

TESTIMONY BEFORE THE U.S. SENATE
COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON STATE AND FOREIGN RELATIONS

STATEMENT OF
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Chairman Leahy and members of the Subcommittee:

Thank you for inviting me to submit written testimony for this session. I am currently the Assistant Director of the National Institute of Military Justice. Before taking my current position, I served this country as a U.S. Army judge advocate. After leaving the military, I worked for the Campaign for Innocent Victims in Conflict (CIVIC) as a military legal advisor. I joined the U.S. Army in January 2002 after completing law school and obtaining my license to the Ohio State Bar. I was both excited about my upcoming service in the Army and unsure of what to expect. After nearly four months of Officer Basic Course, I reported to my duty assignment in Baumholder, Germany with the 1st Armored Division. I trained and worked in that legal office for one year before deploying to Baghdad with the 2nd Brigade of the 1st Armored Division in support of Operation Iraqi Freedom.

Two attorneys were assigned to 2nd Brigade. Based on our division of labor, I was tasked with administrative law, legal assistance and claims law. The testimony here concerns my assignment as the brigade claims lawyer. Besides adjudicating the occasional claim filed by U.S. service members, for items such as lost laundry or stolen DVDs, I adjudicated claims filed by local Iraqis within my brigade's area of operations in Baghdad. This duty occupied approximately 60% of my time while in Iraq. Second Brigade's area of responsibility included the Karkh and Karadah districts of Baghdad, both major population centers. I handled approximately 1,500-2,000 cases during my fourteen months in Iraq. Claims from Iraqis were handled in one of two distinct systems. The first is a product of the U.S. Code—the Foreign Claims Act¹ (FCA)—and the second is an ex gratia program known as the Condolence Payment Program.

I dealt extensively with both programs and met with hundreds of innocent Iraqi civilians in 2003-2004 who suffered immeasurably from the armed conflict. I treated them according to the law and the military orders in place. While these well-intentioned rules – which to my

¹ 10 U.S.C. § 2734(a).

knowledge remain largely the same today – attempt to provide assistance to individuals or families for “collateral damage”, a large gap exists in the system that bars many innocent victims from receiving just treatment. After leaving the military, I decided it was important to shed light on the inherent problems within the claims system with the hope that Congress might remedy the situation to ensure the just and equitable treatment of all innocent civilian casualties. Military commanders, planners and lawyers have long understood the need to help where we have inadvertently harmed. There is no debate about that policy. The question is, can the United States do a better job of providing assistance to civilian casualties?

The Foreign Claims Act:

The preamble of the FCA defines its purpose as being to “promote and maintain friendly relations through the prompt settlement of meritorious claims.” In other words, the goal is to win hearts and minds. Foreign nationals may file claims to receive compensation for a death to a family member, personal injury, or property damage caused by a member of the armed forces or a civilian employee accompanying the force. Several elements of the FCA must be satisfied before compensation may be authorized. The claimant must be “friendly.” This means the victim may not be an enemy to the U.S. or provide aid to an enemy. A claim must be filed within two years from the date the harm occurred. To be payable, the damage or injury must result from a “noncombat” activity or a negligent or wrongful act. A claim is not payable if the harm results from a lawful and reasonable combat act. For example, civilians standing between insurgents and U.S. soldiers during a firefight would not be eligible for compensation under the FCA for any harm that resulted from the firefight as long as the U.S. soldiers involved operated within the rules of engagement (ROE) and without negligence. For example, one type of case I saw a lot of was shootings from a U.S. military convoy. Soldiers in a convoy would perceive a threat from a civilian vehicle and fire at the vehicle killing or injuring the occupants after various non-lethal measures failed to get the civilian car to stop. After investigating the vehicle, the soldiers would not find any weapons or evidence that the occupants were part of the insurgency. I would not be able to offer any of the survivors of the family members of the deceased any compensation because the use of force by the soldier would be deemed within the rules of engagement. Claims judge advocates call this rule the “combat exclusion.” It is defined as any

incident that results directly or indirectly from action by enemy or U.S. forces engaged in armed conflict or in immediate preparation for impending armed conflict.

I believe I authorized a few hundred thousand dollars in FCA payments. The vast majority of cases involved vehicular accidents. I received some training on claims law while at Officer Basic Course in 2002. I also received training by a civilian employee of the U.S. Army Claims Service, the agency responsible for overseeing tort claims. All judge advocates appointed to serve as foreign claims commissioners must receive the U.S. Army Claims Service's training. This training covers the statute and the Army's implementing regulation, Chapter 10 of Army Regulation 27-10 ("the regulation"). Various topics such as the rules of evidence, the burden of proof, rules governing how to evaluate damages, and how to determine a proper claim and claimant are covered extensively in the Regulation. I felt confident before I met my first claimant that I understood the Foreign Claims Act and how to implement it according to Congress' and the military's intent.

Condolence Payments:

The Condolence Payment Program in Iraq is an ad hoc program created six months after Operation Iraqi Freedom began. Because a substantial amount of the harm civilians suffered in Iraq occurred, and continues to occur, during lawful combat engagements, which is precluded from compensation under the combat exclusion of the FCA, the U.S. military realized they needed some system to provide monetary assistance for civilian casualties. Of course, the creation of this ad hoc system was not a foregone conclusion. In fact, originally, the U.S. Central Command, the command responsible for Iraq, ordered solatia or sympathy payments not be allowed in Iraq, meaning there was no supplement to fill the gap left by the combat exclusion of the FCA. This order also applied to Afghanistan. Because of this rule, when I began adjudicating claims and meeting with Iraqis, I could offer no monetary assistance for civilian casualties caused during combat operations. This lasted until October 2003. Between May and September of 2003, I had to tell more innocent civilian Iraqis than I care to count that there was nothing I could do for them. I sent widows, widowers, orphans, and many injured persons away with only a hollow "I'm sorry."

On any given day, more Iraqis brought cases to me arising from combat action than claims arising from a non-combat act. During the summer of 2003, several claims lawyers,

including myself, voiced concern through the chain of command about the numerous Iraqis we were required to turn away without providing assistance. Eventually, the command in Iraq recognized the problem and created the Condolence Payment Program to offer minimal assistance to civilian casualties of combat operations. The program was created under the Commander's Emergency Response Program (CERP) fund. The CERP fund is one of the main tools through which commanders implement reconstruction efforts in Afghanistan and Iraq. Condolence payments constitute one, very small, aspect of the CERP fund. Originally, under the CERP rules, I could offer \$2,500 per death and \$1,000 per injury. Sometime around January 2004, authorization was granted to offer \$1,500 for property damage. After I left Iraq, the rules changed again, now a unit can offer \$2,500 per instance of death, injury, or damage to property. A general office may provide \$10,000 for a death. However, there is no evidence based on the documentation I have looked through, that a payment of \$10,000 has ever been paid.

I paid approximately \$150,000-\$200,000 in condolence payments. I had one of the more visible and heavily visited claims in-take locations so I saw a lot more claimants than other units. I worked inside the Baghdad convention center – a major hub for Iraqis seeking various types of assistance.

With the creation of the Condolence Payment Program I was finally allowed to offer something – even if it was only a token sum – to civilian casualties. However, the program failed in several respects. Most significantly, I never had enough money to offer payments to all deserving claimants. I recall numerous cases where I provided an amount significantly less than what was authorized under the rules. I recall one gentleman who filed a claim after his children were severely burned by a cluster munition they found while playing in a field. I could only provide the man with \$1,000 for the significant injuries of his two children. I once paid a woman only \$300 after an explosion caused her to lose a foot. Further, there were many people I could not offer any money to even though I knew conclusively they were innocent civilians harmed during U.S. military combat operations. I lacked money because the vast majority of my brigade's CERP funds went to various reconstruction projects. Understandably, my commander prioritized CERP funds for hospitals, schools, or power stations, at the expense of condolence payments. The perception was that fixing a school and employing Iraqi contractors allowed funds to go further than paying a widow for her husband's death. Because the same fund supported both projects, the one of seemingly less importance got short-changed. On average, I

received only about \$7,000 a week to spend on condolence payments. However, some weeks I received nothing. It became nearly impossible in my opinion for this program to meet its stated goals of helping win the hearts and minds.

Another significant problem I encountered with the program arose from the ad hoc nature inherent to the program because of the manner in which it was created. There were no rules or solid guidance provided. Some units and lawyers handled substantially similar cases in drastically different ways. For example, different rules of evidence and procedure were applied in adjacent areas of Baghdad. Some units instituted very short time limits, such as three months, on when an Iraqi needed to file a claim for a condolence payment. Some of the problems with such a requirement are obvious: 1) many times survivors simply cannot file a claim within that time limit because they are still grieving or healing; 2) claimants may not be able to discover the proper office to file their claim within that time limit; and 3) it can take much longer than three months for a claimant to collect all of the necessary documents and evidence. It should be noted that the Foreign Claim Act has a two-year statute of limitation.

Additionally, lack of rules and guidance hampered the attainment of the program's goals because some units refused to decide cases where a different unit caused the harm. This was true regardless of whether the unit that caused the harm left Iraq or if it was difficult or impossible for the Iraqi to find transportation to the other unit's location. Also, some units simply did not offer payments for certain types of cases. This wide birth of discretion created great disparity in the application of the program. Obviously, the conflicting outcomes created by these different reasons caused negativity to intensify and nullified much of the goodwill produced by the Condolence Payment Program.

Another problem concerns valuation. Numerous Iraqis expressed shock that all I could offer was \$2,500. Some even indicated they felt insulted. I attended numerous District Advisory Committee meetings in Karkh and Karadah where local politicians discussed pertinent issues to their communities and meetings with local Sheiks. Every Iraqi I spoke with on the issue expressed disbelief I could only offer \$2,500 for the death of a human being. Not one Iraqi I encountered ever said the amount made sense or was equitable. The irony is that if an Iraqi filed a claim with me because a military truck on a routine patrol hit the man's parked car, I could pay him for the full value of his vehicle. However, if the same man filed a claim because his five year old daughter was killed by a stray bullet from a firefight involving U.S. forces, I could only

pay the man \$2,500—if that. Binding a brigade to \$2,500 in every case limits the unit’s ability to adequately assist in the most cases. The artificial limit left survivors bitter and frustrated with the process and in turn the U.S. military.

Historical Perspective:

As mentioned above, the United States has long recognized the need to fill the gap left by the combat exclusion of the FCA. The purpose of the FCA—to win hearts and minds—was not furthered by the combat exclusion. U.S. military attorneys and commanders have stated that paying combat claims is essential to the military’s interests in repeated engagements since the Vietnam War. As one example, after an incident involving the deaths of many Vietnamese in the city of Nha Trang, judge advocates at U.S. military headquarters in Vietnam convinced ground commanders that paying claimants would “gain the goodwill of the people,”² and that an “effective claims program supported the war against the guerrillas.”³ While the military used contingency funds in this particular case, Judge Advocates recommended that U.S. law be amended to authorize combat related claims.⁴ Military lawyers continue to realize that offering combat claims is important. In its after-action review of the first year of combat missions after September 11, 2001, the U.S. Army’s Center for Law and Military Operations wrote, “[C]ommanders believed that the payment of legitimate claims helped win the hearts and minds of the populace and enhanced their units’ force protection postures.”⁵ In each protracted period of armed conflict involving the U.S. military, including Grenada, Panama, Desert Storm, Somalia, etc., the U.S. instituted some work-around of the combat exclusion. However, studying each one of those cases demonstrated that as in Iraq since 2003, the ad hoc fixes have not performed to the degree desired and not led winning all the hearts and minds the military hoped to win.

Solution:

² FREDERIC BORCH, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975 41, (1st ed. 2003).

³ *Id.* at 40.

⁴ *Id.* at 40.

⁵ Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, *Legal Lessons Learned from Afghanistan and Iraq, Volume I: Major Combat Operations 11 September 2001-1 May 2003* 175, available at <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>

There must be a permanent, legislative fix to the gap in the claims law. As long as there is not a permanent system in place, there will never be uniformity from one conflict to the next or even from one unit to the next within the same conflict. For each conflict the command will have to again decide if, and what system, they will build. It seems counterintuitive that an issue as important as providing assistance to innocent civilians harmed by our military actions should be so haphazard.

With a permanent system would come substantive guidance on the standard of proof, rules of evidence, how to determine valuation, protocol for units dealing with civilian casualties and examples of the types of claims to be paid. Importantly, my call for a permanent system does not mean that the Department of Defense is required to make any payments. The department and the commanders on the ground should still exercise discretion on if and when to make a payment. The important thing is that a permanent system exists. One that will come with statutory language and regulations. The various branches of military would be able to make the program a part of its training. Lawyers and commanders would be taught the importance of the program and how to implement it successfully. In order for the program to be successful, the implementer must be adequately trained. The Army provides abundant training to judge advocates on how to pay claims under the FCA. This allows the claims program to run efficiently and uniformly. A program that does not operate efficiently and uniformly will not treat injured parties with fairness and respect. The training must provide practical guidance on the applicable standard of proof and other evidentiary issues, as well as provide information on why the program is important and why the claims officer must show empathy toward victims.

The \$2,500 limit must be lifted. The program must contain a mechanism to provide a sliding scale of payments. This allows more money to be spent in deserving cases. The important point is to ensure the amount is high enough to demonstrate genuine condolence and provide enough resources for the survivors to recover from the loss in the short-term. Establishing guidelines will obviously be difficult. Valuation will always be subjective. However, guidance can be provided in the same way guidance is given to judge advocates in determining valuations under the FCA. A lawyer can be effectively trained to evaluate each case by its set of facts and circumstances to find an appropriate amount and make an informed recommendation to the commander who would ultimately be responsible for authorizing a payment.

Along with lifting the ceiling for awards, a claimant must be able to appeal the decision when he or she feels the amount offered is inadequate. Similarly, if the claim is denied outright, the claimant must be offered the chance to file additional materials and appeal the denial to a higher authority. Transparency is essential in this process. It is important the system be fair and open. If a claim is denied, the claimant deserves to know the basis for the decision and have that decision provided to him or her in writing. None of these attributes existed in any of the ad hoc systems used over the decades, including condolence payments. Both appeals and written notices of a decision are provided under FCA.

By legislating a new system, funds would be separate from any other reconstruction projects associated with the military's involvement in a country. As with the FCA, all the funds needed would be available to all the appropriate claimants. This will also ensure people receive payment in a timely manner. Timely payment is essential; often times a family's suffering continues growing exponentially when help is delayed. Also, having a separate and permanent claims system for this sort of harm ensures more attention will be given to the victims which will help the U.S. achieve the all important counter-insurgency goal of winning hearts and minds.

The single greatest achievement I hope for in instituting a permanent condolence payment system is that the program will be implemented uniformly. Permanence will allow the program to be established as quickly as a foreign claims commission is established at the start of any combat engagement—within two weeks instead of four to six months. A permanent program would necessarily be Armed Forces-wide, ensuring that it would be used the same way by all units throughout a combat zone. All victims would be treated equitably. Without a permanent program, such payments will always be haphazard and arbitrary based on each commander's discretion. The senior commanders of an operation may or may not decide to institute a program—as CENTCOM prohibited solatia in 2003—or, senior commanders may piecemeal a new program together—as CJTF-7 did with “solatia-like” payments. A permanent system will nullify this arbitrariness, which will demonstrate the U.S. is committed to treating innocent victims with dignity and respect.

This type of legislation would represent good public policy, build goodwill on the ground, provide documentation on civilian casualties, ensure adequate training, guidelines, and institutional knowledge, be transparent, treat all civilian victims fairly and would ensure cash-in-hand for victims following a tragic event to help them meet immediate needs. After meeting

hundreds of innocent victims of our nation's military operations in Iraq, I understand firsthand how great the impact of armed conflict can be on individuals and families. The U.S. military has long known that we cannot simply categorize these people as statistics. This is why they repeatedly attempt to close the gap left by the combat exclusion of the FCA. However, these ad hoc systems have not led to the desired results. We need a new system that ensures every innocent civilian casualty is treated with respect and justice.