The routing number of the bank to which the electronic payment will be made.

(16) Block 16. The name of the person or business holding the account, and the account number.

(17) Block 17. Self-explanatory.

(18) Block 18. Self-explanatory.

(19) Blocks 19 & 20: To be dated and signed in original by claimant. Where another settlement acceptance

agreement has been executed, enter "See attached agreement".

(20) Blocks 21-23: To be completed by the CJA or claims attorney authorized to approve payment of settlement award.

(21) Block 24. Date that payment has been entered in the tort claims data base.